

Fall 1998

### Discriminating Among Rights?: A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law

Kristin N. Wuerffel

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#### Recommended Citation

Kristin N. Wuerffel, *Discriminating Among Rights?: A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 Val. U. L. Rev. 369 (1998).

Available at: <https://scholar.valpo.edu/vulr/vol33/iss1/12>

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Wuerffel: Discriminating Among Rights?: A Nation's Legislating a Hierarchy

# DISCRIMINATING AMONG RIGHTS?: A NATION'S LEGISLATING A HIERARCHY OF HUMAN RIGHTS IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS CUSTOMARY LAW

## I. INTRODUCTION

*Whereas*, Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

*Whereas*, a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge . . .<sup>1</sup>

In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, with forty-eight of its fifty-six members voting in favor.<sup>2</sup> The Declaration, adopted only three years after the United Nations Charter, was to clarify and specify the "human rights and fundamental freedoms" which the Charter intended to protect.<sup>3</sup> Though the Declaration was a non-binding instrument, its adoption recognized that human rights were not only deserving of international concern, but also of international protection.<sup>4</sup> As the Declaration's preamble states, members of the United Nations (U.N.)

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<sup>1</sup> Universal Declaration of Human Rights, Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc. A/810, preamble, para. 6, 7 (1948) [hereinafter Universal Declaration].

<sup>2</sup> HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 119 (1996). The eight countries not voting in favor of the Declaration abstained from the vote. These eight countries were Saudi Arabia, South Africa, the Soviet Union, Belorussia, Czechoslovakia, Poland, Ukraine, and Yugoslavia. M. G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816 n.18 (1978). See also Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 15 (1982) [hereinafter *The New International Law*].

<sup>3</sup> U.N. CHARTER art. 1, para. 2. Specifically, the Charter hoped "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small . . ." *Id.* The General Assembly adopted the Universal Declaration on December 10, 1948, and for this reason, many countries celebrate December 10th as Human Rights Day. JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 7 (1993) [hereinafter DONNELLY, *INTERNATIONAL HUMAN RIGHTS*].

<sup>4</sup> See *infra* notes 39-57 and accompanying text.

pledged "co-operation," in the "promotion" of human rights.<sup>5</sup> But how were over fifty countries, each with its own form of government, cultures, religions, and languages, to determine what constituted human rights and how those rights would be protected?

Though the answers to these questions were not evident when the Declaration was adopted, the drafters provided a sort of guidepost, a curb to follow in the world's quest to identify and protect human rights. Very simply, the Declaration calls for a "common understanding" of rights and freedoms.<sup>6</sup> As the drafters intimated, without this common understanding, the promise of states to promote respect for human rights would not be fully realized. International protection of human rights, however, has not solely taken place under the auspices of the United Nations. For this reason, not only does the Declaration call for a common understanding, but it also states that the Declaration is to be the "common standard of achievement for all peoples and all nations."<sup>7</sup> Thus, the Declaration serves both as a rallying point for a common understanding of human rights and a guide for the common standard in international action.

In addition to participation in U.N. sponsored protection, states must act independently<sup>8</sup> or may act on a regional basis<sup>9</sup> to protect human rights on an international level. While independent action no doubt contributes to the realization of human rights on an international level, this approach does not come without its hazards. When a state acts independently, its methods of protection or lack of international support

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<sup>5</sup> *Supra* note 1 and accompanying text.

<sup>6</sup> Universal Declaration, *supra* note 1, at preamble, para. 7.

<sup>7</sup> Universal Declaration, *supra* note 1, at preamble, para. 8.

<sup>8</sup> In signing the U.N. Charter, the member states "pledge themselves to take joint and separate action in cooperation with the [United Nations]." U.N. CHARTER, *supra* note 3, at art. 55, 56. In promoting human rights on an international level, states may act independently through their foreign policy, by providing remedies for victims of human rights abuses in its courts, and through diplomatic pressure. BARRY E. CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 940-956 (1995). See *infra* notes 152-156 for discussion of state protection of international human rights norms through foreign policy. See *infra* notes 125-149 and accompanying text for discussion of domestic litigation. Informal diplomatic pressure is also a means by which to attempt to change a government's treatment of its citizens. See THE DIPLOMACY OF HUMAN RIGHTS 3-12 (David D. Newsom ed., 1986).

<sup>9</sup> The primary human rights regimes operate in the regions of Western Europe, the Americas, Africa, and the Middle East. Burns H. Weston et. al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT'L L. 585, 585-637 (1987). Though this Note will not discuss the regional regimes, it is important to note that these regimes play an increasing role in the protection of human rights. *Id.* at 637. See PAUL GRAHAM TAYLOR, INTERNATIONAL ORGANIZATION IN THE MODERN WORLD: THE REGIONAL AND THE GLOBAL PROCESS (1993); STEINER & ALSTON, *supra* note 2, at 567-569.

may inhibit real protection. Perhaps one of the greatest hazards of independent state action lies in a state's own perception of human rights.<sup>10</sup> Acting independently, a state may choose which human rights deserve more protection than others, or more specifically, which rights are more important than others. Respect for a "common understanding" of human rights, for which the Declaration calls, may be easily replaced with a state's own understanding. Thus, a state may create a hierarchy of human rights, independent of international consensus and the United Nations.

While the debate regarding a hierarchy of human rights has been primarily a scholarly one,<sup>11</sup> an Act recently passed by Congress and signed by the President illustrates how this theoretical concern has very practical consequences. On October 27, 1998, President Clinton signed the International Religious Freedom Act of 1998.<sup>12</sup> As its title denotes, the Act legislates a method to combat religious persecution in other nations.<sup>13</sup> In choosing a particular right and developing a special

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<sup>10</sup> See *infra* notes 191-173 and accompanying text. See also U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 20-23 (Hurst Hannum & Dana D. Fischer eds., 1993) [hereinafter U.S. RATIFICATION].

<sup>11</sup> Theodor Meron, *State Responsibility for Violations of Human Rights*, 83 AM. SOC'Y INT'L L. 372, 384 (1989) [hereinafter Meron, *State Responsibility*]. In a seminar at the American Society of International Law Proceedings, Professor Meron was asked about the existence of a hierarchy of human rights and whether the existence of such a hierarchy affected the use of nonjudicial countermeasures against state violators. He remarked that while scholars concern themselves with the existence of a hierarchy, governments normally do not. Instead, governments are concerned with the gravity of the violations. *Id.*

<sup>12</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, \_\_\_ Stat. \_\_\_. In May of 1997, Representative Frank Wolf (R-VA) and Senator Arlen Specter (R-PA) introduced the first version of the Freedom From Religious Persecution Act of 1997 (FFRP) in the House of Representatives and the Senate, laying the groundwork for the ultimate passage of the International Religious Freedom Act of 1998. H.R. 1685, 105<sup>th</sup> Cong. (1997). S. 772, 105<sup>th</sup> Cong. (1997). On September 8, 1998, a second version of the FFRP was introduced in the House of Representatives. H.R. 2431, 105<sup>th</sup> Cong. (1997). In March of 1998, Senator Don Nickles (R-OK) introduced the International Religious Freedom Act of 1998. S. 1868, 105<sup>th</sup> Cong. (1998). This Senate Bill along with the second version of the FFRP introduced in the House, would serve as the basis for the Act finally passed by Congress and signed by the President. On May 14, 1998, the House of Representatives passed the Freedom From Religious Persecution Act (H.R. 2431), with a vote of 375 - 41. On October 9, 1998, the Senate passed this Bill with a vote of 98-0. Importantly, though, the Senate passed this Bill with an amendment proposed by Senator Don Nickles (D-OK) which resembled the Bill (S. 1868) introduced by him earlier that year. S. Amdt. 3789. The House agreed to the Senate's amendment and the Act was finally signed by the President on October 27, 1998.

<sup>13</sup> *Id.* at § 1.

method by which to protect it, this Act perhaps unintentionally creates a hierarchy of human rights with its preference for religious rights.<sup>14</sup>

Because no international consensus exists regarding which rights are more important than others, the United States, or any other state creating a hierarchy, does so in isolation.<sup>15</sup> The U.N. Charter and Declaration clearly stand for the international protection of human rights through the cooperation of states, as embodied in the United Nations.<sup>16</sup> This cooperation has led to the emergence of a customary law of human rights.<sup>17</sup> States cannot act to protect human rights without recognizing that they act within the context of an international effort. A state-created hierarchy has serious implications for the protection of human rights on an international level. For a hierarchy undermines the "common understanding" upon which the Universal Declaration of Human Rights depends and instead promotes a different understanding based on subjectivity, thus adversely affecting emerging international humanitarian customary norms.

Upon the passing of the fiftieth anniversary of the Declaration, it seems especially appropriate that discussion take place regarding the understanding of human rights today. Such discussion necessitates consideration of a hierarchy of human rights. This Note begins its discussion with a brief introduction of the background of the United Nations and its contribution to the development of human rights law.<sup>18</sup> In Section III, this Note examines the formation of the customary law of human rights.<sup>19</sup> Section IV then discusses the International Religious Freedom Act of 1998 and studies the debate regarding the existence of a hierarchy of human rights.<sup>20</sup> Finally, Section V will address the Act's instituting of a hierarchy and its effects on customary international law.<sup>21</sup>

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<sup>14</sup> See *infra* notes 241-242 and accompanying text.

<sup>15</sup> See *infra* notes 172-213 and accompanying text.

<sup>16</sup> See *supra* note 1 and accompanying text. One scholar notes that while the Declaration was not perfect in enumerating human rights, it exists as a tremendous example of international cooperation. PETER JONES, RIGHTS 85 (1991).

<sup>17</sup> See *infra* notes 87-150 and accompanying text.

<sup>18</sup> See *infra* notes 22-86 and accompanying text.

<sup>19</sup> See *infra* notes 87-150 and accompanying text.

<sup>20</sup> See *infra* notes 151-231 and accompanying text.

<sup>21</sup> See *infra* notes 232-254 and accompanying text.

## II. THE UNITED NATIONS' CONTRIBUTION TO THE PROTECTION OF INTERNATIONAL HUMAN RIGHTS

The concept of "human rights"<sup>22</sup> has roots in a variety of sources,<sup>23</sup> including religion,<sup>24</sup> natural law,<sup>25</sup> legal positivism,<sup>26</sup> and Marxism.<sup>27</sup> These influences have worked together to create what we now consider "human rights," in other words, the "rights one possesses by virtue of being human."<sup>28</sup> Though theories regarding human rights were integral

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<sup>22</sup> The term "human rights" is a relatively new term on the world scene and in many ways has come to replace the term "natural rights." Jones, *supra* note 16, at 81.

<sup>23</sup> See Jerome J. Shestack, *The Jurisprudence of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 74 (Theodor Meron ed., 1984); DONNELLY, INTERNATIONAL HUMAN RIGHTS, *supra* note 3, at 21-28 (discussing a theory for human rights, including the influences of Natural Law, Marxism, Utilitarianism, and Morality); U.S. RATIFICATION, *supra* note 10, at 5-7 (briefly charting the historical development of human rights principles); MOSES MOSKOWITZ, INTERNATIONAL CONCERN WITH HUMAN RIGHTS 9-12 (1974) (discussing the need for a central theme to emerge from the many influences on the international concern for human rights so that goals and objectives for the movement can be defined); see also MICHAEL FREEDEN, RIGHTS 12-23 (1991) (surveying the most influential thinkers on rights talk, including Thomas Hobbes, John Locke, Edmund Burke, Thomas Paine, Jeremy Bentham, Thomas Hill Green, and Karl Marx).

<sup>24</sup> Shestack, *supra* note 23, at 75-81. Religious doctrine (from the Judeo-Christian tradition as well as other religions with a deistic foundation) has contributed to the development of human rights in its views regarding the relationship between humans and God. *Id.* at 76. Believing that humans are created in God's image, human rights come from a divine source and are therefore inalienable. *Id.*

<sup>25</sup> *Id.* at 77. While theologians found authority for human rights in God, those adhering to a theory of natural law found authority for human rights in "elementary principles of justice." *Id.* In other words, natural law gives humans certain unchangeable rights. Though natural law can be viewed as part of the law of God, as Thomas Aquinas viewed it, the development of natural law was an effort to separate such rights from religion. *Id.* Natural law emphasizes the autonomous nature of human beings. *Id.* at 81. Natural law theory led to natural rights theory. John Locke was a champion of natural rights theory, as evident in his view of the relationship between humans and government. *Id.* at 78.

<sup>26</sup> If natural law was the most popular theory of the seventeenth and eighteenth centuries, legal positivism has enjoyed such status during the nineteenth and much of the twentieth centuries. For the Positivist, the source of rights is found only in the enactments of the state. No higher authority exists. Rights are rights because the state says so. Shestack, *supra* note 23, at 79.

<sup>27</sup> Finally, Marxism bases its view of rights on the belief that persons are "indivisible from the social whole." *Id.* at 82. In other words, Marx believed that human rights, specifically civil and political rights, separate one human from another, thus isolating the human from the community. FREEDEN, *supra* note 23, at 21-22 (1991). Marxism would later especially advance economic and social rights. See *infra* note 76 and accompanying text. Another scholar notes that the concept of human rights had its beginnings as a political concept, holding that the individual has a "sphere of freedom" from the state. Theodore van Boven, *Distinguishing Human Rights*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43, 49 (Karel Vasak ed., 1982).

