Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards

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I. INTRODUCTION

Advocates of international human rights have long claimed that some values are so fundamental to human existence that they should be universally applicable. The widespread acceptance of certain international instruments would seem to indicate a significant level of consensus regarding the definitions and requirements of these universal values.¹

Some scholars, however, have raised serious challenges to this claim of universality, arguing that all moral values, including human rights, are relative to the cultural context in which they arise.² Bolstering this relativist viewpoint, many socialist writers

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² Nearly all of the recent literature directly addressing the issue of relativism in human rights has been written by authors whose primary disciplines are political science, anthropology, or philosophy. See, e.g., E. HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY (1983); A. RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990); J. Donnelly, Cultural Relativism and Human Rights, 6 Hum. Rts. Q. 400 (1984); C. Joynner & J. Dettling, Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law, 20 Cal. W. Int'l L.J. 275 (1990); J. Kleinig, Cultural Relativism and Human Rights, in TEACHING HUMAN RIGHTS 111.
and scholars from developing nations have objected to current human rights standards as insensitive to or incompatible with various cultural, political, and social conditions. These objections have ranged from accusations of cultural imperialism and “Western bias” to measured pleas for sensitivity and tolerance. Relativists view international scrutiny of human rights practices as illegitimate to the extent that such an examination questions or interferes with national conditions.

Competing claims about the universal versus relative nature of human rights reflect one of the principal challenges confronting the international system—namely, how to develop and implement meaningful human rights standards in the face of profound diversity. At issue is the degree to which the international community can dictate the specific content and meaning of basic human rights and scrutinize state compliance.

This article examines this debate from an international law perspective and evaluates its implications for the international human rights regime. The discussion includes consideration of the basic premises underlying an international human rights system and of the prevailing international legal doctrines regarding

(A. Tay ed. 1981). All of the aforementioned authors endorse some degree of relativism in human rights.


5 Determining the basic social unit by which to measure a society’s moral values under a relativist framework remains somewhat problematic. Clearly, within every nation a variety of insular cultural and social groups can (and often do) claim value systems distinct from that of the dominant political grouping. While relativism is a group-oriented theory of morality, its human rights proponents fail to explain which social group (family, clan, church, province, nation, or tribe) should be morally determinative and why. See D. Lyons, Ethical Relativism and the Problem of Incoherence, 86 ETHICS 107, 110-11 (1976). However, since international law and human rights operate predominately on the level of nation states, I have limited this discussion to that level of analysis.
the nature and sources of human rights obligations. The practical and jurisprudential implications of a relativist framework for human rights are also considered.\(^6\) The analysis in this article indicates that relativism, while largely incompatible with the founding principals of the current international system, is nevertheless partially reflected in the nature of states' international human rights obligations and in the international system's limited international monitoring and interpretive capacity. In addition, important practical reasons exist for tolerating some relativity regarding the interpretation of human rights requirements. However, because the actual significance of any right springs primarily from its specific requirements and interpretation, the international community should strive to limit and control such relativistic variations. To this end, the international community should: (1) create international mechanisms for generating more authoritative interpretations of rights than are currently available; (2) develop specific minimum requirements for those rights over which some international consensus now exists; and (3) utilize mediating techniques by which states could adopt culturally sensitive interpretations of rights, subject to monitoring criteria which would preserve the essential international understanding of the rights and their specific requirements.

\(^6\) Philosophical critiques of ethical relativity and the possibility of universal moral judgments have preoccupied many philosophers and social theorists, including Immanuel Kant, Jeremy Bentham, John Stuart Mill, Alan Gewirth, S.I. Benn, John Rawls, and H.L.A. Hart. See generally M. Marković, Differing Conceptions of Human Rights in Europe: Towards a Resolution, in PHILOSOPHICAL FOUNDATIONS, supra note 4, at 113, 117-20; J. Shestack, The Jurisprudence of Human Rights, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 74-88 (T. Meron ed. 1984) [hereinafter HUMAN RIGHTS IN INTERNATIONAL LAW]. Although ethical relativism has fallen somewhat into disrepute in philosophical discourse, see E. Hatch, supra note 2, at 12, 64-67, 82, the theoretical debate continues. See, e.g., RATIONALITY AND RELATIVISM (M. Hollis & S. Lukes eds. 1982); D. Wong, MORAL RELATIVITY (1984); M. Spiro, Cultural Relativism and the Future of Anthropology, 1 CULTURAL ANTHROPOLOGY 259 (1986). Some scholars have analyzed the claims of relativism regarding human rights from an anthropological and philosophical perspective. See, e.g., T. Campbell, The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights 2-11, 103-22 (1983); J. Kleinig, supra note 2, at 111-18; see also E. Hatch, supra note 2, at chs. 1, 4, 5, 7; F. Tesón, supra note 2, at 886-90. These long-standing theoretical debates, however, have proven irresolvable and seem of limited utility in assessing relativistic claims in international human rights. Consequently I have, to the extent possible, left these philosophical debates aside in this article in favor of a more pragmatic approach grounded in international law.
II. THE COMPETING CLAIMS OF RELATIVITY AND UNIVERSALITY IN INTERNATIONAL HUMAN RIGHTS

A. Defining the Debate: The Claims of Relativism

Few dispute the profound cultural, political, and social diversity of the modern world. Despite the pervasive influence of industrialization, powerful centralized governments, and Western culture, there remains a vast array of cultural views and variations on the competing political and economic models. Anthropologists have long recognized that divergent cultural and political traditions result in equally divergent social values and diverse approaches toward morality and law. A comparison of Asian, African, and Western industrialized societies demonstrates that sharply differing visions of the "just" society are simultaneously present within the global community.

The idea that the international community should accommodate these diverse traditions within its human rights framework is not a new one. Indeed, articles 22-29 of the Universal Declaration of Human Rights (the "Universal Declaration"), the 1966 Economic, Social and Cultural Rights Covenant (ESCRC), and

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7 Some authors suggest that, despite this diversity, a number of unifying elements associated with the modern state and industrialization exist and justify a Western liberal model of human rights, primarily on a functional basis. According to these authors, the modern centralized state, with its great and often realized potential for repression of individual freedoms, now exists throughout the world. The Western liberal model of rights, under which individuals possess inalienable, justiciable rights which trump arbitrary governmental action, is the most effective means of protecting people from an increasingly powerful state apparatus. E.g., R. Howard, Human Rights in Commonwealth Africa 33-34 (1986); J. Donnelly, Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights, 76 AM. POL. SCI. REV. 303, 311-12 (1982) [hereinafter Analytic Critique]; R. Howard & J. Donnelly, Human Dignity, Human Rights, and Political Regimes, 80 AM. POL. SCI. REV. 801, 803-06 (1986) [hereinafter Political Regimes].


9 For useful general surveys of these diverse cultural and political influences as they relate to human rights, see generally Human Rights in East Asia: A Cultural Perspective (J. Hsiung ed. 1985) [hereinafter Human Rights in East Asia]; Moral Imperatives, supra note 3; Philosophical Foundations, supra note 4; A. Pollis, supra note 1; Comments and Interpretations, supra note 4; Symposium on the International Law of Human Rights, 11 HOW. L.J. 257-264 (1965).

the so-called "third generation" of human rights all partially manifest this idea. Similarly, human rights literature has struggled with the implications of diversity since the beginning of the modern movement. More recently, a growing number of scholars, as well as governments of developing and socialist states, have contended that states may refute accusations of non-compliance and object to international scrutiny on the grounds of divergent cultural, ideological, or social traditions. To varying


13 E.g., COMMENTS AND INTERPRETATIONS, supra note 4; Statement On Human Rights, supra note 8, at 539-43; see also H. Tolley, JR., supra note 12, at 19-31, 194-96; J. Hersch, Is the Declaration of Human Rights a Western Concept?, in ETHICS AND SOCIAL JUSTICE 323 (H. Kiefer & M. Munitz eds. 1968); R. McKeon, Philosophy and History in the Development of Human Rights, in ETHICS AND SOCIAL JUSTICE, supra, at 300.

