Chapter 1

The Human Rights Problem

Introduction

When Pakistani politician Benazir Bhutto was killed in a suicide attack on December 27, 2007, she had been seeking a third term as prime minister after eight years in exile. Her election promise was that her Pakistan People's Party would implement the international standards of judicial independence that the president, Gen. Pervez Musharraf, was persistently flouting. Even before Bhutto's assassination, public anger against President Musharraf had been running high, fueled by his crackdown on the judiciary after his reelection in October 2007. He had suspended the Constitution and dismissed dissenting members of the Supreme Court, including Chief Justice Iftikhar Chaudhry, just three days before the court was expected to overturn his reelection. The legal profession's indignation with Musharraf's flagrant violation of the independence of the judiciary erupted time and again into angry demonstrations, and when a second general election was held in February 2008, some six weeks after Bhutto's assassination, Musharraf's political allies were trounced. Pakistan's new leaders—Bhutto's party and that of another former prime minister, Nawaz Sharif—vowed to restore the independence of the Supreme Court, called for the immediate restoration of the judges, and urged Musharraf to convene Parliament quickly so that the parties could begin the "gigantic task" of restoring the country's much-amended constitution. In the subsequent political turmoil, which included the resignation of President Sharif and the appointment of Asif Ali Zardari, Bhutto's widower, as the new president, the sacked judges were still not restored to their posts.

Pakistan's most serious political crisis since Musharraf had seized power in a coup in 1999 had in fact been brewing for quite a while. In March 2007, in a confrontation between modern Western-derived legal principles of judicial objectivity and unfettered military power, Musharraf had removed Chief Justice Chaudhry from his judicial post over allegations of misconduct.[1] Yet instead of meekly resigning, the flamboyant judge had embarked on a nationwide campaign, traveling from city to city accompanied by a large and noisy group of thousands of supporters, including many black-suited lawyers, all shouting in unison for human rights and judicial independence. They claimed that the chief justice's sacking was motivated by Musharraf's wish to avoid legal scrutiny of his bid for a new presidential term. The independent-minded chief justice had also been raising awkward questions about "disappearances"—Pakistanis who were presumed to have been detained indefinitely by the intelligence service without access to either their families or lawyers.

There was violence: video footage showed round after round of gas shells being lobbed at the Supreme Court's white façade while lawyers scurry to avoid harm. At yet another demonstration government forces opened fire and killed more than forty people. A senior Supreme Court official who refused to bring evidence against the chief justice was shot dead at his home. Then, when Bhutto arrived in Pakistan in October 2007, her triumphant return was overshadowed by nearly two hundred deaths caused by a suicide bomber as her cavalcade traveled through the streets of Karachi. Bhutto was unharmed in this first round of deadly violence, only to die herself two months later.

A key plank in Bhutto's reelection campaign had been hard-hitting criticism of Musharraf's treatment of judges. Yet despite Musharraf's iron military rule over Pakistan, the Supreme Court had allowed Chief Justice Chaudhry to represent himself in his dismissal proceedings before the court in 2007. Shockingly for Musharraf, the Supreme Court reinstated Chadhury and he was given a platform to speak out about human rights: "If there is one lesson we could draw from our past history of sixty years, it is to adhere to the norms and principles of the constitution. It is to enforce the Constitution in its true spirit and letter [that] guarantees fundamental rights and freedoms to citizens. . . . These fundamental rights and freedoms are sacrosanct. They are sublime. Their violation or abridgment is a serious matter. These rights . . . are fundamental issues and civilized societies take a stand on fundamental issues." According to Chief Justice Chaudhry, the job of the Pakistan courts is "to create and sustain an environment in which there is

supremacy of the Constitution and rule of law. . . . The poor and the downtrodden sections of society must be given a stake and treated as equal citizens of the nation. This is how nations are formed and this is how societies move on to develop and progress."

A speech that might sound familiar in the democratic West was, in the eyes of Pakistan's military ruler, seen as something akin to treason. For much of its postindependence history, Pakistan's judiciary had been an apologist for military coups, interventions, and military interference. How is it then that in 2007 it was the Pakistani lawyers who galvanized the people into mass protests using the language of human rights and freedom and at the same time polarized the judiciary and radicalized large parts of political society?

Some of the answers to this question lie in Pakistan's colonial past and its confrontation with globalization and human rights. During all of Pakistan's turbulent sixty-year postindependence history, remnants of the British Raj have continuously reappeared in its political and legal systems. Since partition and independence in the 1940s, Victorian colonialism has continued as a ghostly default reference point for Pakistan's law, order, and probity. In the 1950s, almost without exception, lawyer-politicians making decisions perpetuated the courts and legal institutions they had inherited from the British, at least as far as the formal structure of the institutions is concerned. Even when the Islamist movement forced Pakistan's politicians to face the issue of Islamic identity—a question that had produced the 1962 Constitution that established sharia as Pakistan's basic law—the fundamental anglophone structure of the courts continued.