<sup>28</sup> van Boven, *supra* note 27, at 74. Another scholar notes the close relationship between the terms "natural rights" and "human rights." Human rights may be thought of as natural

to their recognition and development, perhaps the event which most brought human rights to the forefront of the world scene was the Second World War.<sup>29</sup>

The reality of World War II and the atrocities suffered by millions awakened the world's nations to the realization that human rights are central to humanity's very survival.<sup>30</sup> As people around the world

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rights because they are rights everyone has, regardless of whether the state recognizes them. In addition, human rights may be considered natural rights in that human beings possess these rights in their "natural capacity," rather than as citizens of any state. JONES, *supra* note 16, at 81-82. At the same time, however, human rights differ from natural rights in important ways, including that natural rights are often considered absolute while human rights are *prima facie* and that though new natural rights cannot emerge, human rights are often said to come into being. J. Roland Pennock, *Rights, Natural Rights, and Human Rights – A General View*, in HUMAN RIGHTS 7 (J. ROLAND PENNOCK & JOHN W. CHAPMAN eds., 1981). It is helpful to consider what is meant by the word "right." Donnelly notes that the word "right" has two meanings. First, "right" may refer to "rectitude," or "something being right." JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY OR PRACTICE 10 (1989) [hereinafter DONNELLY, UNIVERSAL HUMAN RIGHTS]. Second, "right" may refer to entitlement, or "someone having a right." *Id.* In human rights, "right" of course refers to having a right, but at the same time may also have the connotation that it is right or correct to have such a "right." DONNELLY, INTERNATIONAL HUMAN RIGHTS, *supra* note 3, at 20. See generally Shestack, *supra* note 23, at 70-74 (briefly reviewing other notions of the word "right").

<sup>29</sup> While human rights thought has its beginnings in the years prior to World War II, it was primarily a subject only for national regulation. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 4 (Hurst Hannum ed., 1984). Even though human rights were primarily internal, some events pushed human rights onto the global scene prior to the Second World War as well. *Id.* The antislavery movement of the nineteenth and twentieth centuries, beginning with the Treaty of Paris (1814) and culminating in the adoption of the International Slavery Convention (1926), brought the treatment of individuals and certain ethnic groups to the world's attention. Burns Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 22 (Richard Pierre Claude & Burns Weston eds, 2d ed. 1992). Workers' rights were recognized with the establishment of the International Labor Organization (ILO) in 1919. Bilder, *supra* at 5. In 1900, the Supreme Court of the United States recognized the existence of an international law pertaining to prizes of war. The *Paquette Habana*, 175 U.S. 677, 708 (1900). After reviewing the practice of nations, the Supreme Court held that it is a rule of international law that a coastal fishing vessel, honestly pursuing its "peaceful calling of catching and bringing in fresh fish," is exempt from capture as a prize of war. *Id.* The Court's holding is especially important in its recognition that the humane treatment of civilians in times of war was of international concern. STEINER & ALSTON, *supra* note 2, at 69.

<sup>30</sup> DONNELLY, INTERNATIONAL HUMAN RIGHTS, *supra* note 3, at 6. Donnelly writes, "Often a problem becomes a subject of international action only after a dramatic event crystallizes awareness . . . The catalyst that made human rights an issue in world politics was the Holocaust, the systematic murder of millions of innocent civilians by Germany during World War II." *Id.* Not only did Hitler's atrocities act as a "catalyst," but so too the "unfettered sovereignty" which Germany asserted. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 1 (1990). Arguing that the treatment of its

watched war criminals be convicted and punished for unspeakable wrongs,<sup>31</sup> the international community could no longer ignore that the denial of human rights caused the death of millions. Not only did the War force people to face the past, but it also caused people to look to the future and ask the question, "How can the world ensure that such crimes against humanity will never happen again?" From this sentiment, a desire emerged for the development of international standards for the protection of human rights.<sup>32</sup>

#### A. *The United Nations Charter*

In the aftermath of the War, the creation of the United Nations represented the states' intention to face certain challenges as an international community.<sup>33</sup> One of these challenges was the protection of human rights.<sup>34</sup> In its Charter, the United Nations pledges to promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion."<sup>35</sup>

Though the Charter does not devote lengthy or specific discussion to human rights,<sup>36</sup> one cannot minimize the importance of the document in the development of human rights protection. For, in its suggestion that human rights are of international concern, the Charter legitimized the struggle for human rights.<sup>37</sup> In taking responsibility to protect

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citizens were not of international concern, Germany carried out its atrocities in the face of a world reluctant to intervene. *Id.* World War II proved that human rights cannot solely be a domestic issue and international protection is needed. *Id.*

<sup>31</sup> Sohn, *supra* note 2, at 10. Professor Sohn notes that the Nazi party leaders and military officials on trial for the atrocities committed during the War were not allowed to use the defense that they acted for the state or merely followed orders. *Id.* Thus, international law was concerned with both the acts of sovereigns and the acts of individuals. *Id.* See STEINER & ALSTON, *supra* note 2, at 99-102; DONNELLY, *INTERNATIONAL HUMAN RIGHTS*, *supra* note 3, at 7.

<sup>32</sup> Bilder, *supra* note 29, at 5.

<sup>33</sup> See *supra* text and accompanying note 16.

<sup>34</sup> Bilder, *supra* note 29 at 5; DONNELLY, *INTERNATIONAL HUMAN RIGHTS*, *supra* note 3, at 7.

<sup>35</sup> U.N. CHARTER, *supra* note 3, at art. 55(c).

<sup>36</sup> STEINER & ALSTON, *supra* note 2, at 118. The phrase "human rights" occurs in the following provisions of the U.N. Charter: preamble, para. 2; art. 1(3); art. 13(1)(b); art. 55; art. 56; art. 62(2); art. 68. See STEINER & ALSTON, *supra* note 2, at 119.

<sup>37</sup> Professor Henkin remarks that the end of the War brought acceptance of "human rights" in two ways. On a national level, constitutions and laws incorporated human rights. On a "transactional" level, human rights were either incorporated into or the actual subject of international agreements. The UN Charter was one of these international documents, stating and solidifying international concern for human rights. Louis Henkin, *International Human Rights as "Rights"*, in *HUMAN RIGHTS*, *supra* note 28, at 258.

human rights, the Charter placed human rights on the world's agenda. Importantly, just as the United Nations had an obligation to promote human rights, so too did each of the member states have the duty to observe and protect human rights.<sup>38</sup> Human rights, then, were no longer abstract principles, but legitimate, tangible goals for which the international community was to strive.

### B. *The Universal Declaration of Human Rights*

Because the Charter did not have much to say specifically regarding human rights, there was an obvious need to draft a document solely dedicated to a discussion of human rights.<sup>39</sup> To respond to this need and pursuant to Article 68 of the Charter,<sup>40</sup> the United Nations General Assembly created the Human Rights Commission in 1946 to make reports and draft proposals for an "International Bill of Rights."<sup>41</sup> In Commission discussions, members voiced their concern for the form that the Bill of Rights was to take, some fearing that a treaty form would legally bind their nations and infringe on national sovereignty.<sup>42</sup> For this reason, many wanted the Bill of Rights to be in the form of a declaration.<sup>43</sup> While not legally binding on states, a declaration is a recommendation made by the General Assembly to member states and is

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<sup>38</sup> In Article 56, members states "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER, art. 56. Article 55 states that the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER, *supra* note 3, at art. 55 (a)(b)(c).

<sup>39</sup> U.S. RATIFICATION, *supra* note 10, at 7. In fact, when the states convened in San Francisco to sign the U.N. Charter, the United States and several other countries proposed that a Bill of Human Rights be included in the Charter. Though this proposal was unsuccessful, Article 68 of the Charter provides for the creation of a commission on human rights. *Id.*

<sup>40</sup> Article 68 states, "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights. . . ." U.N. CHARTER, *supra* note 3, at art. 68.

<sup>41</sup> STEINER & ALSTON, *supra* note 2, at 119. The U.N. Commission on Human Rights first met in early 1947 and consisted of representatives from member states. *Id.* Eleanor Roosevelt, the representative from the United States, served as the chairperson of the Commission. Tom J. Farer, *The United Nations and Human Rights: More Than a Whimper, Less Than a Roar*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 227, 228 (Richard Pierre Claude & Burns H. Weston eds., 2d ed., 1992).

<sup>42</sup> Farer, *supra* note 41, at 229. See *infra* notes 91-95 and accompanying text for discussion of treaties.

<sup>43</sup> STEINER & ALSTON, *supra* note 2, at 119.

intended to exert a moral and political influence.<sup>44</sup> The Commission chose the latter, and drafted the document to be non-binding on member states.<sup>45</sup>

With forty-eight states voting in favor, the General Assembly adopted the Declaration in 1948.<sup>46</sup> Though the Declaration did not enunciate the rights with exacting specificity,<sup>47</sup> it did include those human rights widely accepted and agreed upon at the time, including both civil and political rights, and economic and social rights.<sup>48</sup> With its adoption, the Declaration became the primary human rights instrument in the world, despite its non-binding nature.<sup>49</sup> The Declaration was the first of three parts to the International Bill of Rights.<sup>50</sup> Because the Declaration outlined general principles of human rights, a second, more detailed and comprehensive document was to be drafted after the

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<sup>44</sup> STEINER & ALSTON, *supra* note 2, at 119.

<sup>45</sup> There was little confusion regarding the non-binding nature of the Declaration. Before the General Assembly cast its final vote, Eleanor Roosevelt stated:

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

5 MARJORIE MILLACE WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 243 (1965).

<sup>46</sup> *See supra* note 2.

<sup>47</sup> Arguably, the drafters as well as the U.N. General Assembly were in no position to be too specific or definite regarding the content of human rights. Drafted only three years after the U.N. Charter created the United Nations, the Declaration had to elicit support from governments and nations with very different ideologies and cultures. JONES, *supra* note 16, at 85.

<sup>48</sup> Political and civil rights provided for in the Declaration include: equality before the law, (Article 7); protection against arbitrary arrest (Article 9); the right to a fair trial (Article 10); freedom from *ex post facto* criminal laws (Article 11(2)); the right to own property (Article 17); freedom of thought, conscience and religion (Article 18); freedom of opinion and expression (Article 19); and freedom of peaceful assembly and association (Article 20). Economic and social rights provided for in the Declaration include: the right to work and to choose one's work (Article 23(1)); the right to equal pay for equal work (Article 23(2)); the right to form and join trade unions (Article 23(3)); the right to rest and leisure (Article 24); the right to an adequate standard of living (Article 25); and the right to education (Article 26). Universal Declaration, *supra* note 1.

<sup>49</sup> *See infra* note 123.

<sup>50</sup> John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75, 85 (Maarten Bos ed., 1973).

Declaration. This second instrument was to be a covenant, while the third was to provide for measures of implementation.<sup>51</sup>

Upon completion of the first phase of the International Bill of Rights, the Commission turned its sights to the second. With the Declaration as a "springboard,"<sup>52</sup> the Commission began discussion regarding the covenant which was to follow the Declaration.<sup>53</sup> It proved difficult for the Commission to draft a single document which could adequately transform the broad principles of the Declaration into a more specific listing.<sup>54</sup> Recognizing this difficulty, the Commission decided to divide the rights enumerated in the Declaration into two categories: civil and political rights,<sup>55</sup> and economic and social rights.<sup>56</sup> To sufficiently treat these two groupings, the General Assembly, in 1952, decided to place them into two different covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.<sup>57</sup>

### C. *The International Covenant on Civil and Political Rights (ICCPR)*

Though the Commission completed its work on the two covenants in 1954, the General Assembly did not approve the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) until 1966.<sup>58</sup> The United States Senate, however, did not ratify the ICCPR until

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<sup>51</sup> *Id.*

<sup>52</sup> STEINER & ALSTON, *supra* note 2, at 120.

<sup>53</sup> Humphrey, *supra* note 50, at 85. The second instrument of the Bill of Rights was intended to be a treaty which made the rights contained in the Declaration enforceable. *Id.*; see also Sohn, *supra* note 2, at 19.

<sup>54</sup> Sohn, *supra* note 2, at 19. Professor Sohn notes that it was difficult to treat the rights in a "parallel manner." *Id.* Equal treatment of rights was especially important due to the states' differing ideologies regarding rights. Humphrey, *supra* note 50, at 82. With the emergence of the Cold War, differences in ideology split the United Nations in half: the West often championed civil and political rights while the East focused on economic and social rights. STEINER & ALSTON, *supra* note 2, at 120. See U.S. RATIFICATION, *supra* note 10, at 7-8.

<sup>55</sup> See *infra* notes 58-72 and accompanying text.

<sup>56</sup> See *infra* notes 73-86 and accompanying text.

<sup>57</sup> Humphrey, *supra* note 50, at 86. See STEINER & ALSTON, *supra* note 2, at 120; U.S. RATIFICATION, *supra* note 10, at 7-8; Sohn, *supra* note 2, at 19. A "covenant" is a treaty in that it binds the state parties according to its terms and subject to reservations. STEINER & ALSTON, *supra* note 2, at 123. See *infra* notes 91-95 and accompanying text for discussion of treaties.

<sup>58</sup> Humphrey, *supra* note 50, at 86.

1992.<sup>59</sup> The United States' ratification seems to have come especially late when one considers the rights at issue in the ICCPR. For, many of the rights promoted in the ICCPR are rights often thought to be "American."<sup>60</sup>

Substantively, the ICCPR obligates a state party to treat individuals in a certain way.<sup>61</sup> In Article 2 of the ICCPR, the state party promises to "respect and ensure to all individuals" the rights recognized in the Covenant, irrespective of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>62</sup> In its listing of rights, the Covenant assigns different obligations to different rights. Those rights which state parties are obligated to observe at all times are called non-derogable rights.<sup>63</sup> Certain non-derogable rights include: the "inherent right to life,"<sup>64</sup> the right to be free from torture,<sup>65</sup> freedom from slavery,<sup>66</sup> and "freedom of

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<sup>59</sup> U.S. RATIFICATION, *supra* note 10, at 20. Though the United States ratified the ICCPR, it placed a number of reservations on the treaty, thereby restricting its enforceability on the United States. *Id.* at 269-289.