14 See, e.g., J. Cobbah, African Values and the Human Rights Debate: An African Perspective, 9 HUM. RTS. Q. 309, 310, 319, 325-28 (1987); Western Construct, supra note 3, at 4, 7-13; N. Pollis, Conformity, Compliance and Human Rights, 3 HUM. RTS. Q. 93, 102-04 (1981); see also A. Renteln, supra note 2, at 13, 56-60, 77-78, 82-87, 139-40; G. Tunkin, Theory of International Law 80 (1974); Y. Khushalani, supra note 3, at 331; C. Murphy, Objections to Western Conceptions of Human Rights, 9 HOFSTRA L. REV. 433 (1981); C. Mojekwu, International Human Rights: The African Perspective, in INTERNATIONAL HUMAN RIGHTS: CONTEMPORARY ISSUES 85, 89 (J. Nelson & V. Green eds. 1980) [hereinafter INTERNATIONAL HUMAN RIGHTS]; B. Shen, C. Wang & Z. Li, On the Question of Human Rights in the International Realm, BEIJING REV., July 26, 1982, at 13; P. Sinha, The Anthropocentric Theory of International Law as a Basis for Human Rights, 10 CASE W. J. INT'L L. 469, 501-02 (1978) [hereinafter Anthropocentric Theory]; P. Sinha, Human Rights Philosophically, 18 INDIAN J. INT'L L. 139, 159 (1978); Y. Tyagi, supra note 12, at 125-26. Nearly all of these works have weaknesses which limit their usefulness. First, few of the authors provide evidence of or account for actual governmental positions on these issues in the relevant international fora. Although it seems safe to assume that at least some governments would endorse a degree of relativism regarding their international obligations, see, e.g., 32 U.N. GAOR C.3 (43rd mtg.) at 11-13, U.N. Doc. A/C.3/32/SR.43 (1977) (statement of Saudi Arabia's representative); 32 U.N. GAOR C.3 (74th mtg.) at 15, U.N. Doc. A/C.3/32/SR.74 (1977) (statement of Nigeria's representative), these scholars have failed to examine the extent of these endorsements and their implications. Similarly, few of these authors have addressed the common discrepancy between official governmental positions and general public sentiment regarding the appropriateness of certain human rights in their societies. Second, most have failed to document their general assertions of cultural and political perspectives with current empirical evidence. Rather, they often rely upon misleading generalizations, stereotypes, and abstractions, thereby reifying their own conceptions about the societies they describe. Some authors are particularly
degrees, these arguments rely on the assertion that the existence, application, and meaning of human rights should be dependent upon national conditions.

Scholars commonly group states into the three competing views of human rights: Western, socialist, and developing nations. Typically, they regard the Western view as that reflected in current human rights instruments, which are historically derived predominantly from European, liberal, democratic traditions. Commentators characterize developing countries, particularly African and Asian nations, as viewing current human rights standards as culturally biased, since they fail to reflect the varied cultural, political, and social heritages of the non-Western world. These developing states and scholars frequently object to an alleged overemphasis on individual, justiciable rights and political and civil liberties in contrast to social welfare, collective rights, consensual dispute resolution, economic development, and state interests. While asserting many of the same objections, socialist states also argue for an ideological conception of rights as a social institution and for a priority among rights which is fundamentally different from that espoused by Western nations.

Collectively, these objections reveal the considerable resistance among developing and socialist states to human rights standards cast in predominately liberal, Western terms. While such culpable in this respect. See A. Legesse, supra note 3; A. Pollis, supra note 1; Western Construct, supra note 3; R. Wilson, Rights in the People's Republic of China, in Human Rights in East Asia, supra note 9, at 109.

15 Many authors have stressed this theme of Western bias in human rights. See, e.g., Framework, supra note 1, at 4-7, 15-16; P. Kirpal, Human Rights: The Contemporary Situation, in Philosophical Foundations, supra note 4, at 281-83; A. Legesse, supra note 3, at 123-24, 130; C. Murphy, supra note 14, at 435, 439-40; Western Construct, supra note 3, at 8-14; E. Zvoglo, supra note 3, at 90-95. While some Western commentators have (at least partially) rejected this accusation of bias, see, e.g., L. Henkin, The Human Rights Idea in Contemporary China: A Comparative Perspective [hereinafter Human Rights Idea], in Human Rights in Contemporary China 10-12 (R. Edwards, L. Henkin & A. Nathan eds. 1986) [hereinafter China]; L. Henkin, supra note 1, at 15-14, others have rather enthusiastically acknowledged it. See, e.g., Analytic Critique, supra note 7, at 304-05, 311-14; Political Regimes, supra note 7, at 801-06.


17 E.g., T. Campbell, supra note 6, at 2-11, 103-22; see also V. Kudryavtsev, Human Rights and the Soviet Constitution, in Philosophical Foundations, supra note 4, at 83-87; C. Murphy, supra note 14, at 438-45.
objections undoubtedly contain strong elements of political rhetoric (and rationalizations designed to support repressive tactics by ruling elites), their existence reflects significant differences among the various states' fundamental conceptions regarding the meaning of human rights and the relation of the individual to society and government.

In broad terms, all of these claims fall under the rubric of relativism.18 Scholars have given the term "relativism" a variety of interpretations,19 but in human rights discourse, it typically involves some combination of three related propositions. The first proposition simply points out that an observable divergence in moral judgments exists among societies due to their differing cultural, political, and social traditions.20 The second proposition, often described as "normative relativism," asserts that these divergent moral judgments and values have no meaning or validity outside their particular social context. In other words, "what is right or good for one individual or society is not right or good for another, even if the situations involved are similar."21 The

18 Relativism traces its roots to both anthropology and the philosophy of ethical relativism. Cultural relativism in anthropology developed largely as a response within that discipline to the dangers of ethnocentrism, to insights about enculturation, and to the limitations that one's own cultural and linguistic heritage may place on the understanding of other societies. Enculturation is the process by which all people unconsciously absorb the cultural values of their society and learn to believe that they are "true" values. Ethnocentricity is the belief that one's own value system is superior to all others and thereby constitutes the standard for all moral judgments. M. Herskovits, supra note 8, at 21, 75-76. See E. Hatch, supra note 2, ch. 1; A. Renteln, supra note 2, at 63-65. Ethical relativism describes a position taken in the long-standing philosophical debate regarding the possibility of reaching universal moral judgments. See, e.g., id.; R. Brandt, Ethical Relativism, in 3 ENCYCLOPEDIA OF PHILOSOPHY 75 (P. Edwards ed. 1967); F. Tesón, supra note 2, at 886-89.

19 See generally RATIONALITY AND RELATIVISM, supra note 6, at 2-11 (describing both the sources of and variations in relativist theory); RELATIVISM: COGNITIVE AND MORAL (J. Meiland & M. Krausz eds. 1982) (discussing both "cognitive" or "epistemological" relativism (subjective, objective, and conceptual) and "moral" or "ethical" relativism (meta-ethical, normative, descriptive, and emotive)); C. Joyner & J. Dettling, supra note 2, at 277-86 (1990) (discussing "cultural relativism" as including ethical, epistemological, linguistic, and historical variations).

20 This proposition is often described as "descriptive relativism." Spiro, however, points to three distinct levels of this "descriptive relativism" in his critique of "epistemological" relativism and its "hermeneutic agenda" in anthropology. M. Spiro, supra note 6, at 250-73, 276. Although some anthropologists have argued that ethical conflicts between cultures are often merely factual disputes and therefore only appear to be ethical conflicts, it is evident that at some level substantive ethical conflicts exist between diverse cultures. See A. Renteln, supra note 2, at 70-71; see also D. Lyons, supra note 5, at 115-21.