With each successive constitutional amendment, Pakistan's colonial past has cast a shadow, though increasingly refashioned over each decade as the international principle of the "rule of law." Each successive military government, including the present one, has then countered these principles, devising legalistic loopholes, keeping the judiciary weak, and eliminating potential judicial challenges to military rule. In 2007 and 2008, however, a previously docile judiciary felt so alienated that it sparked a lawyers' movement calling for true judicial independence in the name of the rule of law. These ideas are rallying Pakistan's judges, lawyers, and thousands of ordinary people marching in demonstrations. The Supreme Court's appeal to notions of international human rights as a check on domestic sovereignty has been both catalyst and fuel to this brushfire. As the example of Pakistan demonstrates, international human rights as part of the rule of law are today claimed around the world

by people of many cultures and traditions. Ideas of human equality and fair, transparent government have been a force driving the creation of legal and political institutions to serve those principles. Even as human rights are invoked in a call for better treatment from oppressive government and harmful social practices, however, the expansion of international human rights has been criticized by both scholars and grassroots organizations. It has been argued that even as international law codifies civil, political, social, cultural, and economic rights that can be invoked on behalf of marginal groups and the poor, governments often thumb their noses at their international obligations. Other critics claim that international human rights have perverse effects, such as legitimizing the appropriation of indigenous property rights for the benefit of multinational corporations or through rationalizing interventions by powerful states in weaker ones. Others even suggest that what masquerades as human rights "progress" is really a subtle form of global subjugation that becomes even more pernicious when harnessed to new global patterns of capital and labor.

Some analysts point out that the human rights offered in international treaties that are grounded upon European philosophical and political writings reflect the individualism of Western legal and political thought and make little sense in cultures that do not share these intellectual roots. Still others criticize the concepts of international law as so inextricably entwined with Europe's harmful history of colonialism that the rights anchored in modern constitutions may simply repeat the sins of the past. U.S.-based African scholar Makau Mutua makes this argument sharply when he analogizes the human rights movement to earlier religious crusades, suggesting "the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world."[2]

International human rights, its critics allege, keep bad company: first, with Europe's colonial appropriation of the New World, then with twentieth-century aggressive nationalism that led to two world wars and countless smaller conflicts, and finally with the aggressive economic expansionism that overwhelms local systems. In an eerie reprise of international law's earliest days, during the Spanish and Portuguese evangelization of South American "Indians," today's international culture wars are fought in the name of secularism versus religion, East versus West, and universalism versus particularism.

A question has been put squarely on the table for those who promote international human rights: can Europe's Enlightenment philosophy of individual

rights survive present-day culture wars and contrive to provide legitimacy for international human rights institutions and courts? Or has the justification for a universal system of rights been extinguished because Enlightenment ideals of respect for culture, religion, and political organization simply cannot engage with systems that are not built upon the same foundations?

This book is a response to these critiques of international human rights. While each has some force, I argue that these critiques are incomplete. More important, they divert attention from the need to craft institutional responses to these tensions—responses that can make the international human rights system a workable means to promote human rights across cultures and systems.

Human Rights Aspirations and Reality Today

Human Rights Aspirations

The number of international human rights treaties, declarations, and statements has never been higher. Since 1946, when the Nuremberg trials exposed the horrifying dimensions of the Holocaust and punished individuals for their role in it, international law has held out the tantalizing possibility that there may be collective-action solutions to the world's problems. The architects of the United Nations system believed that human rights, already expressed piecemeal in a handful of state constitutions around the world and slowly expanded over two centuries, could be internationalized and universalized through their expression in a collective document. These post–World War II visionaries identified core human rights and gave the various governments the obligation to provide those rights for their citizens. Since the United Nations Declaration of Human Rights was adopted, international human rights treaties created under the UN system have grown at an exponential rate, which has resulted in the propagation of international standards of human rights across an ever-expanding spectrum: from prisoners' rights to women's rights, from religious rights to children's rights, from voting rights to disability rights.

On December 10, 1948, at the Palais de Chaillot in Paris, all fifty-eight member states of the United Nations General Assembly adopted the Universal Declaration of Human Rights. The declaration recognizes that freedom, justice, and peace in the world are linked to the recognition of fundamental human rights. Eighteen years later, in 1966, the United Nations (then comprising 122 states) adopted the Covenant on Civil and Political Rights, which elaborated the rights to life, liberty, and security of person as well as the rights

to freedom of opinion and expression, thought, conscience, and religion. In 1976 the Covenant on Economic, Social, and Cultural Rights declared that human rights also included an adequate standard of living, health, education, and housing as well as the right to give expression to one's own cultural identity. Many of these social, economic, and cultural rights are described as "non-absolute," unlike many of the "absolute" civil and political rights, such as the human right to freedom from torture.