<sup>60</sup> Louis Henkin, *The Covenant on Civil and Political Rights, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?* 20, 23 (Richard Lillich ed., 1981). Discussing the reservations proposed by the Executive Branch to the ICCPR at the time, Professor Henkin argues that the ICCPR would make little change in U.S. law. *Id.* at 22-23. In fact, the ICCPR works to specify American rights. For the rights guaranteed in the ICCPR are those championed in the American as well as the French Revolutions. Sohn, *supra* note 2, at 17. In 1776, American colonists signed the Declaration of Independence, maintaining that all persons have "inalienable rights." *Id.* In 1789, the French followed suit, writing the Declaration of the Rights of Man and of the Citizen. *Id.* In this document, the French maintained the equality of man and held that each man has "natural and imprescriptible rights." *Id.* The Western nations' notion of rights, especially evident in the ideals of the American and French revolutions, was founded on the belief that individuals are autonomous beings. Shestack, *supra* note 23, at 82. See generally Louis Henkin, *International Human Rights and Rights in the United States, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 25 (Theodor Meron ed., 1984) (discussing the similarities as well as differences between American and international conceptions of human rights) [hereinafter HUMAN RIGHTS IN INTERNATIONAL LAW].

<sup>61</sup> Oscar M. Garibaldi, *Obligations Arising from the International Covenant on Civil and Political Rights, in U.S. RATIFICATION, supra* note 10, at 54. Garibaldi notes that the ICCPR has two types of obligations, substantive and procedural, which work together to achieve protection. *Id.* The ICCPR outlines the procedures for the international oversight of individual states' adherence to the substantive obligations of the covenant. *Id.*

<sup>62</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 2(1) [hereinafter ICCPR]. In this provision, the Covenant makes clear the "content of obligation," the beneficiaries of the obligation, and underscores that the state party is obliged to honor the rights of *all* individuals. *Id.* at 55.

<sup>63</sup> *Id.* at art 4.

<sup>64</sup> *Id.* at art. 6.

<sup>65</sup> *Id.* at art 7.

<sup>66</sup> *Id.* at art. 8(1).

thought, conscience and religion.”<sup>67</sup> Article 4(1) of the ICCPR, however, provides that state parties may derogate, or suspend, some rights when a public emergency threatens the life of the state.<sup>68</sup> Finally, states may limit certain rights when “time[s] of public emergency” threaten the very life of a state.<sup>69</sup>

To enforce these rights, the Covenant stipulates that where a state party’s domestic law does not afford the same protections, the state must adopt appropriate legislation to give effect to the rights within the Covenant.<sup>70</sup> In addition to national implementation, the Covenant provides for international implementation in Article 41.<sup>71</sup> The ICCPR requires that state parties present periodic reports on the enjoyment of rights recognized in the Covenant and provides for a Human Rights Committee to hear complaints alleged by one state against another for failure to comply with the Covenant’s obligations.<sup>72</sup>

#### D. *The International Covenant on Economic, Social, and Cultural Rights (ICESCR)*

In his famous State of the Union Address of 1941, President Franklin Roosevelt spoke of the “four essential human freedoms,” for which the

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<sup>67</sup> ICCPR, *supra* note 62, at art. 18. The rest of the non-derogable rights in the ICCPR include: no imprisonment based on failure to fulfill a contractual obligation (Article 11), the nonapplicability of retroactive criminal laws (Article 15), and the right to recognition as a person before the law (Article 16).

<sup>68</sup> ICCPR, *supra* note 62, at art. 4(1). While the Covenant does not explicitly state which rights fit into this category, Professor Sohn has made the following list: “[f]reedom from compulsory labor, right to liberty and security of person, right to humane treatment in prison, right to certain minimum guarantees in criminal proceedings, and freedom from interference with privacy, family, home . . .” Sohn, *supra* note 2, at 18.

<sup>69</sup> ICCPR, *supra* note 62, at art. 4(1). Such rights include: the rights to liberty of movement and the freedom to choose one’s residence (Article 12), the right to a public hearing (Article 14), freedom to voice one’s religious beliefs in public (Article 18(3)), freedom of expression (Article 19 (2)(3)), right of peaceful assembly (Article 21), and freedom of association (Article 22).

<sup>70</sup> Specifically, the Covenant reads:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

ICCPR, *supra* note 62, at art. 2(2).

<sup>71</sup> ICCPR, *supra* note 62, at art. 41.

<sup>72</sup> ICCPR, *supra* note 62, at art. 41; Sohn, *supra* note 2, at 22. The Human Rights Committee only has jurisdiction over a state if it has consented to such jurisdiction. So, in order for a state to bring a complaint against another, both states must have accepted the Committee’s jurisdiction. *Id.*

world at that time could only hope.<sup>73</sup> President Roosevelt called for the freedom of speech and expression, the freedom of religion, the freedom from want, and finally, for the freedom from fear.<sup>74</sup> Specifying what "freedom from want" meant, he stated, "freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world."<sup>75</sup> Little did President Roosevelt know that his notion of "freedom from want" would be fleshed out in the International Covenant on Economic, Social, and Cultural Rights.<sup>76</sup>

Among its provisions, the Covenant recognizes the right to work<sup>77</sup> and the right to favorable working conditions,<sup>78</sup> and it also protects the privacy of the family.<sup>79</sup> Interestingly, the Covenant not only promotes the right to education,<sup>80</sup> but also outlines the structure of education—primary, secondary, and higher.<sup>81</sup> Unlike the ICCPR, states are not expected to begin implementing the provisions of the ICESCR upon ratification of the document.<sup>82</sup> Recognizing that some states may not be in a position to realistically promote these rights, the Covenant allows for their "progressive" realization.<sup>83</sup> In other words, the Covenant requires that states proceed down the road of realizing these rights in a way suitable to their condition.<sup>84</sup>

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<sup>73</sup> President's Message to Congress, 77 CONG. REC. 44, 46-47 (daily ed. Jan. 6, 1941).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The rights of the ICESCR are often traced to the Russian Revolution and the rise of the proletariat. Sohn, *supra* note 2, at 32-33. The Russian Revolution embodied the Marxist notion that the individual is a part of a greater whole. For this reason, the needs of the whole may take precedence over those of the individual. Shestack, *supra* note 23, at 82. While the United States has signed the ICESCR, it has not yet ratified the document and is therefore not a member of the treaty. NEWMAN & WEISSBRODT, *supra* note 30, at 401.

<sup>77</sup> Importantly, the right to work does not mean that a person has an obligation to work, because such a notion would support forced labor. Sohn, *supra* note 2, at 45. Rather, the right to work refers to an individual's free choice of occupation. *Id.*

<sup>78</sup> ICESCR, *supra* note 76, at art. 7.

<sup>79</sup> ICESCR, *supra* note 76, at art. 10.

<sup>80</sup> ICESCR, *supra* note 76, at art. 13.

<sup>81</sup> ICESCR, *supra* note 76, at art. 13. Though the Covenant outlines such a structure, it allows the state parties to implement the right of education as they see fit, as long as the methods are consistent with the right. ICESCR, *supra* note 76, at art. 14.

<sup>82</sup> ICESCR, *supra* note 76, at art. 2(1).

<sup>83</sup> Though state parties may wish to sign the Covenant, they may not be in the financial situation to observe the rights as outlined in the Covenant. Sohn, *supra* note 2, at 39.

<sup>84</sup> *Id.*

If the Charter worked to recognize human rights, the Declaration and two covenants have worked to define them.<sup>85</sup> Although the Declaration was drafted as a non-binding instrument, the two Covenants were drafted as treaties, and are therefore binding on the state parties.<sup>86</sup> But the fact that the Covenants created legal obligations only in their signatories presented a problem: How were principles of international human rights to become binding on all states? The emergence of a customary law of human rights has provided a promising answer.

### III. HUMAN RIGHTS AS CUSTOMARY INTERNATIONAL LAW

#### A. Sources of International Law

International human rights operate within the context of international law.<sup>87</sup> Thus, one must have a working understanding of the processes of international law before examining human rights in the context of international law more specifically.<sup>88</sup> For the purposes of this discussion, a short explanation of the primary sources of international law, including treaty and custom, will provide an adequate background for examining the development of human rights law.

Article 38 of the Statute of the International Court of Justice (ICJ) states the three primary sources of international law—"international conventions," "international custom," and "general principles of law."<sup>89</sup> The first source, "international conventions," refers to treaties that countries adhere to voluntarily.<sup>90</sup> In international law, treaties<sup>91</sup> create international legal obligations with corresponding duties of compliance and remedies.<sup>92</sup> In order for a document to be a treaty, Article 2 of the

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<sup>85</sup> Richard B. Lillich, *The Growing Importance of Customary International Law*, 25 GA. J. INT'L & COMP. L. 1, 1-2 (1996).

<sup>86</sup> Sohn, *supra* note 2, at 20.

<sup>87</sup> STEINER & ALSTON, *supra* note 2, at 26.

<sup>88</sup> *Id.*

<sup>89</sup> Statute of the International Court of Justice, art. 38(1). Article 38 also states "subsidiary" sources for defining international law. Subsidiary means include "judicial decisions and the teaching of the most highly qualified publicists of the various nations." Art. 38(1)(4)(d).

<sup>90</sup> RICHARD LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 93 (3d ed. 1995).

<sup>91</sup> Terminology changes when discussing "treaties" in an international setting or in a United States domestic setting. In international settings, all international agreements are considered treaties. In the United States, however, the Constitution distinguishes between international agreements and treaties. For the United States, treaties are agreements "concluded by the President with the advice and consent, or approval, of two-thirds of the Senate." International agreements, however, include those agreements the President concludes on the basis of constitutional authority or a delegation of authority by Congress. CARTER & TRIMBLE, *supra* note 8, at 109.

<sup>92</sup> *Id.*

Vienna Convention on the Law of Treaties stipulates that sovereign states must be parties, that the treaty must be in writing, and that the agreement be governed by international law.<sup>93</sup> A "party" to a treaty means a state which has consented to be bound.<sup>94</sup> A state party may accept a treaty, but may make a "reservation" to that treaty, by qualifying particular provisions with which it disagrees. By so doing, the state party limits the legal effect of the treaty when applied to that state.<sup>95</sup>

The ICJ describes the second source of international law, customary law, as "international custom, as evidence of a general practice accepted by law."<sup>96</sup> Perhaps Section 102 of the Restatement (Third) Foreign Relations Law of the United States clarifies this description, providing in clause (2): "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>97</sup> That is, customary law develops from the consistent practice of states, coupled with the states' feeling of legal obligation to so act. Importantly, customary law binds all states. If a state wishes not to be bound, it must persistently object to the emerging international norm.<sup>98</sup>

One scholar remarked that customary law seems as though it develops "by mistake."<sup>99</sup> For states must "happen" to practice the conduct out of some understanding that it is legally obligated to do so.<sup>100</sup> Though customary law may seem a bit nebulous, international law consisted primarily of customary rules until recently.<sup>101</sup> Generally, the

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<sup>93</sup> Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The Vienna Convention sets forth a set of rules for the formation, interpretation, and termination of treaties. CARTER & TRIMBLE, *supra* note 8, at 110. While the United States is not one of the sixty-five states who is party to the treaty, State Department officials have commented that its provisions have attained customary law status and are therefore binding. *Id.*

<sup>94</sup> Vienna Convention, *supra* note 93, at art. 2.

<sup>95</sup> *Id.* at 2(1)(d).

<sup>96</sup> Statute of the International Court of Justice, *supra* note 89, at art. 38(1)(b).

<sup>97</sup> RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.2 (1986) [hereinafter RESTATEMENT].

<sup>98</sup> *Id.*

<sup>99</sup> In a class discussion with Professor Richard Stith, Valparaiso University School of Law, he remarked about the curious nature of customary rules and their seemingly haphazard way of becoming law. (October 12, 1997).

<sup>100</sup> *Id.*

<sup>101</sup> JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34 (9th ed. 1984). Customary rules emerged due to a "long historical process" which culminated in their recognition as customary law. *Id.* An example of rules which became law by gaining status as customary international law are the rules of the "law of the sea." CARTER & TRIMBLE, *supra* note 8, at

use of treaties to create international law has increased, thereby diminishing the need to identify evolving customary rules in many areas of law.<sup>102</sup> While customary law develops from the daily practice of countries, the final source of law looks to the principles and laws present in nations' domestic settings to determine the existence of an international principle.

The third source of international law as outlined by the ICJ is the "general principles of law recognized by civil nations."<sup>103</sup> When examining general principles of law to find evidence of international law, one must look to principles of private law found in domestic settings.<sup>104</sup> General principles of law are most often used in domestic and international courts when no international law covers a particular point.<sup>105</sup> A general principle of law, then, is recognized by examining domestic settings and determining whether the principle is widely held by enough states that the principle actually exists on an international level.

While it may be easy to accept international law made by treaty, law which develops through custom and recognition of general principles is often more difficult to bite one's teeth into.<sup>106</sup> Treaty law is certainly a

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978. Prior to the twentieth century, most of the law of the sea consisted of customary law. The customary law which emerged was based on the notion of the freedom of the sea. *Id.*  
<sup>102</sup> STARKE, *supra* note 101, at 34. The International Law Commission has worked to codify much of customary law through its drafting of treaties, such as the Vienna Convention on Diplomatic Relations (April 18, 1961), the Vienna Convention on Consular Relations (April 24, 1963), and the Vienna Convention on the Law of Treaties (May 22, 1969). *Id.* The law of the sea, once primarily customary law, has also been codified in the United Nations Convention on the Law of the Sea, December 10, 1982, 21 I.L.M. 1261. CARTER & TRIMBLE, *supra* note 8, at 977. A number of factors influenced states' desire for the codification of law of the sea. Concerns for fishing and the possibility of harvesting other valuable resources from the sea were among the leading factors. *Id.* at 978.

<sup>103</sup> Statute of the International Court of Justice, *supra* note 89, at art. 38(1)(c).