21 W. Frankena, ETHICS 109 (1973), quoted in A. Renteln, supra note 2, at 72; see also C. Joyner & J. Dettling, supra note 2, at 282; M. Spiro, supra note 6, at 260-61. This extreme form of relativism would deny the very possibility of international human rights, since all moral judgments would be equally valid and therefore strictly confined
third, less extreme version of relativism argues that no objectively justifiable moral standards or judgments exist outside particular cultural contexts. This "meta-ethical" view does not necessarily deny the possibility of universal truths or shared values, but rather contends that no valid means exist to objectively justify one culture's moral values over another's.22

Advocates of a relativistic framework for international human rights rarely distinguish between competing meanings of relativism.23 Rather, relativist arguments tend to be based on the general proposition that members of one society may not legitimately judge or condemn the social practices of other traditions.24 The essence of this relativist argument is the insight that normative values take their meaning primarily from context. At its extreme, relativism denies the existence of legitimate cross-cultural standards for evaluating human rights practices25 and exempts certain variations in social practices and institutions from external criticism.

Not all forms of relativism necessarily require tolerance of diverse moral practices.26 However, without the notion of tolerance, the relativist position is reduced merely to an acknowledgement of enculturation and of the ethnocentricity inherent in cross-cultural moral judgments.27 While such insights...
provide important lessons for human rights advocates, the relativist argument does not end here. Rather, most proponents of relativism endorse tolerance as a paramount value and reject, to some extent, the legitimacy of external critiques of culturally based practices. Under this view, foreign scrutiny challenging the legitimacy of culturally or politically accepted domestic practices at best constitutes intolerance and disrespect, and at worst, cultural imperialism and a violation of domestic sovereignty.

Relativism in human rights suggests four related and somewhat overlapping claims. First, the relativist position argues that certain human values, as articulated in general and abstract rights such as equal protection or political participation, are simply inappropriate in certain cultural or political contexts. Islamic states, for example, assert that the equal treatment of women and the freedom to change religion conflict with the dictates of Shari'ah, the historically based Islamic religious law, and are therefore inappropriate in their societies.

Second, even if an abstract human right is appropriate to a culture, its specific content and application depend primarily upon the cultural and political circumstances of that society. Fundamental values such as justice, liberty, equality, and freedom from want mean markedly different things depending upon

ponent of cultural relativism"); see M. Herskovits, supra note 8, at 14-15, 33, 45-46, 93-94; see also supra note 18 (defining “enculturation” and “ethnocentrism”).

28 See A. Renteln, supra note 2, at 74-76, 86-87, 138-40; K. Brennan, The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study, 7 LAW & INEQUALITY 367 (1989) (Note) (arguing that recognition of ethnocentrism has resulted in increased sensitivity to diverse cultural norms in the deliberations of the UN Subcommittee on Prevention of Discrimination and Protection of Minorities); see also E. Hatch, supra note 2, ch. 7; M. Herskovits, supra note 8, at 71-96; A. An-Na’im, Religious Minorities Under Islamic Law and the Limits of Cultural Relativism, 9 HUM. RTS. Q. 1, 4-5 (1987).

29 See supra note 14 and accompanying text; see also C. Joyner & J. Dettling, supra note 2, at 278; S. Sucharitkul, supra note 4, at 306-07, 315-17; F. Tesón, supra note 2, at 871, 873. Despite Renteln’s argument to the contrary, A. Renteln, supra note 2, 73-74, 86, it is difficult to understand what meaningful message other than tolerance the concept of relativism has to offer. For example, even if a human rights advocate accepts the relativist insights regarding ethnocentrism and enculturation and acknowledges the necessity for culturally “sensitive” international critiques of a country’s human rights practices, that acceptance is, by itself, meaningless in the absence of tolerance of culturally based variations in the specific human rights standards. See D. Donoho, Book Review, 85 AM. J. INT’L L. 416, 418 (1991).

30 See, e.g., A. Renteln, supra note 2, at 47-60; G. Tunkin, supra note 14, at 80-81; Western Construct, supra note 3, at 9-17; B. Shen, C. Wang & Z. Li, supra note 14, at 15-17.

31 See, e.g., A. An-Na’im, supra note 28, at 9-14. Other examples of this claim include apartheid in South Africa and the rights of women in many other parts of the world.
one’s cultural and political assumptions.\textsuperscript{32} For example, Americans and Chinese will arguably interpret the meaning of abstract rights, such as due process, political participation, and the right to work, in conflicting and perhaps incommensurable ways.\textsuperscript{33} Does due process, for example, require cross-examination, state-appointed lawyers for indigents, or a right of appeal? Must political participation encompass the direct, competitive election of representatives and the concept of legislative supremacy? Must the right to work guarantee full-time employment, unemployment compensation, and job training? The answers arguably depend upon the particular culture and therefore differ greatly from state to state.

A third major relativist claim, derived from the two preceding claims, asserts that respect and toleration of diverse cultural traditions should insulate certain specific, culturally based social practices from external critique and action. Discrete ethnic or linguistic minorities (and anthropologists) frequently make these culturally based “defense” claims, arguing that the international community should tolerate certain cultural practices prohibited by human rights law, such as child betrothal, widow inheritance, and female genital mutilation.\textsuperscript{34}

Finally, relativists contend that each state should espouse its own conception of what human rights entail as a social institution based upon its cultural preferences and political ideology. Western societies consider human rights to be individualistic, adversarial, justiciable, and inalienable, while human rights in the Asian, African, and Hindu traditions may not encompass any of these characteristics.\textsuperscript{35} For example, in the People’s Republic of


\textsuperscript{33} See Multicultural World, supra note 8, at 164-70; see also C. Joyner & J. Detting, supra note 2, at 279-80. For thorough descriptions of the divergence in American and Chinese interpretations of such rights, see generally China, supra note 15, and Human Rights in East Asia, supra note 9.


\textsuperscript{35} E.g., J. Cobbah, supra note 14, at 320-25; J. Hsiung, Human Rights in an East Asian Perspective, in Human Rights in East Asia, supra note 9, at 3, 4-12; Y. Khushalani, supra note 3, at 322-26, 351-34; see also Analytic Critique, supra note 7, passim (arguing that non-
China (PRC), the state justifies strict controls over freedom of speech on the basis of "collective welfare." The logical consequence of government policy viewing rights to privacy, marriage, education, and freedom of movement as subservient to the collective welfare is that such rights are considered as neither justiciable nor a function of individual choice. Similarly, due process arguably need not depend upon an adversarial legal system or an independent judiciary because such a system may violate a society's cultural preference for non-adversarial justice or ideological rejection of judicial review.

The remainder of this article will evaluate the relativist claims in light of international law and the contrasting claims of universality in international human rights. There are two important variables to be considered when evaluating these conflicting claims. First, the allocation of decision-making authority should be evaluated. A truly relativistic human rights framework would ultimately defer decisions about the appropriateness of particular rights to each state's discretion. However, one can argue that while human rights standards are relative, the international community should nevertheless make final determinations as to the validity of such claims.

The second variable involves the level of specificity at which the relativist claim challenges the universal applicability of a given right. A relativist claim may affect human rights discourse along a continuum of specificity ranging from abstract values, such as liberty and justice, to the application of concrete rules to particular situations. Relativist critiques are directed at three levels of specificity: (1) "abstract rights," which consist of functional rights; (2) "abstract rules," which consist of substantive rules; and (3) "abstract institutions," which consist of the structure and operation of rights systems. Western cultures originally had no conception of rights and that the concept of human rights presupposes a Western model of rights; infra text accompanying notes 143-51.

See infra text accompanying notes 143-51.


The fourth distinct set of relativistic claims, which deals with rights as a social institution, is too complex to be analyzed adequately in a general essay on relativism. Consequently, this article will only discuss these claims as needed to clarify the other issues presented.

These categories may seem somewhat arbitrary, but they are essential for pur-
damental human rights ideals expressed as abstract values; the “specific content” of rights, which give substance to the shared values underlying abstract rights; and the “interpretive meaning” of rights, which describes the concrete meaning given to rights through the process of interpretation and application.