In an astonishingly short period the international system has generated a human rights thrust. Today the United Nations has 192 states at its table. There are fourteen core international human rights treaties covering everything from racial discrimination to violence against women to children's human rights as well as hundreds of related international agreements. Under these treaties and agreements governments of signatory states undertake to see to it that human rights are included in their national legislation, enforced in national courts, and enacted into government domestic policy. As international phenomena go, the coupling of human rights values to legal forms is an extraordinary historical development.

Human Rights Reality

Despite the impressive structure of human rights agencies and notwithstanding the energy and action driving the creation of the international human rights system, the world remains full of human rights atrocities. While the language and the law of human rights create higher and higher expectations of good behavior, governments fail in their human rights responsibilities every day. International human rights reality still routinely lags behind human rights aspirations.

For example, even though all 192 member states of the UN have committed themselves to the peaceful resolution of internal conflicts, in the last half-century 127 civil wars occurred in 73 states, killing more than 16 million people. Right now in The Sudan, government-supported forces are massacring civilians, raping women, destroying villages and food stocks, and driving tens of thousands of people into camps and settlements where they live on the very edge of survival, hostage to abuses of the Janjaweed militia groups. Other contradictory examples abound. For instance the United States is a signatory to the UN Convention Against Torture, yet since it seeks to finesse its international obligations towards prisoners by placing them in the jurisdictional no-man's-land of Guantánamo Bay, Cuba.[3] Mexico is likewise a signatory to

the UN Convention Against Torture, yet torture is reported to be widespread in the military, and corruption can be found at all levels of Mexico's federal, state, and municipal systems of administration. Virtually every postcolonial government of Australia, a signatory to the International Covenant on Civil and Political Rights, has a bad human rights record in regard to its indigenous population.

Governments also fail in their human rights obligations through simple neglect or even complete lack of interest in the human rights of certain groups in their society. These are the everyday human rights problems that lack the shock value of wartime atrocities. For instance Jordan, one of the few Arab countries where women vote and hold seats in parliament, signed the Convention on the Elimination of Discrimination Against Women (CEDAW) in the early 1990s but has not managed to pass national legislation to prevent hundreds, possibly thousands, of "honor killings." Even women who are the victims of rape are considered to have compromised their families' honor; fathers, brothers, and sons then see it as their duty to avenge their honor, not by pursuing the perpetrators but by murdering their daughters, sisters, and mothers.

Thirty years after CEDAW was adopted by the UN General Assembly, mothers in some African countries still hold their young daughters down for the ritual of female genital cutting even though national criminal legislation in some African countries prohibits the practice. China is one of 138 countries that have signed the UN Convention on the Rights of the Child (CRC), but in Yunnan province alone 7,000 children have been trafficked as prostitutes, beggars, domestics, and workers in garment factories. It seems astounding that these human rights violations occur in countries that have reasonably functional governments, administrative structures, fiscal policies, and trade relations with other countries. When the atrocities of war are added into this picture of everyday human rights neglect, the international human rights problem looks overwhelming.

What do these failures of human rights implementation and enforcement tell us about the world-scale phenomenon of human rights? If there is a disconnect between global human rights values and local human rights implementation, what is the cause? What might be its solution? Have international human rights advocates stalled in their march to civilize governments and liberalize cultures? Why can't international society have more influence on individual governments, and why can't international human rights have more influence on the actions of individuals?

Three Critiques of the International Human Rights System

The great universalist aspirations of the United Nations are today criticized from across the political spectrum. Critiques of international human rights fall into three categories. First, the "sovereignty critique" argues that the problems of international human rights lie in the international system itself. "Sovereigntists" view any attempt to supplant the role of governments as doomed to failure. They would simply leave law in the hands of the state to be decided along lines of national interest. The second main critique of international human rights arises out of the role of civil society under globalization. "Civil societists" argue that the real human rights action in these days of globalization does not spring from formal international and governmental institutions but rather from newer informal sources such as nongovernmental advocacy groups. Third, "multiculturalists" argue that *any* attempt to institutionalize international standards in a multicultural world is philosophically flawed and culturally divisive.