<sup>104</sup> LILLICH & HANNUM, *supra* note 90, at 93. General principles of law have been used in the areas of procedure, evidence, and "machinery of the judicial process," to identify international law. MALCOLM N. SHAW, INTERNATIONAL LAW 82, 83 (2d ed. 1986). While there are differing opinions regarding general principles of law, most agree that the general principles of law "constitute a separate source of law." *Id.*

<sup>105</sup> LILLICH & HANNUM, *supra* note 90, at 93. See e.g., the International Court of Justice in *Corfu Channel* allowed the use of circumstantial evidence because it is admitted in all systems of law and recognized by international decisions. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 1 (holding that the British navy violated Albanian sovereignty when it swept for mines within Albanian territorial waters).

<sup>106</sup> Paul L. Hoffman, *The Blank Stare Phenomenon: Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 181 (1995). A human rights litigator, Hoffman describes the reaction of judges to the introduction of applicable customary law as a "blank stare."

necessary source of law in the development of international human rights standards. But, because treaties only bind their state parties, treaty law by itself cannot ensure the protection of human rights on a global level.<sup>107</sup> For this reason, human rights lawyers and advocates have looked to other sources of law for human rights' protection. In recent years, customary law has emerged as a promising source of law for the development of human rights standards and the protection of human rights on an international level.<sup>108</sup>

### B. *The Emergence of Customary Human Rights Law*

Many scholars who comment on the emergence of a customary law of human rights make note of its unique path to becoming custom.<sup>109</sup> Traditionally, customary law develops from the consistent practice of states and *opinio juris*, that is, the state's sense of legal obligation to act in a certain way.<sup>110</sup> Evidence of the state practice in the human rights context, however, differs from the traditional notion of state practice.<sup>111</sup> Such evidence, for example, includes the incorporation of human rights

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*Id.* He states that the "judicial skepticism" exists as one of the "largest obstacles" in the effort to use customary law in domestic jurisdictions. *Id.* at 182.

<sup>107</sup> The most obvious limitation on treaties is that they only legally bind those states accepting them. Richard J. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 206. Thus, states with human rights problems will likely not become parties. *Id.* A second limitation of treaties is that they "reflect agreement" at the most minimal level. *Id.* In other words, the treaties often represent the parties lowest level of commitment, because the parties would not sign a treaty if they felt they could not live up to its terms. Thirdly, because of the lack of effective enforcement measures, the ratification of a treaty may not automatically equal the observance of it. *Id.* Finally, a state may ratify a treaty, but may make reservations to that treaty. Reservations to the treaty will limit the treaty's force in the domestic law of the state. *Id.*

<sup>108</sup> Professor Meron notes the valuable effect of a norm's customary character. First, once a norm becomes custom, it is governed by international law. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 80 (1989) [hereinafter *HUMANITARIAN NORMS*]. Second, once a human rights norm has obtained customary status, regional human rights organs and treaties referring to the applicability of customary law will broaden the remedies available to individuals and underscore the importance of customary law. *Id.*

<sup>109</sup> See generally OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 86-88 (1991) (noting that that the evidence of state practice does not conform to the "traditional criteria" of evidence of custom); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus cogens, and General Principles*, in *HUMAN RIGHTS LAW* 3, 9-11 (Philip Alston ed., 1996) (contrasting the kind of state practice which has traditionally contributed to emergence of custom with the kind of state practice contributing to the customary norms of human rights).

<sup>110</sup> Simma & Alston, *supra* note 109.

<sup>111</sup> *Id.* Professor Henkin purports that traditional, or "authentic," customary law was never made "intentionally, purposefully." Customary law did not develop because states deliberately acted to form new law. STEINER & ALSTON, *supra* note 2, at 142.

provisions in national constitutions and laws, United Nations resolutions, statements by national officials criticizing other states for serious human rights violations, and decisions in national courts using the Declaration as a source for judicial decision.<sup>112</sup> These evidences of state practice are not “practice” at all, in that they are not *deeds* of states, but *words* of states.<sup>113</sup> Professors Simma and Alston refer to this unique evidence of state practice as “paper practice.”<sup>114</sup> By means of this paper practice, customary human rights norms have emerged more deliberately than traditional customary norms. For instead of relying on the consistent but arbitrary practice of a norm, states have explicitly stated their adherence to human rights norms in such instruments.

Louis Henkin helps to distinguish between the traditional notion of state practice and the type of state practice that has led to the formation of a customary law of human rights.<sup>115</sup> Traditionally, state practice has *reflected* the international norm.<sup>116</sup> Now, however, state practice is an activity designed to *create* the norm.<sup>117</sup> In other words, though a United Nations Resolution condemning a particular human rights violation may not be formally binding on its parties, it is evidence of states’ intention to create a norm to protect this particular right. Thus, “state practice” has come to include not only the works of states, but also their words and stated intentions.<sup>118</sup> In this way, the customary human rights norms emerge in a much less arbitrary manner when compared to the traditional emergence of customary norms.<sup>119</sup> As a result of this unique

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<sup>112</sup> SCHACHTER, *supra* note 109, at 88.

<sup>113</sup> Simma & Alston, *supra* note 109, at 10. Rather than rely on patterns of state practice, the development of a customary law of human rights relies on the “words, texts, [and] votes” of diplomats and delegates to the United Nations. *Id.* Professor Henkin also notes that General Assembly resolutions contribute to the efforts to “create new customary law.” STEINER & ALSTON, *supra* note 2, at 142.

<sup>114</sup> Simma & Alston, *supra* note 109, at 10.

<sup>115</sup> STEINER & ALSTON, *supra* note 2, at 142.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> In order to make sense of this different notion of “state practice” and its relation to *opinio juris*, Schachter asserts that to determine whether a certain practice is custom, one must ask, “Is there a general conviction that particular conduct is internationally unlawful?” SCHACHTER, *supra* note 109, at 89. Thus, Schachter addresses the issue of state practice in his mention of “general conviction” and the issue of *opinio juris* in the phrase “internationally unlawful.” It is helpful to keep this in mind when examining human rights obligations that are mentioned in the Declaration and now considered customary international law.

<sup>119</sup> See *supra* note 113 and accompanying text.

sort of state practice, a number of human rights norms have achieved status as customary law.<sup>120</sup>

### C. Content of Customary Law of Human Rights

Though some assert that the Declaration has achieved customary law status, no true consensus exists on the customary nature of the Declaration in its entirety.<sup>121</sup> Seventeen years after the adoption of the Universal Declaration, Judge Humphrey Waldock asserted that the document had achieved status as customary law.<sup>122</sup> Though Judge Waldock's statement came too early to be true, he foreshadowed the strong influence the Declaration would have in affecting the formation of customary human rights law.<sup>123</sup>

A long list of rights contained in the Declaration have attained customary law status.<sup>124</sup> Norms which have achieved customary law status, as recognized by United States courts, include prohibitions against arbitrary detention,<sup>125</sup> summary execution or murder,<sup>126</sup> causing

<sup>120</sup> See *infra* notes 121-150 and accompanying text.

<sup>121</sup> Professor Sohn states, "The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only members of the United Nations." Sohn, *supra* note 2, at 17. See Lillich, *supra* note 85, at 2-3 (citing others who believe that the Declaration has become customary international law). Others, however, maintain that while some rights have achieved status as customary law, a "careful analysis of the relevant state practice" does not support the notion that all rights have acquired customary status. THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 32 (1988). Though the Declaration has achieved a "moral authority such that it has almost become legally binding," the Declaration as a whole does not bind states. Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 10, 33 (Karel Vasak & Philip Alston eds., 1982).

<sup>122</sup> Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1, 15 (INT'L & COMP. L.Q. SUPP. No. 11, 1965).

<sup>123</sup> Just eleven years after the Declaration's adoption, another scholar noted the important influence of the Declaration, despite the fact that it was drafted as a non-binding instrument. Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 AM. SOC'Y. INT'L. L. PROC. 217 (1959). First, the Declaration was used as a "yardstick" by governments, international conferences, and others, to gauge the observation of human rights. *Id.* at 219. Second, other treaties referred to the Declaration, thereby noting its influence. *Id.* Thirdly, the Declaration had an influence on "national constitutions . . . municipal legislation and, in some instances, on court decisions." *Id.* at 222.

<sup>124</sup> See *infra* notes 125-131 and accompanying text.

<sup>125</sup> *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) (holding that the arbitrary detention of a refugee is prohibited by customary international law.), *aff'd sub nom Rodriguez-Fernandez v. Wilkinson*, 654 F. 2d 1382 (10th Cir. 1981). Like the *Filartiga* court, the court in *Fernandez* looked to the Universal Declaration, the American Convention on

the disappearance of individuals,<sup>127</sup> cruel, inhuman or degrading treatment,<sup>128</sup> and genocide.<sup>129</sup> This list along with other classes of human rights, including the prohibition against slavery, systemic racial discrimination, and a consistent pattern of gross violations of international human rights, are considered customary law and purported as such in § 702 of the Restatement.<sup>130</sup> The Restatement also notes that systematic religious discrimination on the basis of state policy, the right to property, and gender discrimination are emerging norms of customary law.<sup>131</sup> In addition to the rights considered custom, the

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Human Rights, the European Convention, and the International Covenant on Civil and Political Rights, as evidences of the customary norm against arbitrary detention. *Fernandez*, 505 F. Supp. at 796-98.

<sup>126</sup> *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (holding that summary execution or murder by the state is violative of customary international law). The court dismissed the plaintiff's cause of action, which alleged that causing the disappearance of a person constituted a violation of customary international law for failure to state a claim. *Id.* at 1543. The court reasoned that the elements needed to make a claim for causing the disappearance of an individual were unclear. *Id.* The plaintiff then filed a Motion for Reconsideration. *See infra* note 127.

<sup>127</sup> *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (holding that the disappearance of an individual violates customary international law). The court examined several statements submitted by legal scholars, purporting that universal consensus did exist as to the elements of "disappearance." *Id.* at 709. The two elements of disappearance include abduction by the state and refusal of the state to acknowledge the abduction. *Id.* at 710. The court also looked to the Universal Declaration, the International Covenant on Civil and Political Rights, statements of the General Assembly and the Organization of American States, and the Restatement. *Id.*

<sup>128</sup> *Xuncax v. Gramajo*, 886 F. Supp. 162, 185-89 (D. Mass. 1995) (recognizing that the customary law forbidding cruel, inhuman, or degrading treatment exists, but holding that the plaintiff's constructive expulsion from his native Guatemala did not constitute a violation of that norm).

<sup>129</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (finding that genocide violates customary international law, the court held that the defendant, leader of the Bosnian-Serbs, violated customary international law when he ordered the murder, rape, forced impregnation, and other forms of torture, of Bosnian Croats and Bosnian Muslims). The court noted that the prohibition of genocide "quickly achieved" acceptance as the law of nations following the atrocities of World War II. *Id.* at 241. It looked to the Convention on the Prevention and Punishment of the Crime of Genocide, noting that the norm applies to private individuals as well. *Id.*

<sup>130</sup> RESTATEMENT, *supra* note 97, at § 702(b)(f)(g).

<sup>131</sup> *Id.* § 702 com. (j)(k)(l). While U.S. courts have limited their recognition of those norms now considered custom to those listed in the Restatement, other rights have likely reached status as general principles of law. Through examination of national laws, governmental and scholarly statements, the United Nations Commission on Human Rights has cited the right to self determination of peoples and the individual's right to leave and return to one's country as norms which can now be considered general principles. SCHACHTER, *supra* note 109, at 90. Specific to the emerging norm of religious freedom, Professor Meron notes that a specific convention on the issue of religious freedom would aid in defining the content of the right and in "expedit[ing] its passage into the general corpus of customary law." MERON, HUMANITARIAN NORMS, *supra* note 108, at 95.

prohibition against torture has been recognized as achieving customary law status in United States courts.<sup>132</sup> A brief review of *Filartiga v. Pena*,<sup>133</sup> which recognized the prohibition against torture as customary law, will provide a helpful example for understanding how a United States court recognizes customary law.

In *Filartiga v. Pena*, the United States Court of Appeals for the Second Circuit held that the prohibition against torture and other cruel and inhuman treatment is recognized as customary law.<sup>134</sup> Brought under the Alien Tort Statute,<sup>135</sup> *Filartiga* involved an action brought by two Paraguayan plaintiffs against another Paraguayan citizen for the torture and death of their son and brother.<sup>136</sup> The statute gives a United States District Court original jurisdiction over any civil tort action brought by an alien and committed in violation of either the law of nations or a treaty of the United States.<sup>137</sup> Thus, plaintiffs could have used customary international law or treaty law to establish jurisdiction under the statute. Because the United States had not yet ratified the International Covenant on Civil and Political Rights which explicitly prohibits torture,<sup>138</sup> the plaintiffs relied on customary law for a prohibition.<sup>139</sup>

The court agreed with the plaintiffs and found that customary law prohibited torture.<sup>140</sup> Quoting the United States Supreme Court, the *Filartiga* court stated that the "law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law.'"<sup>141</sup> Beginning with the United Nations Charter,<sup>142</sup> the *Filartiga* court then looked to various Declarations of the United Nations<sup>143</sup> which prohibited torture. The court examined

<sup>132</sup> See *infra* notes 133-147 and accompanying text.

<sup>133</sup> *Filartiga v. Pena*, 630 F.2d 876 (2d Cir. 1980).

<sup>134</sup> *Id.* at 884.

<sup>135</sup> 28 U.S.C. § 1350 (1994).

<sup>136</sup> *Filartiga*, 630 F.2d at 878-79.

<sup>137</sup> *Id.* at 880. Under the Alien Tort Statute, universal consensus must exist as to the binding nature and content of the tort. *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988).

<sup>138</sup> See *supra* note 59.

<sup>139</sup> *Filartiga v. Pena*, 630 F.2d 876, 878-79 (2d Cir. 1980).

<sup>140</sup> *Id.* at 884.

<sup>141</sup> *Id.* at 880 n. 2 (quoting *United States v. Smith*, 18 U.S. 153, 160-161 (1820)).