B. The Claims of Universality: The Premises of an International Human Rights System

International human rights were originally conceived as an international means of placing limits and duties on and among governments in their treatment of individuals. Assuming that this poses of simplifying the analysis and identifying the most significant implications of relativism for international human rights. First, by distinguishing rights by levels of specificity, I have implied a hierarchy which arguably does not or should not exist. It is very difficult and often arbitrary to distinguish between an abstract or “core” right (e.g., due process), a component part of an abstract right (e.g., presumption of innocence), and the specific interpretive content of a right (e.g., appearance before an independent decision maker for review within 48 hours of arrest). Second, it may be misleading to refer to a human rights standard without considering its specific content and interpretation, since its actual meaning is determined at those levels. See infra text accompanying notes 140-64. Examples of abstract rights include the Universal Declaration’s proclamation of rights to “life, liberty and security of person” (art. 3), to “equal protection under the law” (art. 7), and to protection against “arbitrary interference with . . . privacy” (art. 12). Universal Declaration, supra note 1, arts. 3, 7, 12.

“Specific content” is intended to describe the various component parts of abstract rights such as the elements of judicial procedure required to satisfy the right to due process in criminal prosecutions. In this sense, the ESCR and the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter CPRC], contain both abstract expressions of rights and the specific contents of certain rights, often setting forth the general abstract value in the first paragraph of each article followed by more specific elements. The right of political participation, as set forth in article 21 of the Universal Declaration, reveals some of the conceptual difficulties with attempts to differentiate between abstract, general rights and their specific content. Article 21 proclaims the abstract right of all individuals to “take part in the government,” but also specifies that the right includes “equal access to public service” and “periodic elections ... by universal suffrage . . . held by secret vote.” Universal Declaration, supra note 1.

conception continues as a fundamental premise of the international system, human rights make a strong claim to universality. This claim stems from three premises which are integral to human rights both as a matter of historical fact and logic. The most important of these premises is that a limited international normative order exists, or can be created, in which states can express and act upon collective moral judgments. Prompted by World War II atrocities, this idea dictates that the community of nations may find certain aspects of a state's treatment of its own citizens morally unacceptable. Thus, in order to avoid social strife, war, and governmental abuse of shared human values, the United Nations Charter obligates all member nations to "promote . . . universal respect for, and observance of, human rights" and to "take joint and separate action in cooperation with the [UN] for [their] achievement." Such collective international moral judgments presuppose some basic level of shared normative values. The practices of states, UN human rights institutions, and various regional human rights organizations have uniformly supported this ideal of universal values.

45 See, e.g., R. Cassin, The Liberal Western Tradition of Human Rights, in Comments and Interpretations, supra note 4, at 55; A. Diemer, The 1948 Declaration: An Analysis of Meanings, in Philosophical Foundations, supra note 4, at 95, 96-102; J. Donnelly, supra note 2, at 404, 407; H. Espiell, The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches, in Human Rights: Thirty Years After the Universal Declaration 41, 42, 46 (B. Ramcharan ed. 1979) [hereinafter Thirty Years After]; F. Tesón, supra note 2, at 885-86. While the international human rights system does reflect a normative order, it is important to recognize its limited nature. As originally conceived and currently practiced, international human rights primarily involve only specified aspects of the relationship between governments and people. E.g., L. Henkin, supra note 44, at 2, 27-30. International human rights may influence and relate to a society's general or "common" moral order, but they do not purport to guide people's conduct in their daily affairs or distinguish between what is morally right or wrong in the comprehensive sense of a domestic ethical system. See C. Tomuschat, supra note 44, at 29-30.


47 See J. Copper, F. Michael & Y. Wu, supra note 37, at 2; R. Cassin, supra note 45, at 55; L. Henkin, supra note 1, at 5, 13-14; F. Tesón, supra note 2, at 885-86.

48 U.N. Charter art. 55.

49 Id. art. 56.

A corollary to the existence of a global moral order with respect to human rights is the legal "internationalization" of those shared, universal values. International law now clearly recognizes that the community of nations has an obligation to collectively promote and protect essential human needs and interests. As the proper subject of international legal obligations, the shared values which make up this limited, global moral order justify intergovernmental scrutiny of human rights practices. This internationalization of human rights necessarily implies some degree of common standards, thereby necessitating an exception to the fundamental rule of absolute state sovereignty—an exception that has become a firmly entrenched tenet of international law as confirmed by state practice.

The third premise supporting the claim of universality lies in
the diverse philosophical bases from which these internationally shared values are derived. Numerous analysts have suggested a variety of specific formulations for the philosophical foundations of human rights. Such foundations include the fulfillment of human potential, social justice, promotion of essential human needs, equal respect and concern for all by governments, common historical social interest or "praxis," just provision of needs, and traditional Western notions of natural rights. Although differing in detail and approach, nearly all of these theories contend that human rights are ultimately based upon essential human needs and interests possessed by all people equally as prerequisites to human dignity.

Similarly, current human rights instruments postulate an international value system based on needs essential to the dignity of all human beings. The Preamble to the UN Charter, the Universal Declaration, and the 1966 Covenants, for example, cite the inherent dignity of all human beings as the basis for human rights and declare that all people share these rights equally and

55 See generally J. Shestack, supra note 6.


60 M. Marković, supra note 6, at 120-25.


63 There is an important deviation from this philosophical orientation by Marxists, who would generally base rights on historical materiality, citizenship, and the performance of one's general obligations to society instead of on each person's status as a human being. See generally T. Campbell, supra note 6, at 105-09; R. Edwards, supra note 38, at 43, 55-56; C. Murphy, supra note 14, at 438-40. Arguably, these socialist conceptions of rights, which are themselves subject to varying interpretations, see T. Campbell, supra note 6, at 2-11, 103-119, do not explicitly deny universality based upon a person's status as a human being. Instead, they alter the priority of rights and add conditions to the exercise of certain rights. See C. Taylor, *Human Rights: The Legal Culture*, in *Philosophical Foundations*, supra note 4, at 50-53. Similarly, the same substantive human rights derived from the ahistorical, pre-societal, natural rights notions generally favored by Western liberalism may also be (and to a degree have been) derived from the historical, materially determinative conceptions which drive Marxist thinking. See M. Marković, supra note 6, at 124-29; see also T. Campbell, supra note 6, at 105-09.
without discrimination. If human rights reflect these essential interests and are equally possessed by all people, then a person's country of residence should be irrelevant to their application. As "essential to human dignity," human rights are by definition those needs and interests sufficiently shared by people in all societies to justify their internationalization.

On the other hand, those needs which are in some sense unnecessary or which vary among diverse cultures cannot be considered human rights from the perspective of international law.

The Preamble to the Universal Declaration states:

[In] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family ... [and] promotion of universal respect for and observance of human rights ... the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples ... to secure their universal and effective recognition ... among the peoples of Member States ...

Universal Declaration, supra note 1, preamble.

Article 2 of the Declaration proclaims that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration ... without distinction ..." Id. art. 2. Without more, however, the above language may merely prove the frequently asserted charge of Western bias in such agreements. See A. Renteln, supra note 2, at 51-54; Western Construct, supra note 3, at 1, 4-8; see also J. Morsink, The Philosophy of the Universal Declaration, 6 HUM. RTS. Q. 309, 313-16, 328, 333 (1984) (arguing from the travaux préparatoires that inherent human dignity and natural rights notions were the philosophical bases for the Declaration).

As originally conceived, the internationalization of human rights resulted in the consensual condemnation of such behavior as torture and genocide, as well as of the failure to prevent hunger amidst plenty, as violations of international law. If the community of nations does not commonly share the underlying values reflected in a right, then that right arguably does not qualify as an internationally protected human right.