Sovereignty

In the American legal academy there has been spirited, even acrimonious, debate about the relevance of international law. Some scholars point to the evidence of ongoing human rights abuses in countries that have signed international human rights treaties as evidence against a worldwide human rights trend. They argue that international human rights are nothing more than political rhetoric and that words and ideas lack the power to prevent mass atrocity, influence the behavior of authoritarian governments, or alter sexist or racist beliefs. For all their moral appeal, these skeptics say, international human rights are nothing more than an empty promise that is ignored by national governments at will: human rights are merely notes in the margins of legal and political debate, supported with zeal by few and ignored by many.[4]

Such criticism of human rights has a long history. Nineteenth-century French political theorist Pierre Proudhon described international law as "a scaffolding of fictions."[5] Likewise, in nineteenth-century Great Britain, when the legal reforms of legislative positivism sought to replace ideas of "natural law" with the transparency of written laws, international law as an explanation of shared human values was ridiculed. Instead, law was portrayed as a product of people's habitual obedience to their sovereign's command. There was no room for a normative order in Jeremy Bentham's well-known scoff in the 1860s that "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts."[6] Rights, he said, are the

product of laws created by sovereigns and legislatures: "Right . . . is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters."[7]

Like Bentham critiquing natural rights, today's sovereigntists argue that there is no *intrinsic* moral valence to international human rights standards.[8] This critique points to the voluntary nature of international human rights treaties and the lack of international enforcement powers when human rights are violated. This analysis points out that states enter into treaties and other international legal commitments only when it serves their particular national interests. When a government does translate international human rights standards into its own domestic legislation, it simply demonstrates the state's internal political agreements and not a deeply shared belief in the principles of international human brotherhood. Any cooperation among states on human rights problems is the serendipitous byproduct of rational acts of national self-preservation.

Weaker states, under this analysis, simply express international human rights commitment because it looks good to the rest of the world. Such states may have little else with which to negotiate with more powerful states: poor countries "trade" state sovereignty in obeisant necessity for economic advantages from richer ones. Sovereigntists say that the very idea of an international system of government is normatively flawed and empirically wrong.[9] International human rights law is merely feel-good rhetoric, an instrumental exercise in international public relations.

This is an especially strong argument for the United States, which has often declared its independence from the international legal system—especially since the terrorist attacks in 2001. The U.S. sometimes chooses to remain aloof from the international human rights system rather than "surrender" state sovereignty to international agencies. It has signed neither CEDAW nor CRC. In 2002 the U.S. was a prominent human rights outlier when it refused to join the treaty establishing the International Criminal Court (ICC). At other times, however, Washington supports international human rights institutions, as when the U.S., in its role in the UN Security Council, agreed in 2005 to refer human rights atrocities in the Darfur region of The Sudan to the ICC. For sovereigntists, however, there is no *moral* necessity for states to participate in the international human rights system. Rather, a government's obligation is to its own people, which may or may not dictate cooperating with broader international standards.

At issue here is the meaning of state sovereignty: the assertion that governments are the supreme legal authority within their own borders, not subject to international rules or institutions beyond them. Of course, the more a country can use economic and military means to achieve its objectives directly, the less it needs to participate in international human rights institutions. The more powerful a state, the more it can play the sovereignty trump card.

"Civil Society"

While the sovereignty critique challenges human rights optimists' belief in the force of international standards, a second critique questions whether law is the best tool for advancing human rights improvements. Traditionally, enthusiasts of the international system had assumed that the gradual expansion of the international human rights treaty system would inexorably spread better human rights through the agency of legal institutions. Evidence that international legal standards and human rights declarations cause governments to change their behavior is hotly disputed, however.[10] Indeed, there is empirical support for the *lack* of practical efficacy of international law generally and international human rights law in particular.[11] Moreover it seems that countries with the worst human rights records ratify human rights treaties as often as those with the best human rights practices.

The "law" question is especially relevant in conditions of globalization: just how important can law be in a world where corporations seem more powerful than governments, where nongovernmental organizations seem to be more effective agents of change than parliament or congress, and where mass media seem to have supplanted the role of formal institutions? On some accounts civil society in a globalized world has dislodged law—both international and national—as an ordering device. Scholars who emphasize the role of civil society when markets are globalized talk instead about global networks—governmental, nongovernmental, and corporate—that perform the regulatory functions that used to be the role of formal politics and law.[12]

Some argue that globalization has reduced, or possibly even removed, the salience of sovereignty, instead placing social change in the hands of civil society. Global networks have displaced the state, it is claimed, overlaying it with multiple decentralized networks that transcend national borders.[13] These scholars point to the multiple layers of relationships between states through multilateral and bilateral obligations and regional and international institutions, arguing that international human rights norms are spread through

persuasion and acculturation rather than through top-down legal coercion.[14] Civil society, not law, is seen as the engine of change and the implementer of social preferences, so much so that it is sometimes simply assumed that human rights are natural components of a reasonable society rather than distinctive norms.[15] As with the evidence about the efficacy of human rights treaties, however, empirical support for the replacement of law by global civil society networks is deeply controversial. While civil society and mass media have added new layers of complexity to political and economic structures, it has yet to be established that these new dynamics have overtaken or replaced formal legal mechanisms.