<sup>142</sup> *Filartiga*, 630 F.2d at 881. The court stated that while the Charter did not define what was meant by its phrase "human rights and fundamental freedoms," there was no dissent that this phrase guaranteed, at a minimum, the right to be free from torture. *Id.* at 882.

<sup>143</sup> *Filartiga*, 630 F.2d at 882. The court explained its examination of the declarations by stating that the declarations specify "with great precision the obligations of the member

the Universal Declaration<sup>144</sup> and the Declaration on the Protection of All Persons from Being Subjected to Torture.<sup>145</sup> The court also reviewed international agreements, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>146</sup> From an examination of these documents, the Court determined that the prohibition of torture is "clear and unambiguous."<sup>147</sup>

An examination of *Filartiga* is helpful when trying to understand a norm's recognition as customary international law. As *Filartiga* illustrates, the court reviews the relevant international documents in order to ascertain consensus regarding a human rights norm.<sup>148</sup> Without consensus, as evidenced through such documents, a norm will not achieve status as a customary norm.<sup>149</sup>

The importance of the emerging customary law of human rights cannot be underestimated. Customary law binds all states to adhere to these human rights obligations, regardless of whether they are parties to any treaty protecting these rights.<sup>150</sup> States who act to protect human rights inside or outside their borders operate against this backdrop of emerging customary law of human rights. In other words, state action not only contributes to the formation of custom, but also operates within custom. Individual state action in the protection of human rights works within this context. Every state operates within this context when it legislates in the area of internationally recognized norms. Thus, the United States acts against the backdrop of an emerging customary law of human rights with its introduction of the International Religious Freedom Act of 1998.

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nations under the Charter." *Id.* at 883. It furthered stated that declarations create the expectation that states will adhere to the rights provided for in the declarations. *Id.*

<sup>144</sup> *Filartiga*, 630 F.2d at 882. The court noted that the Declaration explicitly states, "no one shall be subjected to torture." *Id.*

<sup>145</sup> *Filartiga*, 630 F.2d at 882-883. The court gave special attention to this instrument, which not only provides that states cannot permit torture, but also defines torture and states that any victim of torture should be given redress according to national laws. *Id.* at 883.

<sup>146</sup> *Filartiga v. Pena*, 630 F.2d 876, 883-84 (2d Cir. 1980).

<sup>147</sup> *Id.* at 884.

<sup>148</sup> See *supra* notes 109-120 and accompanying text.

<sup>149</sup> See *supra* notes 109-120 and accompanying text.

<sup>150</sup> See *supra* note 97 and accompanying text.

#### IV. THE INTERNATIONAL RELIGIOUS FREEDOM ACT AND ITS HIERARCHY OF HUMAN RIGHTS

The United States has contributed to the promotion of human rights through its participation in the United Nations<sup>151</sup> and independent action. The U.S. has attempted the latter through its inclusion of human rights in the baggage of considerations for foreign policy.<sup>152</sup> Though the President is the United States' representative in foreign relations and the ultimate determiner of foreign policy,<sup>153</sup> Congress has acted to secure

<sup>151</sup> In addition to its signing of the U.N. Charter and its signing and ratifying of the Universal Declaration and the ICCPR, the United States has become a member to a number of U.N. sponsored treaties, including the following: Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183, 60 L.N.T.S. 253, (entered into force Dec. 7, 1927) (entered into force for U.S. Mar. 21, 1929); Protocol Amending the Slavery Convention, 182 U.N.T.S. 51, (entered into force Dec. 7, 1953) (entered into force for the U.S. Mar. 7, 1956); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, (entered into force April 30, 1957) (entered into force for U.S. Dec. 6, 1967); Convention on the Political Rights of Women, 193 U.N.T.S. 136, (entered into force July 7, 1954) (entered into force for the U.S. July 7, 1976); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, (entered into force Oct. 4, 1967) (entered into force for U.S. Nov. 1, 1968); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951) (entered into force for the U.S. Feb. 23, 1989); Four Geneva Conventions for the Protection of Victims of Armed Conflict, adopted August 12, 1949, 75 U.N.T.S. 287, (entered into force Oct. 21, 1950) (entered into force for U.S. Feb. 2, 1956).

<sup>152</sup> U.S. general legislation affording human rights influence in formation of foreign policy includes: Foreign Assistance Act of 1973 § 32, Pub. L. No. 93-189, 87 Stat. 714, 733 (1973) (declared the "sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes," thereby expressing a more general human rights concern); Foreign Assistance Act of 1974 § 502B, Pub. L. No. 93-559, 88 Stat. 1795 (1974) (stating the "sense of Congress . . . that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, 89 Stat. 849 (codified in scattered sections 7, 22 of U.S.C.) (tying the receipt of economic assistance to a human rights standard); International Security Assistance and Arms Export Control Act of 1976 § 502B, Pub. L. No. 94-329, 22 U.S.C. 2304 (1976) (declaring that a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights, instructing the President to formulate military aid programs to promote human rights, providing for the termination or restriction of security assistance to any country "engag[ing] in a consistent pattern of gross violation of internationally recognized human rights," requiring that the Administration report to Congress on the human rights situation in each country receiving security assistance).

<sup>153</sup> For discussion regarding the relationship between the Executive and Congress in making foreign policy based on human rights concerns, see Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246; DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 242-246; DONNELLY, INTERNATIONAL HUMAN RIGHTS, *supra* note 3, at 99-117.

human rights concerns in foreign policy by passing legislation requiring the President to consider foreign states' human rights records in our dealings them.<sup>154</sup> In the past, Congress has enacted legislation which provides a general structure "within which the Executive is to shape security and development programs."<sup>155</sup> Not only has Congress enacted laws of general applicability, but also country-specific legislation which aims to address violations of human rights within a given country.<sup>156</sup>

Most recently, Congress has passed and the President has signed the "International Religious Freedom Act of 1998," in an effort to hinder the growth of religious persecution on a global level.<sup>157</sup> The end goal of the Act—the curbing of religious persecution—certainly deserves attention, admonition, and action. The means for achieving this goal, however, implicitly place religious freedom above all other rights.

#### A. *The Provisions of the Act*

The International Religious Freedom Act (IRFA) begins by stating that the freedom of religion is a "universal human right and fundamental freedom" and cites several international agreements recognizing this right.<sup>158</sup> In order to remedy religious persecution, the

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<sup>154</sup> Donald Fraser, *Congress' Role in the Making of International Human Rights Policy*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 247 (Donald P. Kommers & Gilbert D. Loescher eds., 1979). Representative Fraser (D-Minn) was the first Chairman of the House Subcommittee on International Operations and Human Rights. He remarks that Congress has a special role to play in the protection of human rights, because it has the power to raise public awareness as well as set standards for the Executive Branch to follow when using "the various assistance programs for leverage in the promotion of human rights." *Id.*

<sup>155</sup> *Id.* at 248. Such legislation is called "general legislation," in that it gives the Executive more breathing room, by only providing standards for the Executive to follow. For examples of "general legislation," see *supra* note 152.

<sup>156</sup> Lawyers Committee for Human Rights, *Linking Security Assistance and Human Rights*, in STEINER & ALSTON, *supra* note 2, at 838. Country specific legislation can have some advantages over general legislation. Country specific legislation can be tailored to the specific set of circumstances in the "target" country. *Id.* Such legislation also allows the possibility to reward the country with security assistance based on the progress of its human rights record, instead of only punishing the country for the violation. *Id.* An example of country specific legislation is Section 728 of the International Security and Development Cooperation Act of 1981. *Id.* This piece of legislation applied to El Salvador in response to the government's killing of thousands of civilians in 1981. *Id.* It required the President to certify on a continual basis that El Salvador met four conditions, dealing with recognition of human rights and treatment of citizens. *Id.*

<sup>157</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, \_\_ Stat. \_\_.

<sup>158</sup> *Id.* at § 2(a)(2). In Section 2, the bill cites to the following international agreements: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the

Act establishes a new "Office on International Religious Freedom" in the Department of State.<sup>159</sup> The head of this Office, the "Ambassador at Large," will work to identify and report violations of religious freedom abroad, and make policy recommendations regarding the United States' response to such violations.<sup>160</sup> The Act also creates the "United States Commission on International Religious Freedom," as well as the position of a Special Adviser on International Religious Freedom within the National Security Council.<sup>161</sup> While the Commission will review violations of religious freedom and make policy recommendations to the President, the Secretary of State, and Congress, the Special Adviser will exist as a resource for executive branch officials on the issue of religious freedom violations, make policy recommendations, and act as a liaison with the Ambassador, the Commission, Congress, and nongovernmental organizations.<sup>162</sup> Once it is determined that a country has violated the right of religious freedom, either through tolerating or engaging in such violations, the Act authorizes the President to take certain action in an effort to promote religious freedom.<sup>163</sup> With these provisions, the Act

European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at § 2 (a)(2).

<sup>159</sup> *Id.* at § 101(a).

<sup>160</sup> *Id.* at § 101(c). Specifically, under the leadership of a President-appointed and Senate-approved Ambassador at Large, the Office will assist the Secretary of State in preparing the portions of the Human Rights Reports which address religious freedom. *Id.* at § 102(a). In addition, the Ambassador will aid the Secretary of State in preparing an Annual Report on Religious Freedom to be transmitted to Congress which will supplement the Human Rights Reports. *Id.* at § 102(b). The Ambassador will also fulfill advisory and diplomatic roles, advising the President and Secretary of State on appropriate United States response to religious freedom violations and using diplomatic means to address violations abroad. *Id.* at § 101(c)(2)(3).

<sup>161</sup> Int'l Religious Freedom Act, 1998, Pub. L. No. 105-242, \_\_ Stat. \_\_ §§201, 301. The Commission consists of three President-appointed members, three President-appointed members on the recommendation of the Senate, and three members appointed by the Speaker of the House of Representatives. *Id.* at § 202(b)(1)(B). None of these members can be officers or employees of the United States. *Id.* The Ambassador at Large is also a member of the Commission, though not a voting member. *Id.* at § 201(b)(1)(A).

<sup>162</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, \_\_ Stat. \_\_ §§ 202(a), 301.

<sup>163</sup> *Id.* at §§ 401, 402, 403, 404, 405. With help from the Secretary of State, the Ambassador at Large, the Special Adviser, and the Commission, the President shall determine the proper action to be taken. *Id.* at § 401(b)(1). The Act provides the President a list of possible actions, including the following:

- (1) A private demarche;
- (2) An official public demarche;
- (3) A public condemnation;
- (4) A public condemnation within one or more multilateral fora;
- (5) The delay or cancellation of one or more scientific exchanges;
- (6) The delay or cancellation of one or more cultural exchanges;
- (7) The denial of one or more working, official, or state visits;
- (8) The delay or cancellation of one or more working, official, or state visits;
- (9) The withdrawal, limitation, or suspension of United

creates a specific system with which to handle violations of religious freedom.

No doubt, religious freedom is certainly recognized as an international human right.<sup>164</sup> One scholar remarked, "Freedom of

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States development assistance in accordance with section 116 of the Foreign Assistance Act of 1961; (10) Directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of any . . . guarantees, insurance, extensions of credit, or participation in the extension of credit with respect to the specific government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402; (11) The withdrawal, limitation, or suspension of United States security assistance in accordance with section 502B of the Foreign Assistance Act of 1961; (12) Consistent with section 701 of the International Financial Institutions Act of 1977, directing the United States executive directors of international financial institutions to oppose and vote against loans primarily benefiting the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402; (13) Ordering the heads of the appropriate United States agencies not to issue any . . . specific licenses, and not to grant any other specific authority . . . to export any goods or technology to the specific foreign government, agency, instrumentality, or official found or determined by the president to be responsible for violations under section 401 or 402 . . . ; (14) Prohibiting any United States financial institution from making loans or providing credits totaling more than \$10,000,000 in any 12-month period to the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 401 or 402; (15) Prohibiting the United States Government from procuring, or entering into any contract for the procurement of, any goods or services from the foreign government, entities, or officials found or determined by the President to be responsible for violations under section 401 or 402.

*Id.* at § 405 (a)(1)-(15). The President may take commensurate action in substitution for the specifically listed actions and must notify the Congress of such a decision. *Id.* at § 405(b). In addition, the Act provides that the President may enter into a binding agreement with the foreign state who violates religious freedom. *Id.* at 405(c). If the President decides to take particular action, listed as actions (9)-(15) of section 405(a) above, the President must consult with the foreign state's government prior to taking such action. *Id.* at § 403(a), (b). Also prior to such action, the President must report to Congress regarding the intention for such action. *Id.* at § 404. The Act also provides for Presidential action responding to states' particularly severe violations of religious freedom. *Id.* at § 402.

<sup>164</sup> Religious freedom as a human right is recognized in the following United Nations documents: Universal Declaration of Human Rights, *supra* note 1, at art. 2, 18, 26, and 29; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. II (providing that the five acts constituting genocide are "committed with intent to destroy, in whole, or in part, a national, ethnical, racial, or religious group, as such . . . "); the Geneva Conventions, *supra* note 151, at common art. 3, art. 16, 34-37 of the Third Convention, and art. 27 of the Fourth Convention; the International Covenant on Civil and

religion is indeed the oldest of the internationally recognized human freedoms and therefore the one with which the international community has had the longest experience."<sup>165</sup> Even still, religious persecution remains a formidable foe on the world scene.<sup>166</sup> For this reason, the emerging customary norm of religious freedom represents an encouraging step in fighting violations of this right. The International Religious Freedom Act seeks to contribute to the protection of religious freedom,<sup>167</sup> but in its effort to make this contribution, the Act creates a preference for religious freedom and institutes its own hierarchy of human rights.