Some commentators have questioned the wisdom, validity, and priority of the new generations of rights. E.g., H. Veatch, HUMAN RIGHTS: FACT OR FANCY? 177-83 (1983) (rejecting the legitimacy of economic, social, and cultural rights); see also M. Cranston, WHAT ARE HUMAN RIGHTS? 36 (1962); P. Alston, supra note 11, at 307, 309, 315-22 (arguing that focusing on the third generation of rights may confuse and potentially hinder the promotion of existing human rights norms). However, despite such jurisprudential doubt, the status of the new rights in international law (with respect at least to economic and social rights) appears to be no different than that of the more traditional rights of Western liberalism. See G.A. Res.34/36, 34 U.N. GAOR Supp. (No. 46) para. 3, U.N. Doc. A/Res. 34/36 (1979); see also P. Alston & B. Simma, Current Developments: Second Session of the U.N. Committee on Economic, Social and Cultural Rights, 82 AM. J. INT'L L. 603, 604-05 (1988). However, these rights are clearly more susceptible to cultural and ideological variation than the so-called first generation rights (civil and political). See infra text following note 169.
Thus, while the claim of universality lies at the core of international human rights, it also serves to define and limit which human interests should be recognized internationally. If human rights were not shared universally in some significant sense, they might still exist as rights on a domestic level, but they would not justify collective international action.\textsuperscript{66}

However, the recognition that universality is at some level inherent in the concept of international human rights and is prevalent in current international practice does not, by itself, determine the degree to which universality is required. It leaves open such questions as: (1) the degree to which such values are absolute (there could logically be derogations, exceptions, and limitations); (2) whether the values and standards may only be satisfied in one particular fashion; (3) how to resolve the priorities between conflicting values; and (4) what social institutions are required in order to protect such values.\textsuperscript{67}

It is theoretically possible to maintain the essential premises of the international human rights system while at the same time denying universality at some level of specificity regarding the meaning and requirements of rights. For example, an international human rights regime could conceivably require universality on the level of agreed basic values, while national governments would be given discretion to decide how to satisfy those general, abstract values in light of local conditions.\textsuperscript{68} Thus,

\textsuperscript{66} This proposition does not mean, of course, that every state must expressly consent to the recognition of any particular right as suitable for international protection in order for that right to be recognized as an international human right. See infra notes 82-88 and accompanying text. Indeed, the international human rights system has a significant "promotional" aspect, which encourages the development of universal standards even in the absence of universal state consent. See, e.g., H. Tolley, Jr., supra note 12, at 32-54, 87-96. For example, the Universal Declaration states that the rights it recognizes are meant to be the "common standard of achievement for all people." See Universal Declaration, supra note 1, preamble. Given that one of the primary goals of the UN Charter is the reduction of international strife, this goal of internationally integrating certain fundamental values seems inherent to the very concept of human rights. See D. Henrich & D. Pacini, The Contexts of Autonomy: Some Presuppositions of the Comprehensibility of Human Rights, 112 DAEDALUS 255, 274-75 (1983). Nevertheless, the unresolved tension in human rights law between domestic sovereignty and the joint international promotion of human rights ultimately requires consensus over which rights should be internationally recognized. See R. Falk, supra note 53, at 35-45, 190-91; A. Pollis, supra note 1, at 2-3.

\textsuperscript{67} While the international community could conceivably determine each of these areas at a level of great specificity, it has not yet done so. The premises of universal human rights do not logically require any particular level of specificity. But see infra notes 122, 140-168 and accompanying text.

\textsuperscript{68} Some authors have suggested that a more effective and culturally sensitive version of the international human rights system would focus almost exclusively upon inter-
it is possible to resolve competing claims of universalism and relativism within the international system only by closely examining the implications of the various relativist objections to current international legal standards with regard to the universalist character of those standards.

III. Determining the Substantive List of General, Abstract Rights — Relativism at the Level of Basic Human Rights Values

The Universal Declaration of Human Rights,69 the International Covenant on Civil and Political Rights,70 and the International Covenant on Economic, Social and Cultural Rights71 most prominently reflect current human rights standards. Most commentators agree that the world community generally accepts the Universal Declaration's catalogue of general, abstract rights as the prevailing standard for international human rights.72 The CPRC and ESCRC, which are more specific than the Universal Declaration's relatively abstract list of rights, have received significantly less support.73

national cooperation designed to encourage each society to fulfill its own vision of human dignity given its peculiar traditions. See H. Berman, American and Soviet Perspectives on Human Rights, Worldview, Nov. 1979, at 15-17; N. Pollis, supra note 14, at 93-96, 103; Anthropocentric Theory, supra note 14, at 501; see also infra note 133.

69 Universal Declaration, supra note 1.
70 CPRC, supra note 42.
71 ESCRC, supra note 10.
72 E.g., Handbook, supra note 1, at 6; M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 274 (1980); L. Henkin, supra note 1, at 1-12; J. Humphrey, The International Bill of Rights, in Philosophical Foundations, supra note 4, at 61. Of course, even widespread scholarly agreement does not, by itself, prove global consensus. Some critics have raised serious questions about whether an international consensus even regarding abstract rights is actually as widespread as most scholars assert. For example, when the United Nations adopted the Universal Declaration in 1948, only 58 of the over 160 current world states were members. Most of the new members have expressed some form of subsequent approval of the Declaration through UN resolution or otherwise. See, e.g., Final Act of the International Conference on Human Rights, supra note 50, para. 2; G.A. Res. 41/120, U.N. GAOR Supp. (No. 53) at 178, U.N. Doc. A/41/53 (1986) (recognizing the "primacy" of the Universal Declaration); see also infra note 87. However, the Declaration itself is an expressly non-binding, aspirational document with obvious political significance. Some authors from developing nations have suggested that its text and form might be considerably different if recreated today. See, e.g., A. Legesse, supra note 3, at 128; E. Zvobgo, supra note 3, at 95. A few authors have asserted that the Declaration is simply irrelevant or largely inapplicable to developing countries. See Western Construct, supra note 3, at 1-4; see also A. Renteln, supra note 2, at 30-32, 51-54.
73 Just over one-half of the United Nations' members have ratified or acceded to each of these agreements. See International Human Rights Instruments §§ 170.42, 180.18 (R. Lillich ed. 1988). A few nations with a significant portion of the world's population have not adopted the 1966 Covenants (e.g., the PRC, the United States, In-
Relativism implies that at least some of the basic, abstract rights contained in these agreements are irrelevant or inappropriate for certain countries. Relativists here reject international scrutiny of state compliance with such rights when a state has determined that the rights are incompatible with its cultural, political, or social conditions. Thus, at the level of abstract rights, relativism appears to be fundamentally inconsistent with the basic premises of international human rights.

The tautological argument for the universality of abstract rights—that human rights should be universally applicable because, by definition, they represent values sufficiently common to all people to justify their internationalization—only partially answers the questions raised by relativism. Simply asserting that relativism is incompatible with traditional concepts of human rights leaves open the following relativist response: states which do not consider a right compatible with national idiosyncrasies should be allowed to “opt out.” The right would then be enforced as an international human right in all states except in the objecting countries.

The positivist realities of traditional international law doctrine lend some support to this relativist position. Indeed, contrary to the assertions of some commentators, certain aspects of international treaty law and, to a lesser extent, customary law appear to tacitly endorse the relativist perspective. Under the current international legal structure, the existence of a legal obligation is determined primarily by state consent and widespread consensus among equal sovereigns.

To the extent that the international community lacks consensus—
donesia, and Brazil). Many other specific, “single issue” human rights instruments—such as the conventions against genocide, torture, racial discrimination, and apartheid, as well as multilateral treaties regarding the rights of women, children, and minorities—have been created under the aegis of the United Nations. There are currently over 65 UN instruments which purport to create international standards relating to human rights. See Report On Implementation, supra note 50, para. 22.

74 See, e.g., 32 U.N. GAOR C.3 (43rd mtg.), supra note 14, at 11-13; B. Shen, C. Wang & Z. Li, supra note 14, at 13-17; see also Y. Khushalani, supra note 3, at 331-34; Western Construct, supra note 3, at 4-14; Anthropocentric Theory, supra note 14, at 479, 481, 501.