"Multiculturalism"

If the "sovereignty critique" from the political right questions the force of international law unless it serendipitously coincides with national self-interest, one might expect that the political left would automatically be *for* international law. On the left, however, social theorists of pluralism and cultural identity can be equally suspicious of the universal principles of international human rights. Postmodernists criticize international human rights as naively papering over deep cleavages in cultural identity and making false assertions of universal norms. Multiculturalists would have the state protect rather than erase conflicting visions of human rights norms. Indeed, the "nationalist" left would elevate group rights as defenses against universal norms built on individual rights. From this perspective international human rights must be treated with suspicion—there can be no one-size-fits-all approach to the content of human rights. In the eyes of some, the absence of non-Europeans in the history of human rights philosophy has discredited the very idea of human rights as a universal norm that could underwrite legal rights. Human rights are seen as irretrievably part of Western triumphalism that reached its apogee in colonial ideology.

The historical account of modern human rights is also a story of human inequality, shadowed by the colonialist mission of civilizing "benighted" peoples. From the sixteenth to the twentieth-century international law legitimized the acquisition of huge swathes of the Americas, Africa, and the Asia-Pacific region in a style of imperial fundamentalism that was supported by the science of the day. Anthropologists made clear distinctions between "savage," "barbarian," and "civilized" peoples. In 1877 lawyer-anthropologist Lewis Henry Morgan wrote in the opening pages of his book *Ancient Society*, "It can

now be asserted upon convincing evidence that savagery preceded barbarism in all tribes of mankind, as barbarism is known to have preceded civilization . . . [and these] three distinct conditions are connected with each other in a natural as well as necessary sequence of progress. . . . Democracy in government, brotherhood in society, equality in rights and privileges, and universal education, foreshadow the next higher plane of society to which experience, intelligence and knowledge are steadily tending."[16]

While the colonizing West brought the constitutive aspects of the human rights tradition—sovereignty, constitutionalism, and ideas of freedom and equality—their beliefs about anthropology effectively excluded non-European peoples from human rights benefits.[17] Instead, the West's anthropological assumptions justified the legalization of unequal treaties between European and non-European peoples, with the consequence that it was completely "legal" to acquire sovereignty over non-European societies by conquest.[18]

The more recent rejection of international human rights by some postcolonial countries has led to suggestions that non-Western systems with different cultural underpinnings have an entirely different set of human rights priorities. The skeptics of international human rights argue that much of the human rights scholarship and activism seems driven by moral absolutism, that aspirations for greater human dignity can only end in clashes between competing visions of the truth like the religious disputes of past ages. International human rights are criticized for being a politics of identity that "allows inclusion only by assimilation or conversion."[19] As Canadian philosopher Charles Taylor has pointed out, "we can't assume straight off, without further examination, that a future unforced world consensus could be formulated to the satisfaction of everyone in the language of rights."[20]

There could be no better example of this than the "Asian values" debate. The first prime minister of Singapore, Lee Kwan Yew, attacked the underlying philosophy of human rights in the West for according primacy to the individual. Yew argued for a different interpretation of human rights, understood through Confucianism. Asian values, he asserted, put the social and economic rights of the community before the rights of the individual.[21] The Association of Southeast Asian Nations (ASEAN) countries of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam conspicuously overlook each other's human rights abuses, refusing for example to sanction the rulers of Myanmar for their brutal crackdown on the Buddhist monks who took to the streets in September 2007 to dem-

onstrate for political freedom or for their prolonged detention of opposition leader Aung San Suu Kyi.

Answering the Critiques: A More Complex Human Rights History

These are long-standing problems in the Western tradition of law, rights, and international society. Each of these critiques points out valid and serious flaws in the current operation of international human rights. The very international institutions that were created to pursue human rights appear undermined by some of the core values and features that were part of their creation. Each of these critiques, when seen more precisely in its historical context, however, reveals that it is missing crucial elements of the genealogy of human rights. Key pieces of the human rights system as it has evolved remain relevant today. The development of international law over the past 500 years is unquestionably a blemished history, but the human rights ideals within that history are not fatally flawed. Human rights as a shared project across dissimilar cultures remains a viable vision.

Each of the three critiques overlooks a crucial piece of the international human rights jigsaw. Although the sovereignty critique is a legitimate account of the effects of national power on international matters, other long-standing features of the development of the international legal system also show a sensibility that can only be described as a moral obligation towards people of other states. The civil society critique properly notes the influence of nonlegal pressures on governments, but it is also clear that the proliferation of nongovernmental forms of activity has gone hand in hand with the creation of legal frameworks. The cultural critique of human rights is a devastatingly accurate account of misused Western power in the colonies, but the history of the Western rights tradition is also one of the desire to accommodate cultural difference within overarching principles and institutions.

The drawback of each of these critiques is that none of them on its own offers a full account that encompasses law, society, and politics in philosophical history. I argue that once these developments are disentangled from their history and their ideology, key elements of the international human rights system are more visible. A more careful analysis of the development of human rights philosophy demonstrates that important values can be disaggregated from a flawed history.