*B. A Legislated Hierarchy With Religious Freedom First*

Though the Act does not expressly state that it places religious freedom at the top of a hierarchy of human rights, the method by which the Act seeks to protect religious freedom does just that. In a hearing of the House Committee on International Relations discussing an initial version of a bill to address religious persecution, the Freedom From Religious Persecution Act, Secretary John Shattuck remarked,

[T]he [Freedom From Religious Persecution Act] would create a de facto hierarchy of human rights violations under U.S. law that would severely damage our efforts to ensure that all aspects of basic civil and political

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Political Rights, *supra* note 50, at art. 18, 20, 27; the International Covenant on Economic, Social and Cultural Rights, *supra* note 61, at art. 13(1), 2(2); the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S.; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, G.A. Res. 36/55, 36 U.N. GAOR Supp. No. 51, U.N.Doc. A/36/51 (existing as the most important international instrument for religious rights) [hereinafter, Declaration Against All Forms of Intolerance]. For excellent explanation of these documents and their role in the international protection of religious rights, see generally Natan Lerner, *Religious Human Rights Under the United Nations*, in 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 79 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the U.N. Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487 (1988).

<sup>165</sup> John P. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW, *supra* note 60, at 171, 176.

<sup>166</sup> In his introduction of the Freedom From Religious Persecution Act, a precursor version to the passing of the International Religious Freedom Act of 1998, Representative Frank Wolf stated that religious persecution has "persisted and accelerated . . . while the world and the United States have turned their efforts elsewhere." 105 CONG. REC. E996-E997 (daily ed. May 21, 1997) (extension of remarks of Rep. Frank R. Wolf). For review of the bills that led to the passing of the IFRA, see *supra* note 12 and accompanying text.

<sup>167</sup> See *supra* note 158 and accompanying text.

rights, including religious freedom, are protected. It would differentiate between acts motivated by religious discrimination and similar acts based on other forms of repression or bias, such as denial of political freedom, or racial or ethnic hatred. In doing so, the bill would legislate a hierarchy of human rights into our laws.<sup>168</sup>

By creating an office to monitor religious persecution, establishing a Commission and a position in the National Security Council, and specifically providing for action to be taken in response to states' violations of religious freedom, the Act distinguishes among human rights. In so doing, it establishes a hierarchy of human rights within U.S. law. As Secretary Shattuck notes, legislating a hierarchy has an impact on national law.<sup>169</sup> But a hierarchy, such as that legislated by the IFRA, operates within an international context as well. Before analyzing its place in the international context, though, it is important to examine the problem regarding the existence of a hierarchy of human rights.

### C. *The Debate Regarding the Existence of a Hierarchy of Human Rights*

#### 1. Fundamental Rights vs. Ordinary Rights

The quest to identify a hierarchy of human rights often begins with an attempt to distinguish between fundamental and ordinary human rights.<sup>170</sup> The task of discerning which rights are fundamental and which are not has proved to be a difficult one. An examination of United Nations documents provides little help. As Professor Meron notes, the terms "human rights," "freedoms," "fundamental human rights," "fundamental freedoms," "rights and freedoms," and "human rights and fundamental freedoms" are used interchangeably throughout U.N. human rights instruments.<sup>171</sup> The vocabulary and language of these

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<sup>168</sup> *Freedom From Religious Persecution Act, 1997: Markup on H.R. 1685 Before the House Comm. on International Relations, 105th Cong. (1997)* (statement of John Shattuck, Assistant Secretary of State, Bureau of Democracy, Human Rights and Labor, U.S. Dpt. of State). Though this quote was made in the context of another version of a bill to address religious persecution, for the purposes of this Note, Secretary Shattuck's concerns are just as relevant for the IRFA. For his remarks concern the effect of legislation which creates a method to deal with the violation of one right but not others.

<sup>169</sup> See *supra* note 168 and accompanying text.

<sup>170</sup> Theodor Meron, *On a Hierarchy of Human Rights*, 80 AM. J. INT'L L. 1, 5 (1986) [hereinafter *On a Hierarchy*].

<sup>171</sup> *Id.* The instruments and provisions containing these phrases include the following: the Charter of the United Nations (the Preamble, Articles 1(3), 13(b), 55(c), 62(2), 76(c)), the Universal Declaration of Human Rights (the Preamble, Articles 2, 29(2), 30), the International Covenant on Civil and Political Rights (Articles 2(1), 3, 5(1), 5(2)), the

international instruments make no distinction between ordinary human rights and fundamental human rights.

Though this is true, the attempt to identify fundamental human rights continues.<sup>172</sup> Comment M to § 703 of the Restatement states that while all the rights of the Universal Declaration and the Covenants are internationally recognized human rights, some rights are fundamental to human dignity.<sup>173</sup> Thus, when these rights are consistently violated, a violation of customary international law has occurred.<sup>174</sup> Comment M lists the rights it considers fundamental, but provides no guidelines for determining which rights could be considered fundamental.<sup>175</sup> Furthermore, there is no international agreement regarding the listed rights as fundamental in the Restatement.<sup>176</sup>

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International Convention on the Elimination of All Forms of Racial Discrimination (the Preamble, Article 1(1)), and the Convention on the Elimination of All Forms of Discrimination Against Women (the Preamble, Articles 1, 3). Meron, *On a Hierarchy*, *supra* note 170, at 5.

<sup>172</sup> See van Boven, *supra* note 27, at 43. Professor van Boven notes that modern human rights thinking holds to the indivisibility of human rights which views human rights as a "single package" and therefore incapable of ranking. *Id.* Even so, he asserts that some rights have a "supra-positive" character. *Id.* These rights, he argues, lie at the "foundation of the international community . . . represented in the United Nations and, in a more limited sense, in other important worldwide and regional organizations." *Id.* at 48. Evidence of these rights is found in special procedures established by other international organizations, such as the International Labor Organization, to promote fundamental rights. *Id.* at 46. Additional evidence includes international penal law as well as resolutions of the U.N. Economic and Social Council which give guidance to the fundamental nature of certain rights. *Id.* at 47-48. Still, Professor van Boven notes that the differing implementation measures of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, do not automatically suggest that civil and political rights are fundamental, while economic, social and cultural are not. *Id.* at 48-53. He states that the "gradual progress" of implementing rights is actually part of the "whole human rights area." *Id.* at 53. So, while van Boven asserts that supra-positive rights exist, he fails to reveal which rights have such character.

<sup>173</sup> RESTATEMENT, *supra* note 97, at § 702 cmt. m.

<sup>174</sup> *Id.*

<sup>175</sup> Comment M states that the following rights are "fundamental": systematic harassment, invasions of privacy in the home, arbitrary arrest and detention, denial of fair trial in criminal cases, grossly disproportionate punishment, denial of freedom to leave a country, denial of the right to return to one's country, mass uprooting of a country's population, denial of freedom of privacy such as the right to marry and raise a family, and invidious racial or religious persecution. Comment M provides that any state party under the Covenant for Civil and Political Rights that violates any of these rights a single time is liable and that any state is liable under customary law for a consistent pattern of state violations of any right. RESTATEMENT, *supra* note 97, at § 702 cmt. m.

<sup>176</sup> Meron, *On a Hierarchy*, *supra* note 170, at 4. Meron notes that while the Restatement includes the right to leave one's country as a fundamental right, a study prepared for the

One step towards determining whether a right constitutes a fundamental right may involve examining the sort of obligations the right creates. In the *Barcelona Traction* case,<sup>177</sup> the International Court of Justice (ICJ) stated in dictum that "basic [fundamental] rights" create obligations *erga omnes*.<sup>178</sup> If a right has *erga omnes* status, all states have an interest and are obligated to protect that right.<sup>179</sup> In other words, any state can bring action against the violators of such a right, regardless of whether the victim is a citizen of the state.<sup>180</sup> Thus, the ICJ suggests that one can identify fundamental rights as those having *erga omnes* obligations.<sup>181</sup>

Though this presents a possible path to identify fundamental rights, Professor Meron notes that since the *Barcelona Traction* case, a growing consensus views the *erga omnes* character of human rights as not limited to basic or fundamental rights.<sup>182</sup> In fact, the Restatement provides that any state may pursue international remedies against any other state (*erga omnes* obligations) simply for the violation of customary law.<sup>183</sup> In this way, a right may become customary law without being fundamental, yet still enjoy *erga omnes* character. Due to the different notions regarding *erga omnes* obligations, this principle lends little help in identifying fundamental rights.<sup>184</sup>

Professor Meron comments that most would agree that the right to life from arbitrary deprivation, protection from torture, egregious racial discrimination, and prolonged arbitrary detention, are fundamental rights.<sup>185</sup> He also includes those rights which are non-derogable under the International Covenant on Civil and Political Rights, the European

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UN Sub-Commission on Prevention Discrimination and Protection of Minorities questions whether the right to leave one's country is a right or a "mere human attribute." *Id.* at 5.

<sup>177</sup> *Barcelona Traction Case* (Bel. v. Spain), 1970 I.C.J. 3 [hereinafter *Barcelona Traction*] (holding that Belgium was not entitled to bring an action on behalf of nationals who owned ninety percent of a Canadian corporation which in turn owned a Spanish corporation and suffered injury as a result of action by Spain, because Belgium's interest was too indirect).

<sup>178</sup> *Id.* at para. 33-34. See Meron, *On a Hierarchy*, *supra* note 170, at 10-11.

<sup>179</sup> *Barcelona Traction*, *supra* note 177, at para. 33-34. The Court mentioned the protection from slavery and racial discrimination as examples of fundamental rights. *Id.* See 1 OPPENHEIM'S INTERNATIONAL LAW 4 (Robert Jennings & Arthur Watts, eds. 9th ed. 1994) [hereinafter OPPENHEIM'S].

<sup>180</sup> *Barcelona Traction*, *supra* note 177, at para. 33-34; MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS, *supra* note 108, at 194.

<sup>181</sup> *Supra* note 178 and accompanying text.

<sup>182</sup> Meron, *On a Hierarchy*, *supra* note 170, at 11-12.

<sup>183</sup> RESTATEMENT 3d, *supra* note 97, at § 703 reporter's note 3.

<sup>184</sup> Meron, *On a Hierarchy*, *supra* note 170, at 13.

<sup>185</sup> MERON, HUMANITARIAN NORMS, *supra* note 108, at 193.

Convention, and the American Convention on Human Rights, such as the right to life<sup>186</sup> and the prohibitions of slavery,<sup>187</sup> torture,<sup>188</sup> and retroactive penal measures.<sup>189</sup> Though these seem the most likely to be considered fundamental, neither consensus as to any additional fundamental rights, nor criterion for ascertaining fundamental human rights exists.<sup>190</sup>

No agreement exists because discerning between those rights which are fundamental and those rights which are not involves the application of subjective standards. Professor Meron maintains that characterizing some rights as fundamental "results largely from . . . subjective perceptions of their importance."<sup>191</sup> He contends that while some view due process rights as fundamental, others believe that the rights to food and other basic needs supersede due process rights.<sup>192</sup>

A recent statement by the Premier of China, Jiang Zemin, serves as an excellent example of the subjectivity involved in choosing fundamental rights. When asked about the many civil and political rights refused to his country's citizens as well as the many political prisoners within China, Premier Zemin responded by stating, "I believe

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<sup>186</sup> ICCPR, *supra* note 62, at art. 6(1); The European Convention for the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, U.K.T.S. 71, art. 2 [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, art. 4(1) [hereinafter American Convention].

<sup>187</sup> ICCPR, *supra* note 62, at art. 8; European Convention, *supra* note 186, at art. 4(1); American Convention, *supra* note 186, at art. 6.

<sup>188</sup> ICCPR, *supra* note 62, at art. 7; European Convention, *supra* note 186, at art. 3; American Convention, *supra* note 186, at art. 5(2).

<sup>189</sup> ICCPR, *supra* note 62, at art. 15. European Convention, *supra* note 186, at art. 7; American Convention, *supra* note 186, at art. 9.

<sup>190</sup> MERON, HUMANITARIAN NORMS, *supra* note 108, at 194. See DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 37-45. Professor Donnelly reviews the attempts of other scholars, including Henry Shue, to construct a list of basic rights. *Id.* at 39. He notes that all the lists have one thing in common: if all the "basic" rights were enjoyed, people would still be "living degraded lives." *Id.* at 41. He writes:

Without other human rights, "basic human rights" are inadequate to protect human dignity in any plausible sense of that term. Human dignity, the realization of which is the aim of human rights, cannot be reduced to dimensions that can be encompassed by a short or narrow list of "basic" human rights. All human rights are "basic rights" in the fundamental sense that systematic violations of any human right preclude realizing a life full of human dignity—that is, prevent one from enjoying the minimum conditions necessary for a life worthy of a human being.

*Id.*

<sup>191</sup> Meron, *On a Hierarchy*, *supra* note 170, at 8.

<sup>192</sup> MERON, HUMANITARIAN NORMS, *supra* note 108, at 194.

the most important, the most fundamental human right is how to ensure that the 1.2 billion Chinese people have adequate food and clothing."<sup>193</sup> From Premier Zemin's perspective, China must first address the welfare rights of China's citizens before addressing civil and political rights, such as the freedom of speech. United States citizens, whose history emphasizes other fundamental rights such as the right to free speech,<sup>194</sup> would likely disagree with China's preference for economic rights. Thus, two versions of fundamental rights emerge.

Addressing the problem of subjectivity in determining those rights which are fundamental, Professor Meron states, "it is fraught with personal, cultural and political bias, and has not been addressed by the international community as a whole, perhaps because of the improbability of reaching a meaningful consensus."<sup>195</sup> Professor Donnelly contends that states emphasize certain human rights because of their good track record of observance.<sup>196</sup> Thus, the United States' support of personal rights abroad reflects its support of personal rights at home.<sup>197</sup> Without a "comprehensive normative and empirical theory of human rights," basic rights may be chosen on the basis of domestic "convenience" or "policy."<sup>198</sup> While the international community has agreed upon a listing of human rights in the Declaration, prioritizing them according to their fundamental nature seems largely an exercise controlled by national perceptions and morals. Though fundamental or basic rights may exist, agreement regarding such a list is scarce. Because of the difficulty in assessing fundamental rights, the principle of *jus cogens* exists as a possible method for identifying the most important human rights.