75 See, e.g., F. Tesón, supra note 2, at 875-84.

sus over the status of a putative human right or a particular state refuses to recognize the right either by treaty or as a part of customary state practice, the right is not internationally enforceable at least against the objecting state.\(^7\) Were a state to argue that it is not required to comply with any right to which it has not assented, its claim would, as a general matter, be unassailable in terms of treaty law; it is axiomatic that no state may be bound to treaty obligations it has not voluntarily accepted.\(^8\) Moreover, liberal use of reservations to multilateral treaties has, in practice, arguably followed the relativistic position, as states have extensively "opted out" of rights viewed as inconsistent with national conditions.\(^9\)

A similar situation exists where a state has not expressly bound itself to recognize a particular right by international

\(^7\) See, e.g., Handbook, supra note 1, at 8. The prerequisite of consent arguably implies that when a state accepts a right in its abstract form, the state must also approve of its specific content and interpretive meaning. See infra notes 80-81, 104-23 and accompanying text; see also A. Pollis, supra note 1, at 2-3.


\(^9\) An examination of the reservations, declarations, and understandings registered by parties to the CPRC amply demonstrates this point. As of 1988, at least 25 parties to the CPRC had filed substantive reservations to its provisions. Of its 26 articles recognizing substantive rights (with over 80 specific component parts), at least 12 articles or their subparts have been declared inapplicable by some parties, and approximately 11 of the articles have been adopted only insofar as they are construed consistently with existing domestic law. Similarly, at least 13 articles or their subparts have been qualified by restrictive declarations or understandings. Only articles 5-7, 16, 18, and 26 appear not to have been subjected to at least one substantive reservation, declaration, or understanding. See International Human Rights Instruments, supra note 73, §§ 170.15-.33.

The U.S. executive branch also appears to have endorsed wholeheartedly this relativistic approach. In its recommendations to the Senate regarding human rights treaties currently awaiting the Senate's advice and consent, the President urged the Senate to make a reservation to any provision which is even remotely inconsistent with domestic law. In his letter of transmittal to the Senate, which accompanied his submission of the CPRC, President Carter stated that "[w]herever a provision is in conflict with United States law, a reservation, understanding or declaration has been recommended." Letter of transmittal to the Senate accompanying the CPRC and ESCRC, quoted in M. Nash, Contemporary Practice of the United States Relating to International Law, 72 Am. J. Int'l L. 620 (1978). See generally id. at 620-31.

It is equally likely, however, that this extensive use of reservations reflects the difficulties of securing Senate consent more than any conscious adoption of a relativist perspective.
agreement, but the right has attained the status of customary international law. Orthodox doctrine holds that although a state need not expressly consent to a customary norm in order to be bound by it,\textsuperscript{80} it may exempt itself by objecting to the norm during its formation and persistently thereafter.\textsuperscript{81} This "persistent objector rule" would at least theoretically support the relativist claim that states may "opt out" of rights.

These positivist international law arguments supporting the relativist position are, however, neither entirely accurate nor persuasive. First, the practice of states in human rights law appears to contradict the traditional doctrine. The international community, for example, has ignored the persistent objector rule to such an extent that one can reasonably question its validity in human rights law.\textsuperscript{82} Likewise, the United Nations and individual states have often condemned and, in some cases, even sanctioned alleged human rights abuses occurring in states which have not bound themselves to respect such rights other than by adopting the inchoate obligations of the UN Charter and by approving the non-binding Universal Declaration.\textsuperscript{83} Although perhaps legally


tenuous under traditional doctrine, such scrutiny is implicitly endorsed by the promotional aspect of each state's UN Charter obligations to undertake joint and singular efforts to promote human rights standards in cooperation with the United Nations. Indeed, many states objecting to international criticism of domestic policies have themselves participated in such scrutiny when it furthered their political interests.

Second, in terms of customary international law, the "opt-out" relativist position appears to be largely academic because virtually all states, except South Africa, have manifested agreement with the short list of human rights that have clearly attained such status. For example, no state has claimed an exemption from the customary law prohibitions of slavery, torture, genocide, and summary (extrajudicial) execution. There is also persuasive evidence that nearly all countries, including developing and socialist countries, have endorsed, at least on a programmatic level, most of the other current human rights in their abstract forms.

Third, a strong argument can be made that human rights are


84 U.N. CHARTER arts. 55, 56. Although some states still maintain that such scrutiny violates the principle of self-determination and article 2(7)'s injunction against interference in "the essentially domestic" affairs of member states, an overwhelming scholarly consensus endorses this result as permissible under international law. See, e.g., Domestic Jurisdiction, supra note 51, at 25-28; F. Tesón, supra note 2, at 879-84.


86 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987), for example, lists only prohibitions against slavery, torture, genocide, prolonged arbitrary detention, summary execution, apartheid, and a consistent pattern of gross abuses as having attained the status of customary international law. Some commentators, however, argue that the entire Universal Declaration has now attained the status of customary law. See, e.g., J. Humphrey, supra note 46, at 30-36; see also E. Schwelb, The Influence of the Universal Declaration of Human Rights on International Law and National Law, 53 Proc. Am. Soc'y Int'l L. 217-29 (1959); L. Sohn, supra note 11, 16-17 (1982).

87 See, e.g., Banjul Charter on Human and Peoples' Rights, supra note 50; American Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S. Off. Rec. OEA/Ser. L/V/II. 50, doc. 21, rev. 2 (entered into force July 18, 1978), 9 I.L.M. 673 (1970); P. Alston, supra note 12, at 62-63; J. Humphrey, supra note 46, at 29-30, 34-36; E. Schwelb, supra note 86, at 217; see also Human Rights Idea, supra note 15, at 26-27; S. Leng, supra note 85, at 90-96; A. Nathan, Political Rights in Chinese Constitutions, in China, supra note 15, at 77-81; J. Seymour, supra note 37, at 75; E. Zvobgo, supra note 3, at 96. Despite this evidence, troubling exceptions remain. Most notable are South Africa's adherence to apartheid and the status of women in Islamic states. Other examples include the right to change religion (e.g., in Islamic societies), the right to freely choose one's spouse (e.g., within cultural groups in India and Bangladesh), and the right to freely leave one's country (e.g., in the PRC and North Korea). See supra note 31 and accompanying text.
essential to humanity, whether or not they are recognized as such by any government.\footnote{Such arguments are closely tied to natural law concepts and thus reflect a strongly anti-positivist view of human rights. See, e.g., R. Falk, supra note 53, at 42-49, 51-52, 190-201; H. Lauterpacht, supra note 54, at 73-80, 91-93, 111-120; L. Henkin, supra note 44, at 19-23, 27-30 (discerning ties between natural law and the "higher positive" law of human rights); see also L. Henkin, International Human Rights and Rights in the United States, in 1 Human Rights in International Law, supra note 6, at 25.}

Even assuming that, in the positive law sense, a state is not bound by a norm to which it objects, the question remains whether the international community should nevertheless condemn that state’s non-compliance. If states may simply “opt-out” of rights otherwise universally accepted as essential to human dignity, then the basic enterprise simply loses much of its rationale and motivating force. Indeed, the very concept of joint international effort to promote certain human values and interests through international law presumes that some states may fail to endorse or implement a right in violation of the global collective judgment. Thus, the international community should strongly resist the relativist viewpoint as it relates to the basic list of abstract human rights.

However, the essence and power of the relativist insight is clearly not limited to the objections of a few states to certain abstract rights. Rather, on close analysis, it appears that the most significant relativist claims concern the specific content and interpretive meaning of rights and reflect a conception of rights as a social institution quite different from traditional Western, liberal models. The tension between relativism and universalism, as set forth below, is most pronounced not at the level of consensus over general, abstract norms, but rather at the more specific level of what those norms actually require of governments.

IV. Determining the Meaning of Rights — Relativism at the Level of the Specific Content and the Interpretive Meaning of Rights

An ideal catalogue of abstract rights would reflect a consensus regarding the fundamental human values that should be promoted and protected, as well as agreement over the specific content, interpretive meaning, and, to a lesser extent, application of these rights.\footnote{Many authors and international institutions believe (perhaps based upon the widespread acceptance of the Universal Declaration) that the interpretive meaning and specific content of human rights is cross-cultural and self-evident. Indeed, writers commonly address human rights issues in terms of state compliance with rights, particularly regarding the provisions of the ESCRC and the CPRC. Cornelius Murphy points out} Relativists, in essence, deny that this “ideal
model" is either possible or good. Rather, they suggest that the specific content depends upon the cultural, political, and social characteristics of each country. Relativism makes its most plausible and significant claims when it addresses the meaning of rights as expressed in their specific content, interpretation, and application.