Despite many failures in their implementation, these ideas have been offered in the Western philosophical tradition as far better alternatives to

singular national interests, inflexible legal institutions, and fixed ideas of human identity. Ideas about self-determination, humanitarian intervention, cultural and ethnic difference, and religious diversity were all part of the interactions between the Old World and the New World that began in the fifteenth century.[22] They have been part of the philosophical scaffolding of empire from its earliest days and need to be reemphasized in the contemporary human rights story.

Recovering a Lost Philosophical Tradition

The conventional legal story about human rights starts with the end of World War II, the Nuremberg trials, and the Universal Declaration of Human Rights. Traditional accounts of the philosophy of human rights have focused on the political history of Europe and the United States. This perspective emphasizes international law as a development contiguous with the Enlightenment, the rise of sovereignty in the Peace of Westphalia of 1648, and the rise of individual rights in modern government. The history of individual rights is therefore seen to stretch from the contributions of Thomas Hobbes and John Locke to the English tradition of individual freedom as the "birthright of the English people," to Jean-Jacques Rousseau's articulation of individual French liberty and the writings of Charles de Montesquieu and James Madison that framed the tradition of individual freedoms in the U.S. Constitution.[23]

The law and the philosophy of human rights have a far longer and more complex lineage, however, one that goes back to ancient Greece and Rome but that in Enlightenment times was deeply connected to Europe's discovery of the New World and to Europe's own religious wars. Its early principles were constructed in the shadow of the Roman Catholic Church's designs upon the souls of the heathens in distant lands, then came a steady drumbeat of laws and policies that pursued two often conflicting goals: reducing the influence of Rome on Europe's commercial activities in the New World and increasing the claims of European individuals for religious freedom at home. Europe's rapid commercial expansion required new rules to regulate the "rights" of trade and navigation, establishing the earliest principles of the "open seas," unfettered by claims of sovereignty of other countries plying the oceans. It also needed principles by which Europe's land grabs in the Americas, Africa, and Asia could maximize profits and minimize demarcation conflicts with other European neighbors in the colonies. When it became clear that colonization was bringing disease and depredation, as well as enslavement and

outright massacre, to the far-flung satellites, rules were needed to constrain colonialism's worst excesses. International human rights began as two parts greed and one part compassion.

Cultural Differences While European evangelism, voracious trade, and predatory slave activities still reverberate in contemporary postcolonial societies, these activities were criticized by some in Europe as early as the sixteenth century.[24] Of course it had always been known that other lands had different cultures, and traders had been dealing with this fact for as long as goods had moved along the Silk Road. After the discovery of the Americas, however, Portuguese and Spanish explorers and conquerors wanted to stake their claims to the new hemisphere's resources in ways that their competitors in Europe would acknowledge and respect. The Roman Catholic Church saw non-Christians as having no souls, which meant they could not be said to own their lands and so could be enslaved with impunity. When news reached Europe of hideous violence in what is now Latin America, however, it became clear that the subjugation of distant lands and peoples was producing serious political, social, and legal problems. Spanish Catholic cleric Francisco de Vitoria mounted an eloquent defense of Indian rights in his 1532 *De Indis* lecture, arguing against enslavement of the natives whom most Europeans believed were "slaves, sinners, heathens, barbarians, minors, lunatics and animals."[25] Going against the status quo, Vitoria discerned humanity in the indigenous population: "they are not of unsound mind, but have, according to their kind, the use of reason. . . . They have polities which are orderly arranged and they have definite marriages and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion."[26]

In the end, however, Vitoria's protests did nothing to slow Spain's—or Portugal's and other countries'—colonization of Latin America. In a sad twist to the only compassionate aspect of what was otherwise a rationalization for conquest, the ascribing of European-like rationality to the natives was instrumental in destroying their culture. While Vitoria argued for the right of the Indians to retain their own religion and to own their land, his attribution of reason to the indigenes was a double-edged sword. As soon as they either converted to Christianity or used force to keep Spanish traders from exercising Spain's "natural" right to roam freely over the land for the purposes of trade, the local populations incurred either the "protection" or the wrath of the Spanish crown. The argument for universal humanity brought the indigenous

peoples up from their subhuman status but also justified the Spanish empire through legal arguments that delivered the "natives" into the jurisdiction of their colonizers.[27]

Religious Tolerance Religion in Europe also played a central role in the development of human rights. When Alberico Gentili, a sixteenth-century writer fled Italy because of his Protestantism, he went to England where Protestantism was taking hold. Ultimately, he became a professor of law at the University of Oxford and advised Queen Elizabeth I on the principles that ought to apply to military engagement with the Spanish Armada. The brilliance of Gentili's works, which became classics of international law, is that he wrote of the world as a community comprised of a single human race—not Christians and "others," who held alternative religious beliefs. He argued for more compassion in times of war. In a time when war was only fought to secure territory or spread religion, he was one of the first to argue for war in the name of humanitarian intervention, or, as he put it, "to right human wrongs."[28] Gentili's thinking prefigured military interventions in the name of human rights in the latter half of the twentieth century by insisting that a sovereign should neither rule by fear nor have absolute discretion over citizens.[29]

Gentili's flight to Protestant England from Catholic Italy in 1580 was the impetus for the trenchant critiques of religious intolerance that he delivered as a professor of civil law at Oxford. This sentiment took root in England over the next century as freedom of conscience. The struggle between Catholics and Protestants in England led ultimately to the establishment of parliamentary supremacy over monarchical rule after the Glorious Revolution in 1688, which removed the part of the English monarchy's power that had been based on its "divine right" to rule.