## 2. *Jus Cogens*/Peremptory Norms

Norms defined as *jus cogens*, or peremptory norms, enjoy the highest status in international law and trump both treaties and customary law.<sup>199</sup>

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<sup>193</sup> *U.S. and China: Ups & Downs*, TIME, Oct. 27, 1997, at 17.

<sup>194</sup> See *supra* note 60 and accompanying text.

<sup>195</sup> Meron, *On a Hierarchy*, *supra* note 108, at 4.

<sup>196</sup> DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 44.

<sup>197</sup> *Id.*

<sup>198</sup> Professor Donnelly does not oppose the construction of a list of basic rights. On the contrary, he remarks that for purposes of foreign policy, states may have to set limited goals, concentrating on the "most important" human rights. In his discussion of lists of basic rights, however, he sheds light on the difficulty of constructing a sound and effective list of basic rights and thus calls for theoretical guidance. DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 43-4.

<sup>199</sup> *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (holding that the obligation of parties to obey a judgment from the International

A peremptory norm is only modified if a new peremptory norm emerges which requires it to be modified.<sup>200</sup> If an existing treaty is in conflict with a new peremptory norm, that treaty becomes void and terminates.<sup>201</sup> A new peremptory norm can terminate such a treaty because derogation from peremptory norms is not permitted.<sup>202</sup> Compared to the formation of customary law, which requires that a norm be "generally practiced," Article 53 of the Vienna Convention provides that a peremptory norm is formed when the norm is "accepted and recognized by the international community of States as a whole . . . ." <sup>203</sup> The Restatement explains that acceptance by the whole international community means acceptance by a "very large majority of states," even if a small minority of states dissents.<sup>204</sup> Still, ascertaining when a "large majority of states" has accepted the norm becomes difficult. While the threshold for a peremptory norm seems higher than that for customary law, discerning the appropriate line of recognition and acceptance by the "whole" of the international community indeed seems a difficult task.<sup>205</sup>

Perhaps as a result of the difficulty involved in ascertaining the threshold for peremptory norms, lack of agreement exists regarding the content of *jus cogens*.<sup>206</sup> Though the Vienna Convention states the process for formation, it refrains from listing those rights it considers *jus cogens*.<sup>207</sup> The drafters of the Restatement, however, state that those

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Court of Justice is not a peremptory norm, and therefore, the United States did not violate a peremptory norm when it contravened such a judgment).

<sup>200</sup> Vienna Convention, *supra* note 93, at art. 53.

<sup>201</sup> *Id.* at art. 64.

<sup>202</sup> *Id.* at art. 53.

<sup>203</sup> *Id.* at art. 53.

<sup>204</sup> RESTATEMENT, *supra* note 97, at § 102, reporters' note 6.

<sup>205</sup> Simma & Alston, *supra* note 109, at 24-25. The practice of states is difficult to assess because most of *jus cogens* are "rules of abstention," in that states abstain from taking a particular course of action. *Id.* at 24. Whether states have recognized and accepted a norm as peremptory becomes a question of whether states have abstained from such conduct. Alston notes that one must consider the intention motivating such an abstention. *Id.* at 25. Alston then suggests that *opinio juris* may play an important part in the recognition of peremptory norms in light of the difficulty in assessing state practice. *Id.* Still, in order for a norm to have peremptory status, the "whole" of the "international community" must practice the norm, making such a determination especially difficult. *Id.*

<sup>206</sup> RESTATEMENT, *supra* note 97, at § 102 reporters' note 6; OPPENHEIM'S, *supra* note 179, at 5 (stating that there is "no general agreement as to which rules have this character"); Meron, *On a Hierarchy*, *supra* note 170, at 14. The Restatement notes that there is "general agreement" that the Charter principles prohibiting the use of force are *jus cogens*. The Restatement also notes that norms creating "international crimes," such as rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks of diplomats, may have peremptory status. RESTATEMENT, *supra* note 97, at § 102 reporters' note 6.

<sup>207</sup> See *supra* note 203 and accompanying text.

rights listed as customary norms which are prohibitory in nature are *jus cogens*.<sup>208</sup> In another work, the drafters further assert that the Universal Declaration is “established customary law, having the attributes of *jus cogens*.”<sup>209</sup> Alfred Verdross, though, remarks that all “rules of general international law created for a humanitarian purpose” constitute *jus cogens*.<sup>210</sup> In sum, the full content of *jus cogens* has yet to be determined.<sup>211</sup>

Without consensus regarding fundamental rights and the difficulties associated in identifying peremptory norms, it is clear that no common understanding of a hierarchy of human rights exists. Cultural, economic, and political biases affect states’ perceptions of fundamental rights, thereby making a common understanding impossible at this point in time.<sup>212</sup> Similarly, no common understanding exists as to those rights which may have status as *jus cogens*. Presently, no standards for distinguishing between fundamental rights and ordinary rights exist and peremptory norms have yet to be worked out. The future will hopefully help to reconcile both. The international community must work to provide criteria for differentiating among rights<sup>213</sup> and allow peremptory norms the time to develop.<sup>214</sup> In the mean time, when legislating human rights policy, every state must keep in mind that no common understanding of a hierarchy of human rights exists.

#### D. What is the Common Understanding?

The only true international consensus regarding human rights lies in the listing of rights in the Declaration.<sup>215</sup> Though states cannot agree on the prioritizing of these rights, states can and have agreed as to their status as human rights.<sup>216</sup> The Declaration stands as proof of the ability of states to identify those rights belonging to every human. But, at the

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<sup>208</sup> RESTATEMENT, *supra* note 97, at § 702 reporters’ note 11. The Restatement lists the following rights as customary norms, and therefore peremptory norms: prohibitions against genocide, slavery, murder or causing disappearance of individuals, torture, arbitrary detention, and racial discrimination. *Id.* at § 702 (a)-(f).

<sup>209</sup> MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 274 (1980).

<sup>210</sup> Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 60, 53, 59 (1966).

<sup>211</sup> OPPENHEIM’S, *supra* note 179, at 6 (stating that the content must be determined through the “practice of states” and “jurisprudence of international tribunals”).

<sup>212</sup> See *supra* notes 191-198 and accompanying text.

<sup>213</sup> Meron, *On a Hierarchy*, *supra* note 170, at 23.

<sup>214</sup> *Id.* at 22.

<sup>215</sup> See *supra* notes 39-86 and accompanying text.

<sup>216</sup> See *supra* notes 39-86 and accompanying text.

same time, the Declaration provides evidence of the international community's unwillingness to rank human rights.<sup>217</sup>

The ratification of the two Covenants, however, spurred inquiries into the relationship between civil and political rights, and economic, social, and cultural rights.<sup>218</sup> Many inquired whether the rights protected under the International Covenant on Civil and Political Rights (ICCPR) supersede the rights protected under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>219</sup> The differing nature of state party obligations under the two Covenants has contributed in large part to this inquiry.

Once a state ratifies the ICCPR, the Covenant demands that the state ensure to all individuals within its jurisdiction the rights recognized in the Covenant.<sup>220</sup> Ratification of the ICESCR, on the other hand, is less stringent and obligates the state to take the necessary steps to maximize its resources in order to realize the rights within the Covenant.<sup>221</sup> The stricter obligations demanded by the ICCPR initially seem to suggest that the rights contained in that Covenant are more valued than the rights within the ICESCR.<sup>222</sup> However, the Preamble of each Covenant

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<sup>217</sup> Nayar, *supra* note 2, at 818.

<sup>218</sup> See *infra* note 219 and accompanying text.

<sup>219</sup> STEINER & ALSTON, *supra* note 2, at 263, 1127; Meron, *On a Hierarchy*, *supra* note 170, at 1; van Boven, *supra* note 27, at 48-53; DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 28-37. As discussed, the U.N. had planned to draft an International Bill of Rights, encompassing both civil and political, and economic, social and cultural rights. Because of the varied nature of the rights, however, two documents were drafted. See *supra* notes 52-55 and accompanying text.

<sup>220</sup> ICCPR, *supra* note 62, art. 2 para. 1.

<sup>221</sup> ICESCR, *supra* note 76, art. 2 para. 1.

<sup>222</sup> See DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 31-37. Discussion regarding the value of the rights has often centered around the concept of "negative" and "positive" rights. Viewed in this light, much of the ICCPR protects "negative rights" in that the rights prohibit certain action of others, such as the prohibition of slavery. It has been argued that these rights deserve priority because they involve direct infliction of injury. *Id.* at 34. The ICESCR, however, protects "positive" rights, in that the rights require others to act for the rights to be realized. *Id.* at 33. This distinction between the negative and positive rights, however, fades when considering the actual implementation of the rights. *Id.* at 33. For a negative right, such as protection against torture, requires the state to refrain from torturing. But this also includes the positive duty of the state to supervise and control its police and security forces. *Id.* Similarly, a positive right, such as the right to be fed, may require a government to refrain from the exporting of local crops and allow local crops to be locally consumed. *Id.* Professor Donnelly remarks, "All human rights require both positive action and restraint on the part of the state." *Id.* Professor Donnelly notes that even if civil and political rights were wholly negative, they would not possess priority over economic, social and cultural rights. *Id.* at 34. For acts of commission (negative rights) as well as acts of omission (positive rights) can result in the same human rights violation. *Id.*

addresses this concern and states that in order to achieve the Declaration's vision for civil and political freedom, as well the economic, social, and cultural freedom, states must create an environment where both sets of rights are equally recognized.<sup>223</sup> The Covenants, then, assert the interdependent nature of these two sets of rights.<sup>224</sup>

The U.N. General Assembly has reiterated in other forums its dedication to the interdependence and interrelated nature of human rights.<sup>225</sup> For example, when the U.N. General Assembly endorsed the Proclamation of Teheran in 1977, the Assembly stated its approach in resolution 32/130 for future human rights work within the U.N.:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the economic, social, and cultural rights; The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development . . . .<sup>226</sup>

The Declaration and Covenants, as well as later statements from the U.N. General Assembly, reveal that the common understanding of human rights maintains the interrelated nature of those rights.<sup>227</sup>

Whenever a state acts unilaterally in the protection of human rights, it cannot ignore the context within which it acts, for this context is the international community.<sup>228</sup> The United States acts to protect human

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<sup>223</sup> ICCPR, *supra* note 62, at preamble para. 3; ICESCR, *supra* note 76, at preamble para. 2.

<sup>224</sup> Not only do the Covenants state their interrelated nature, but the rights conferred in each of them work together for their full realization. For example, the ICESCR protects the right to form trade unions. ICESCR, *supra* note 76, at art. 8(1). The ICCPR, then, guarantees the right to freedom of association. ICCPR, *supra* note 62, at art. 22(1). See STEINER & ALSTON, *supra* note 2, at 263, for discussion of this example as well as explanation regarding the similarity of rights within the documents.

<sup>225</sup> See *infra* note 226 and accompanying text.

<sup>226</sup> van Boven, *supra* note 27, at 51. Sohn, *supra* note 2, at 62-63.

<sup>227</sup> *Id.*

<sup>228</sup> This is not to suggest that states should not take national action. National action plays an integral role in the protection of human rights on an international level. DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 28, at 266-269. States, however, cannot lose sight of the fact that international human rights norms have developed. As Professor Donnelly states, "The moral universality of human rights, which has been codified in a strong set of

rights inside and outside its borders. The Declaration of Independence, with its listing of the inalienable rights of "life, liberty, and the pursuit of happiness," and the Bill of Rights have served as the sources for the United States' commitment to human rights on a domestic level.<sup>229</sup> The United States commitment to the protection of human rights outside of its borders, however, derives from its obligations as a Declaration signatory.<sup>230</sup> To ignore this fact is to ignore the basis upon which the struggle for human rights began and the pledge which the member states took in their signing of the Universal Declaration: full realization of human rights lies in a common understanding of them.

The common understanding of human rights asserts that all human rights are interdependent and interrelated.<sup>231</sup> In the International Religious Freedom Act, however, the U.S. has taken a unilateral measure to institute a hierarchy. Thus, the Act runs contrary to the very foundation of the international effort to protect human rights. Such contradiction carries consequences.

## V. HIERARCHY AND ITS IMPACT ON CUSTOMARY LAW

### A. *The International Religious Freedom Act and Its Two Principles*

The IFRA begins by stating that "the right to freedom of religion undergirds the very origin and existence of the United States," and cites several international agreements and covenants asserting religious

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authoritative international norms, must be realized through particularities of national action." *Id.* at 269. Thus, the international norms must serve as the basis for national action. Another scholar notes that the U.S. has a history of difficulty in "adjusting to an interdependent, nonhegemonic world." DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 137-38 (1991). In the human rights arena, this difficulty shows itself in the United States' prioritization of civil and political rights. *Id.*

<sup>229</sup> Nayar, *supra* note 2, at 825; PETER R. BAEHR, *THE ROLE OF HUMAN RIGHTS IN FOREIGN POLICY* 82 (1994). The international effort to protect human rights asks the United States to go beyond its own "tradition" and recognize the importance of such rights as "adequate food, clothing, shelter, health care, and education." FORSYTHE, *supra* note 228, at 138.