A. The Argument for Relativism

Three related assertions justify the relativist claim that national (or local) conditions determine the specific content and interpretive meaning of rights. First, the actual shared understanding between nations over human rights norms exists only at the level of abstract rights, the meaning of which is necessarily indeterminate. Second, interpretation of these rights legitimately varies among nations, depending upon their cultural, social, and political conditions. Third, adherence to these abstract human rights can be satisfied by diverse interpretations of their specific content and application. The conclusion which follows from these assertions is that the international community must allow states to interpret rights in ways consistent with their particular national conditions. Each of these assertions has considerable plausibility.

Whatever degree of consensus presently exists over the basic catalogue of rights, it is built primarily upon generality and flexible abstractions. The more general and abstract a standard is, the greater acceptance it will generally receive among diverse states. Indeed, one can argue that some states consent to abstract expressions of rights essentially because their generality will allow for widely differing interpretations of what they mean and require. Moreover, human rights lack a commonly shared
philosophical foundation upon which to promote a uniform interpretation of rights within the international community. Consequently, human rights have suffered from the paradox of being either so general that states interpret the rights in widely divergent and inconsistent ways or too specific to gain widespread acceptance. The international system thus exhibits a significant degree of vagueness and indeterminacy regarding the specific meaning of its abstract values.

Further, abstract rights may legitimately mean and require different things in diverse cultural settings. Each country's cultural and political heritage, as well as the vagaries of language itself, fundamentally shape the meaning of abstract rights, such as political participation, due process, and equal protection. For example, while the PRC and the United States agree that the full realization of human potential requires the rights to work and to participate in the government, the two nations differ drastically on what those general concepts actually signify and require. These differences may be traced, at least in part, to fundamentally divergent cultural, social, and political heritages and conceptions of human society.

The third proposition which supports the relativist position is that, at least theoretically, more than one interpretation of the specific content and meaning of some rights may satisfy the shared values that they embody. Clearly, not all interpretations of a right will genuinely reflect the internationally shared value it ostensibly represents. Similarly, the meaning and content of

ESCRC and CPRC. See International Human Rights Instruments, supra note 73, §§ 170.42, 180.18, 440.5; see also supra notes 42, 72-73.

92 The various posited theories of human rights are extremely diverse. See supra notes 55-63 and accompanying text; see generally J. Shestack, supra note 6, at 69-101; Anthropocentric Theory, supra note 14, at 482-95.

93 See, e.g., D. Forsythe, supra note 90, at 31-38, 180; C. Murphy, supra note 14, at 435; A. Pollis, supra note 1, at 5-4.

94 D. Forsythe, supra note 90, at 39; J. Donnelly, supra note 2, at 409-10; see also J. Maki, General Principles of Human Rights Law Recognized by All Nations: Freedom from Arbitrary Arrest and Detention, 10 Cal. W. Int'l L.J. 272, 283-89 (1980); N. Pollis, supra note 14, at 93-95.

95 See Multicultural World, supra note 8, at 5-4, 14-16, 27-29, 34-49, 161-72; E. Hatch, supra note 2, ch. 2; Law, Human Rights, and Culture, supra note 25, at 26-30; R. Panikkar, supra note 25, at 74-83, 89-94; see also N. Pollis, supra note 14, at 93, 93-96.

96 See infra text accompanying notes 143-64; C. Joyner & J. Detling, supra note 2, at 279-80, 283-85 (discussing the incommensurability of legal concepts resulting from divergent linguistic and culturally based understandings of terminology); see also Multicultural World, supra note 8, at 14 (ideas are "not transferable in their authenticity"); R. Panikkar, supra note 25, at 78-79, 93-94.

97 See L. Henkin, supra note 1, at 24-27; F. Tesón, supra note 2, at 874.
some prohibitions, such as torture and summary execution, do not seem subject to culturally or politically based variations.\textsuperscript{98} Yet, despite these caveats, the experience of the diverse municipal rights systems supports the proposition that abstract human rights values may be satisfied in diverse ways. American jurisprudence regarding the content and meaning of abstract rights, such as equal protection and free speech, has changed dramatically over the last one hundred years, and its modern incarnation varies in significant ways from the interpretations given those same concepts in other well-developed legal systems.\textsuperscript{99} The complex content of that comparative jurisprudence reflects the inherent difficulties in giving abstract rights uniformly understood, cross-cultural content. In light of this wide variation in the specific content and interpretive meaning of rights among domestic systems, one could, for example, reasonably claim that many procedural systems might satisfy the basic human values reflected in the right to due process.\textsuperscript{100}

In addition, the international human rights system itself arguably reflects these relativist assertions to a significant degree. Most widely accepted human rights instruments, and especially the Universal Declaration, set forth rights in general and abstract terms.\textsuperscript{101} Even the more specific major multilateral treaties require states only to implement general standards through their domestic laws, giving almost no specific guidance as to what those rights require.\textsuperscript{102} Indeed, the international human rights system is sufficiently bound to the concepts of state sovereignty, consent, and independent national implementation of human

\textsuperscript{98} See infra notes 129, 141 and accompanying text.


\textsuperscript{100} To some extent, the traditional international rules regarding state responsibility and minimum treatment of aliens reflect a recognition of this diversity. The international community clearly expects and tolerates variations in the exact protection provided by the subject state. See H. Steiner \& D. Vagts, supra note 99, at 408-22. Even efforts to provide minimum international standards have often been disputed by nations, especially those in Latin America, which espouse a national treatment standard. See \textit{id.} at 553-60.

\textsuperscript{101} See D. Forsythe, supra note 90, at 31-34, 180; J. Humphrey, supra note 46, at 64-65; C. Murphy, supra note 14, at 433-35. Because of such variation, these abstract expressions arguably do not represent shared values in any meaningful way. See infra text accompanying notes 140-64.

\textsuperscript{102} But see infra notes 110-22 and accompanying text. Forsythe notes that the travaux préparatoires of the major agreements generally fail to provide any clear guidance as to precise shared meaning. D. Forsythe, supra note 90, at 32; see also J. Morsink, supra note 64, passim (analyzing the travaux préparatoires of the Universal Declaration).
rights standards as to allow for significant variations in the content and meaning of rights. The system thus at least approximates a relativistic result. The nature of any state’s human rights obligation, in terms of the content and interpretive meaning of rights, is determined in part by whether that obligation stems from a conventional or customary source of international law. A close look at the nature of current human rights obligations reveals that international law not only fails to provide any clear response to the relativistic perspective, but also implicitly endorses a limited relativist framework.

1. Multilateral Treaty Obligations

In terms of conventional law, the language of a treaty, as the best evidence of the parties’ intent, largely determines each state’s international obligation. In the case of multilateral human rights treaties, however, precise intent is difficult to determine. Such treaties typically use vague language both in describing each state’s obligation and in giving specific meaning and content to the rights protected. In the absence of precise language, the more than 160 potential state parties may embrace differing interpretations of both the precise obligations created and the exact content and meaning of the norms adopted.

Multilateral treaties often seem to encourage relativist interpretations. The UN Charter sets forth fundamental human rights treaty obligations in articles 55 and 56, but these obligations remain largely inchoate. Although the Charter requires states to promote “universal respect for and observance of” human rights, it never defines the rights to be protected. The Charter

103 See F. Tesón, supra note 2, at 75-84; see also L. Henkin, supra note 1, at 25, 31. Professor Tesón suggests that since neither current treaties nor international law generally provide express authorization for a state to interpret human rights standards in accordance with its own cultural, political, or social conditions, it therefore is barred from doing so. This argument, however, seems to approach the issue from the wrong direction. Since state sovereignty, consent, and self-determination are the paramount features of the current international order, it is simply not enough to assert that no express authorization exists. Rather, we must ask whether either conventional or customary international law clearly prohibits a state’s intended action or interpretation of its obligations. See S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 18 (Judgment of Sept. 7) (“[r]estrictions upon the independence of States cannot . . . be presumed”).