Death and destruction through warfare and conquest was the problem of their time, and Vitoria and Gentili were among the first European philosophers to lambaste the human rights violators who acted in the name of religion and territorial expansion. The slow separation of church and state had begun but with the paradox that a more secular universal law of rights sharply differentiated between European "civilized" peoples and non-European peoples.

As civil war in Europe and violent conquest overseas continued, scholars crafted rules that would tie the hands of kings and princes and limit the extent of civilian suffering. First Gentili then Dutch separatist Hugo Grotius developed ideas about the legal conduct of war. Grotius lived at the time of the Eighty Years' War between Spain and The Netherlands and the Thirty

Years' War between Catholic and Protestant European countries. He witnessed slaughter, disease, and destruction that wiped out 15–20 percent of the total population of what is now Germany. The work of Grotius signaled a fundamental shift from earlier writings on international law that has shaped its contours ever since. Although both Gentili and Vitoria had claimed that their writings for the most part merely systematized the growing number of customs, usages, and state practices that had developed over the previous centuries, Grotius made the distinction between the natural law, jus naturale (the justification for his rules) and jus gentium (the customary law of nations). Jus naturale rests upon basic metaphysical principles of religion and divine authority, but customary law is quite different. It simply justifies international law through describing the practice of states and the conduct of international relations, as evidenced either by informal customs or forced treaties. While assuming universal humankind, Grotius also prefigured positivism, the new political theory that would explain the steady rise of the nation-state and its increasingly absolute claims to legal and political supremacy from the latter part of the eighteenth century to the early part of the twentieth.

Selective Compassion All three of these early scholars of international law—Vitoria, Gentili, and Grotius—seem to have been genuinely motivated by humanitarian concerns. They were grasping for a wider view of human values beyond either blind obedience to the church or fearful self-defense of territory, towards a view that included protecting the weak from those more powerful according to higher principles.[30] This became the theme over the next century, and law was increasingly seen as the leavening influence between chaos and order. Against Thomas Hobbes's idea of the all-important sovereign—his "Leviathan"—German philosopher Samuel von Pufendorf also argued that "Any man must, inasmuch as he can cultivate and maintain toward others a peaceable sociality that is consistent with the native character and end of humankind in general."[31] Law was the key to maintaining sociability: "What would men's life have been like without a law to compose them?" "[A] pack of wolves, lions, or dogs fighting to the finish," he concluded.[32] It was a view that spread through Europe and then to the American founders Hamilton, Madison, and Jefferson as their formulation of the role of rights in the new republic.[33]

Nonetheless, these compassionate arguments applied to just a tiny percentage of any population. Privilege rather than any fundamental moral

equality recognized by law was the doorway to political life. Although social conditions and the human rights agenda improved during the Enlightenment, in fact many people did not qualify to receive the freedoms guaranteed by the European and American declarations of rights. Property ownership and private wealth were both formal and informal prerequisites to political participation. Despite the advances made in fundamental rights such as the right to life and freedom of opinion, civil inequality remained prevalent.[34] "Freedom" and "liberty" were written about in neutral terms, but these principles only applied to those eligible to vote—initially, propertied white men.[35] The position of women in society still remained unequal to that of men, even in England, where women had more human rights than in any other part of Europe. Granting minority rights and freeing all repressed nationalities throughout Europe was theoretically part of the French revolutionary agenda, but although Napoleon did much to spread these ideals during his conquests, real conditions lagged far behind.[36]

Human rights in the Western tradition were crafted to suit a particular set of historical conditions: Europe's new emergence at the center of global military and economic power abroad and religious schisms at home. The European particularity can seem shocking to those familiar with the rich history of earlier systems of belief outside Europe, yet little or nothing of non-European moral philosophy was deemed relevant by the men of the Enlightenment.[37]

Abolition of Slavery There was one development in this early period that demonstrated the potential of human rights to be a truly global movement. When the French civil code was translated into English by an anonymous barrister in the Inns of Court in London in 1804, its advancement of the legal status of homosexuals, slaves, and Jews struck a chord with the British Quakers, who had for years been advocating for an end to the slave trade. European expansionism had massively stoked the trade because the colonial powers relied upon slave labor both at home and in the colonies, and also trafficked in slaves as part of their commercial enterprise with one another. By the middle of the eighteenth century, British ships were carrying about 50,000 slaves a year and the trade was bringing in huge profits.