<sup>230</sup> Nayar, *supra* note 2, at 825. Professor Nayar notes that President Jimmy Carter recognized that when states signed and ratified the Charter, they pledged not only to respect the rights of their own citizens, but they also pledged that any mistreatment of their own citizens would result in the inquiry by other states. *Id.*

<sup>231</sup> More specifically, the human right of the freedom of religion cannot be isolated from the general principle of equality. In other words, because human rights are indivisible, measures to remedy religious discrimination must be coordinated with measures to remedy other types of discrimination, such as racial, gender, education, and employment. Lerner, *supra* note 164, at 106.

freedom as a human right.<sup>232</sup> Underscoring religious freedom's status as an internationally recognized human right, section 2 of the Bill cites Article 18 of the Universal Declaration,<sup>233</sup> and Article 18 of the Covenant on Civil and Political Rights.<sup>234</sup> Governments, then, have the responsibility to protect the fundamental right of religious freedom and "pursue justice for all."<sup>235</sup> With the inclusion and citation to these international documents, the Act explicitly places itself in the context of the international pursuit to protect religious freedom.<sup>236</sup>

Upon first glance, the Act seemingly advances one principle—that every human has the right to choose his or her own religion or belief and not to be persecuted for that choice. As the drafters of the Act state in section 2, international agreements strongly support this principle and, as a right held by each human, religious freedom no doubt deserves protection.<sup>237</sup> The purpose of this Act, the protection of religious freedom, is thus not only valid, but vital.

Certainly, the recent interest of Americans and their representatives in the denial of religious rights around the world is encouraging and a sign that the protection of human rights has become a matter of public concern.<sup>238</sup> The introduction of the IFRA represents a real and legitimate concern that violations of religious freedom have gone largely unnoticed,

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<sup>232</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, \_\_ Stat. \_\_ § 2(1), (2). Opening with these words regarding the United States' historical tradition of religious freedom, the Act provides clear evidence of the subjective perceptions at work in defining which rights deserve more protection than others. See *supra* notes 191-197 and accompanying text.

<sup>233</sup> "Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration, *supra* note 1, at art. 18.

<sup>234</sup> "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching . . ." ICCPR, *supra* note 62, at art. 18.

<sup>235</sup> International Religious Freedom Act of 1998, Pub. L. No. 105-292, \_\_ Stat. \_\_ § 2(3).

<sup>236</sup> Even if the Act did not cite these international agreements, because the Act addresses an internationally recognized right, the Act exists in the context of international norms. See *supra* notes 87-150 and accompanying text.

<sup>237</sup> See *supra* notes 158, 233-34 and accompanying text.

<sup>238</sup> Though there is impressive constituent support for the Act, especially from the Christian Right, others have voiced their concerns regarding a resulting hierarchy of human rights. See Anthony Lewis, *Religious Persecution Act First Step Toward Hierarchy of Fundamental Rights*, N.Y. TIMES, Sept. 16, 1997, at 13A.; Editorial, *Freedom of Religions*, WASH. POST, Sept. 11, 1997, at A14; Pat M. Holt, *Religious Persecution In the Global Balance: It May Rightfully Rank Low In World Security Priorities*, CHRISTIAN SCI. MONITOR, October 2, 1997, at 19.

and for this reason, have escalated in number and severity.<sup>239</sup> Theodor Meron comments that when governments decide to act in the protection of a particular right, they are usually concerned with the "egregious" nature of the violation.<sup>240</sup> Meron's comment certainly rings true for the IFRA. For the Act exists as a response to the egregious nature of violations of religious freedom.

Closer examination, however, reveals a second principle at work. The goal of the Act clearly conforms with the cited international agreements, but the means to achieve it does not. In order to influence the realization of religious freedom on the international scene, the Act establishes an Office on International Religious Freedom, a Commission, and a position of Special Adviser, and provides for presidential action in response to states' violations of religious freedom. In so doing, the Act established a *de facto* preference for religious rights. That is, the Act's method for the promotion of religious freedom—the establishment of a framework *only* for this right—reflects the principle of a hierarchy of human rights.<sup>241</sup>

While Meron comments that governments act in response to "egregious" violations of human rights, he asserts that governments do not concern themselves with questions regarding the existence of a hierarchy.<sup>242</sup> In the IFRA's case, Meron is correct again. The IFRA intends to respond to the egregious violations of religious rights with its

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<sup>239</sup> See Susan Gvozdias, *Christian Coalition Broadens Focus: Religious Persecution Targeted*, U.S.A. TODAY, August 27, 1997, at 8(A); Terry Mattingly, *Clergy Call for Fight Against Persecution: Religious Leaders Trade Tales of Oppression at Unveiling of Legislation*, MILWAUKEE J. & SENTINEL, May 31, 1997, at 2; Larry Witham, *New Ad Sheds Light on Persecution of Religious Believers*, WASH. TIMES, MAY 29, 1997, at A(5).

<sup>240</sup> Meron, *State Responsibility*, *supra* note 11, at 384. Meron states that governments also often look to the "massive" and grave nature of the violation. *Id.*

<sup>241</sup> Secretary of State Madeleine Albright remarked on the importance of the "method" with which the United States seeks to protect rights, stating:

If we are to be effective in defending the values we cherish, we must also take into account the perspectives and values of others. We must recognize that our relations with the world are not fully encompassed by any single issue or set of issues. And we must do all we can to ensure that the world's attention is focused on the principles we embrace, not diverted by the *methods* we use.

Madeleine K. Albright, *Religious Freedom*, Remarks at the Columbus School of Law, The Catholic University (Oct. 23, 1997) [*italics added*]. With these words, Secretary of State Albright was likely referring to the methods with which we deal with violations, such as sanctions against the violating state. Still, her words help to make the distinction between the ultimate purpose—protection of a human right—and the method used to achieve it.

<sup>242</sup> Meron, *State Responsibility*, *supra* note 11, at 384.

first principle. But it perhaps unknowingly asserts a hierarchy with its second principle.

These two principles do not function independently of one another. In fact, the method instituted by the Act necessarily alters or skews the human right it seeks to protect. Under the IFRA, the human right of religious freedom no longer exists on the same level as other rights, such as political freedom or due process rights, and instead becomes the highest human right. The Act asserts this in contrast to several U.N. documents that stand for the indivisibility of rights.<sup>243</sup> For the Act, religious freedom is no longer one right among equals, but one above the rest. The special protection afforded to religious freedom skews the nature of the right itself, because religious freedom moves to the apex of a hierarchy of human rights. The IFRA's hierarchy has significant impact on the emerging customary norm of religious freedom.<sup>244</sup>

#### B. *The Differing Nature of Humanitarian Norms of Customary Law*

Human rights norms have emerged as customary law in a way different from traditional customary law.<sup>245</sup> In the traditional sense, customary norms develop through a lengthy process of state practice that is performed by states because of *opinio juris*. This state practice consists of the daily action of states. This notion of state practice is arbitrary in that it does not rely on states' cooperation to form a

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<sup>243</sup> U.N. documents maintain the equality of human rights. The Declaration states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Universal Declaration, *supra* note 1, at preamble para. 1. Throughout the document, the Declaration makes no distinction between the rights it lists as those belonging to each human. The International Covenant on Civil and Political Rights supports the belief that all rights are interdependent and interrelated by stating, "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights." Like the Universal Declaration, the ICCPR nowhere states that there is an ordering of rights. ICCPR, *supra* note 62, at preamble para. 3. Finally, the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, focusing on religious discrimination nowhere states that the human right of religious freedom deserves the highest priority. Declaration on the Elimination of All Forms, *supra* note 164, at preamble. Rather, it places it in the context of the promotion of all "human rights and fundamental freedoms." *Id.*

<sup>244</sup> While some view religious freedom as a customary norm, its status as such has not yet gained universal status. See *supra* notes 121-132 and accompanying text. Even for those who assert that religious freedom is customary law, the singling-out of one right over all others should be disturbing in light of the international assertion of the interdependent nature of rights. See *supra* note 243.

<sup>245</sup> See *supra* notes 109-119 and accompanying text.

consensus on a given norm.<sup>246</sup> Instead, such practice looks to the individual actions of states to discern whether a customary norm exists.

The formation of humanitarian customary norms, however, has depended upon a different notion of "state practice." First, instead of "state practice" referring to individual state action, the "state practice" of humanitarian customary norms largely refers to the statements or intentions of states, or "paper practice."<sup>247</sup> In this different understanding of state practice, states are much more deliberate in their advocacy of a particular human right, because they express their support for and intention to observe it. In this way, state practice leading to the formation of humanitarian customary norms seems much less arbitrary than the traditional notion of state practice.

State practice in the development of humanitarian customary norms differs from the traditional notion of state practice in a second way. Rather than individually asserting their intentions and beliefs regarding the protection of human rights, states have acted together to cooperatively assert their stance.<sup>248</sup> Customary human rights law, therefore, has its beginnings in states "teaming-up" to express their shared intentions for the promotion of human rights. International agreements made under the auspices of the United Nations or regional human rights organizations provide evidence of such "teamwork."<sup>249</sup> Thus, as opposed to the traditional notion of state practice, humanitarian customary norms begin with a consensus and follow with individual state action adhering to that consensus.

Humanitarian customary norms, therefore, emerge from a more concerted effort than traditional customary norms. States express their intentions to observe human rights and do so through forming a consensus with other states. The agreements representing the consensus of states, such as the Declaration, the ICCPR, and the ICESCR, stress the interdependent and interrelated nature of human rights.<sup>250</sup> When these documents are used as evidence of state practice regarding a particular human right, they reveal the principle of the indivisibility of rights. In

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<sup>246</sup> The second component of customary law, *opinio juris*, exists as the component which reflects consensus regarding the legal obligation of a given norm. Still, traditional customary law relies on individual state practice to reveal the consensus regarding the legal obligation. In short, the traditional formation of customary law depends on individual state action. See generally *supra* notes 96-102 and accompanying text.

<sup>247</sup> See *supra* note 113 and accompanying text.

<sup>248</sup> See *supra* notes 16, 109-119.

<sup>249</sup> The U.S. has participated in numerous such efforts. See *supra* note 151.

<sup>250</sup> See *supra* notes 214-231 and accompanying text.

summary, state practice contributing to the formation of humanitarian customary norms consists of deliberate, cooperative efforts of states to express their support for human rights and reveals the principle of the indivisibility of those rights.

C. *The IFRA At Odds With Customary Human Rights Law*

The emerging customary norm of religious freedom based on such a cooperative effort of states to assert indivisible rights, does not include the implicit principle of a hierarchy. Rather, the emerging customary norm of religious freedom explicitly asserts the principle of the interrelatedness of rights.<sup>251</sup> The IFRA stands in contrast to the emerging custom of religious freedom and works to its detriment in two ways.

First, the IFRA, by itself, cannot legitimately contribute to the emergence of this customary norm of religious freedom. The emerging customary norm, based on the common understanding of states, maintains the equality of all rights, and therefore, places religious freedom on an equal level with all others. The IFRA, however, provides a special method to protect religious freedom, thereby giving this right special status.<sup>252</sup> The emergence of the customary norm of religious freedom requires the common understanding of the indivisibility of rights. Because the IFRA sets forth a hierarchy of rights, it fails to contribute to the emerging customary norm of religious freedom. The Restatement provides that state practice in building customary law includes, "action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy . . . ." <sup>253</sup> As a national law, the IFRA would claim to adhere to the principles of international consensus, but in fact, it fails because it promotes the notion of a hierarchy. As a result, the IFRA cannot contribute to the emerging customary norm of religious freedom.

Second, in failing to contribute to the formation of this customary norm, the IFRA acts to promote a different understanding of religious freedom. According to this understanding, states may apply their own subjective standards and may give preference to one right. Customary law of human rights, by contrast, relies on the teamwork and cooperation of states as evidenced by international agreements to reveal

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<sup>251</sup> *Id.*

<sup>252</sup> See *supra* notes 167-168 and accompanying text.

<sup>253</sup> RESTATEMENT, *supra* note 97, at § 701, reporters' note 2.

consensus regarding a particular right. In turn, states act in accordance with the customary norm. In contrast, instead of acting in accordance with the consensus which maintains the interrelated nature of rights, the IFRA acts unilaterally and applies its own subjective notions regarding religious freedom.<sup>254</sup> Therefore, while the formation of humanitarian customs relies on teamwork and consensus, the IFRA relies on unilateral action and the application of subjective standards.

In its failure to contribute to the emergence of this customary norm and its promotion of a different understanding, the IFRA will slow the emergence of the customary norm of religious freedom that asserts the indivisibility of rights. Instead of building momentum for the emerging customary norm, the IFRA works to fragment the understanding of religious freedom and its relationship with other rights.

While the IFRA is an important step in the right direction, standing on its own, it cannot promote the interrelated nature of human rights. In order to be true to the indivisibility of human rights, the United States must work to develop a comprehensive human rights policy. Within the context of a policy which provides a system to practically deal with human rights violations, the IFRA will not only achieve its goal of the protection of religious freedom, but also honor the interdependent relationship of human rights.

## VI. CONCLUSION

The formation of the United Nations set the stage for universal cooperation, while the Declaration has provided the script. Actual promotion and protection of human rights, however, has depended upon the member states to be actors in this international effort. Though the Declaration did not legally bind states to protect human rights within their own borders or ensure that these rights were not violated in other states, its effect on states' actions to protect human rights cannot be underestimated. Whether a state participates in U.N. sponsored protection or acts on its own, the Declaration has served as the foundation for the international understanding of human rights. Because of its influence, some of the rights listed in the Declaration have become customary law, and therefore, binding on all states. Put in another way, as a script, the Declaration has had great influence on the words and actions of states.

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<sup>254</sup> See *infra* note 191 and accompanying text for discussion on subjective standards.

The Declaration asserts the interdependent nature of human rights as does the international consensus that forms international customary human rights law. By legislating a hierarchy into its law with the International Religious Freedom Act, the United States runs counter to the principle of indivisibility of rights found in customary law. In so doing, it fails to contribute to the emerging customary norm of religious freedom, and instead promotes a different understanding of the right and will ultimately slow or alter its emergence into customary law. When legislating in the area of internationally recognized human rights, the United States, like any nation, must remember that it operates within this context and must work to contribute to the emerging humanitarian customary norms rather than confusing them. To honor the interdependent nature of human rights, the United States must legislate a way in which to deal with violations of human rights and commit to the protection of all, instead of only one.

—Kristin Nadasdy Wuerffel