Philosophical opposition to slavery had been rising since Vitoria's day. From France, Montesquieu's *L'esprit des lois* (The Spirit of the Laws) had a powerful influence over the early U.S. slave abolitionist movement.[38] In Great Britain philosophers such as Adam Smith opposed slavery on both economic and moral grounds. In the *Wealth of Nations* Smith wrote: "From the

experience of all ages and nations, I believe, that the work done by free men comes cheaper in the end than the work performed by slaves. Whatever work he does, beyond what is sufficient to purchase his own maintenance, can be squeezed out of him by violence only, and not by any interest of his own."[39] In his *Theory of Moral Sentiments*, he wrote: "[It is cruel] . . . to reduce them [captured indigenous people] into the vilest of all states, that of domestic slavery, and to sell them, man, woman, and child, like so many herds of cattle, to the highest bidder in the market."[40]

Yet the slave trade continued until years of wars made inroads on the economic underpinnings of slavery, especially on the business interests of particular British members of Parliament. Finally, twenty-five years of advocacy by the Quakers and the English Evangelicals was recognized in 1807 when Parliament outlawed the slave trade within the British Empire, authorizing the navy to collect fines for any slaves found on British ships. With ships active in every ocean, the British Navy became a de facto international police agency charged with monitoring and enforcing the first international human rights campaign.

As a global campaign it had extraordinary success. In 1833 Parliament passed the Abolition of Slavery Act and provided £20 million in compensation to the slaveholders. France abolished slavery in its colonies after the 1848 revolution, and Tsar Alexander II emancipated Russia's fifty million serfs in 1861. Despite these international successes, it took a bloody civil war finally to abolish slavery in the U.S. Until the U.S. Civil War the majority of bills concerning slavery were more concerned with the economy than the rights of the slaves. A proposal in 1839 by Congressman John Quincy Adams to end slavery failed. It was not until 1863, two years into the Civil War, that Pres. Abraham Lincoln issued the Emancipation Proclamation. Like the abolition of slavery in the U.K., the U.S. abolition of slavery resulted from a combination of economic factors and moral sentiment. The Thirteenth Amendment to the United States Constitution was finally passed in 1865 to guarantee the permanent abolition of slavery and the rights of newly freed slaves. It was followed by the Fourteenth Amendment to protect the civil rights of former slaves and the Fifteenth Amendment, which banned racial restrictions on voting.[41]

Of course these momentous events did not eradicate "state-sanctioned" slavery. Indeed, the trade had created new economies: some African nations had prospered so much through the slave trade that they sent tribal leaders from the Gambia, Congo, and Dahomey in delegations to London and Paris to

protest its abolition in its very earliest days.[42] The Dutch system of coerced labor in its East Indian (Indonesian) colonies continued until the 1880s, and slavery similarly persisted in parts of France's African colonies until the 1940s.

Children's Rights Concern about children's human rights began in the same way as the movement for the abolition of slavery. Indignation over the plight of child labor in factories and coal mines was a rallying point for progressive forces throughout Europe, leading ultimately in the mid-1800s to British, French, and American legislation for the protection of children.[43] As the industrial revolution progressed, many European countries passed legislation to make elementary education universal and compulsory.[44]

In the global context these were modest successes,[45] yet they demonstrated two things. First, an international publicity campaign telling the public about human rights harms could result in legal change. Most people in Europe had known nothing of slaves' conditions on the ships and the plantations or the plight of seven-year-old children in the mines. Once they knew, political movements for reform developed momentum that blossomed into new national legal standards. Second, a growing consensus in Europe about core human values of individual freedom and agency was paying off in increased international legal cooperation. Transnational activism about slavery sparked international organizations such as the Eight Power Declaration of the Congress of Vienna, the French Société des Amis des Noirs, and the British and Foreign Anti-Slavery Society.[46] Human rights ideas within states were influencing ideas across their borders.

Early Principles of Humanitarian Intervention Notions of humanitarian intervention began with ideas of "mutual aid" in the eighteenth century, the same time the first suggestions of regional and international confederations of states were advanced.[47] German philosopher Christian Wolff wrote in *The Law of Nations* in 1749 that all the countries of the world together make up a "supreme state" that ought to have its own right to promulgate laws for the universal good. Wolff's idea was that just as people are free and equal before the law, so individual countries ought to be free and equal parts of the supreme state of the world.[48] Writing in the mid-eighteenth century, Swiss jurist Emerich de Vattel popularized Wolff in his own work, also called *The Law of Nations*.[49] It became especially influential in the United States because of its parallels with the Declaration of Independence. Like Wolff, Vattel asserted the equality and sovereign independence of states. Just as individuals