104 Similar to contract law in this sense, no international law rules per se prohibit states from adopting a relativistic framework for obligations created under multilateral human rights treaties. It is theoretically an issue for the parties to determine.


106 Many have suggested that the Universal Declaration provides content to the gen-
also requires member states to take joint and separate “action” in cooperation with the United Nations in order to fulfill this obligation. Yet, while joint action and cooperation may strongly imply some form of common understanding about the human rights standards to be applied, the language itself does not indicate that states must agree over the specific content or meaning of rights.

Although the CPRC and ESCRC set forth the specific content of some of these rights, the nature of state obligations under both agreements tacitly supports a relativist framework for their interpretation. Both agreements essentially oblige states only to take measures needed to achieve the desired result. For example, article 2 of the CPRC requires only that state parties “ensure” that “all individuals” enjoy the rights recognized by undertaking “such legislative or other measures as may be necessary to give [them] effect . . . .” The ESCRC similarly specifies that state parties “take steps . . . to achiev[e] progressively . . . the rights recognized . . . by all appropriate means, including . . . legislative measures.” Under these formulations, the treaties leave each state to determine, in the first instance, what the rights mean and require. Thus, the treaties delegate actual enforcement of the rights almost exclusively to the parties’ municipal legal systems. Since enforcement and implementation necessar-


108 CPRC, supra note 42, art. 2.

109 ESCRC, supra note 10, art. 2. Both the CPRC and ESCRC explicitly recognize that states may place certain limitations on the rights protected. The CPRC, for example, provides for derogations in times of national emergency, although these exceptions are strictly limited to those required by the exigency. CPRC, supra note 42, art. 4. The ESCRC similarly allows a state to limit rights, but “only in so far as . . . compatible with the nature of these rights and solely for purposes of promoting the general welfare in a democratic society.” ESCRC, supra note 10, art. 4. A number of the rights also contain similar concessions to public policy based-restrictions, which are left to the discretion of the state. See, e.g., CPRC, supra note 42, arts. 19(3), 21, 22(2) (freedoms of speech, assembly, and association).
ily involve interpretation of meaning and content, this reliance on the various domestic legal systems allows for considerable interpretive variation. From a relativist perspective, one could argue that current international treaties do not bind a party to anything more than substantial compliance with the general standards set forth in the treaty as that party interprets them.

This argument, however, merely begs the question of state intent. As is true with any international agreement, human rights instruments presume to reflect some common intent and consensus regarding what their obligations entail. Presumably, certain interpretations of rights would effectively vitiate the parties' common understanding of what such rights mean and require. Thus, just as with any international agreement, the parties are fully within their rights to scrutinize the compliance of other parties and to seek remedies for perceived violations. Traditional doctrines regarding the nature of treaty obligations, such as *pacta sunt servanda*, and restrictions on appeals to domestic law as a basis for avoiding treaty obligations, would seem to support this observation. Consistent international efforts to implement and enforce human rights accords also imply that parties believe that they agree to a certain extent about the content of their obligations and the existence of uniform standards by which to measure compliance.

The international enforcement and monitoring mechanisms created by multilateral treaties and pursuant to the UN Charter, although clearly rudimentary, also seem to support a restrictive view of state discretion in interpreting human rights. The CPRC, for example, requires each state to submit periodic reports to a central monitoring body, the Human Rights Committee, on measures taken to "give effect" to the rights being

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110 See Domestic Jurisdiction, supra note 51, at 25-27, 35; L. Henkin, supra note 1, at 5-6, 14-17, 24-25.


113 See Domestic Jurisdiction, supra note 51, at 30-32; L. Henkin, supra note 1, at 25-26, 31.

monitored. The Human Rights Committee then reviews the state’s compliance and gives its opinion on the state’s progress and the substantive requirements of the various rights. Similar arrangements have been created under other multilateral accords, including the ESCRC. In most cases, the treaty-monitoring body may criticize, make suggestions in the form of “general comments,” and report its evaluation of the state’s progress to the international community. Although this review and monitoring process does not eliminate state discretion, the process itself demonstrates a strong international drive towards the development of uniform, minimum standards by which to measure compliance with the specific content of rights.

An analogous process for developing the specific content and interpretive meaning of rights also exists under UN Charter-based mechanisms, regional organizations, and interna-

115 CPRC, supra note 42, art. 40, para. 1.


117 Under the ESCRC, state parties must submit periodic reports to ECOSOC (through the Secretary General) on their “progress . . . in achieving” the rights promoted. ESCRC, supra note 10, art. 16. ECOSOC, which has recently appointed a special working group, may then distribute these reports to the CHR. See id. art. 18, 19. See generally P. Alston, Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights, 9 HUM. RTS. Q. 332 (1987). The CHR may in turn make comments and submit reports to the General Assembly from the information received. ESCRC, supra note 10, art. 21. See generally P. Alston & B. Simma, Second Session of the UN Committee on Economic, Social and Cultural Rights, 82 AM. J. INT’L L. 603 (1988) (Current Development) (detailing improvements and problems with the ESCRC reporting system).


tional, intercountry critiques. While none of these processes produces authoritative interpretations of rights or binding obligations that directly refute the relativistic viewpoint, they indicate an intention by the international community to maintain uniform standards through its monitoring and interpreting activities.

Strong practical reasons also support significant international limitations on state discretion to interpret the content of human rights obligations. To the degree that each state controls the meaning and requirements of rights, human rights progressively lose any common, central core of meaning, thereby eviscerating the purposes of internationalization. While domestic implementation and enforcement of rights implies that each state has some discretion to interpret rights consistently with national traditions and circumstances, these treaties also oblige governments to do so in ways which preserve the core values reflected in those rights.

The tension between international supervision of human rights and the principle of state sovereignty also strongly contrib-
utes to the reliance on domestic enforcement. Indeed, to some extent, the abdication of implementation and enforcement to the various domestic legal systems merely indicates the incapacity of the current international legal order effectively to undertake that task itself. Thus, adherence to a uniform, universal specific content of rights rather than a relativistic interpretation may more accurately reflect the obligations intended by current multilateral treaties.

2. Customary International Law Obligations

For states which have failed to ratify multilateral human rights instruments, international human rights obligations rest primarily on the existence of customary international law. Despite Herculean promotional efforts by some scholars, the number of viable customary norms remains limited. By virtue of the persistent objector rule, customary norms ultimately depend upon state consent, although to a lesser degree than with treaty obligations. From a relativist perspective, state consent should also extend to interpretations of the meaning and content of such norms. The persistent objector rule, however, provides only limited support to the relativist claims at this level. First, in order to achieve this exemption, the state must not only consistently object to the norm, but must also do so from the norm’s inception and during its evolution. This requirement would present a practical problem for any objecting state when interpreting the specific content and meaning of a customary law norm. Most interpretations of the specific content of customary norms occur only when applied to a particular situation. In most cases, objections under those circumstances could not be viewed as exceptions under the persistent objector rule without completely eviscerating the norm itself, since states could simply avoid any

123 See, e.g., D. Forsythe, supra note 90, at 39-40; E. Lane, Demanding Human Rights: A Change in the World Legal Order, 6 Hofstra L. Rev. 269, 270-72, 293 (1978); A. Pollis, supra note 1, at 1-3.
124 All UN member states also have an obligation to respect and promote human rights under articles 55 and 56 of the UN Charter. See supra notes 105-06 and accompanying text.
126 See supra text accompanying notes 80-81. Charney notes that many scholars, even while accepting the persistent objector rule, reject a purely consent-based theory of customary international law obligations. See J. Charney, supra note 76, at 1-6.
127 J. Charney, supra note 76, at 2-3; T. Stein, supra note 80, at 458; see also Restatement (Revised) of Foreign Relations § 102 comment d (Tent. Draft No. 6, 1985).
application of the norm over which they disagree. Thus, unless the application of the norm effectively creates a new obligation that was not contemplated by the international community as a part of the original norm, the state would essentially have to anticipate all possible undesired interpretations in order to claim persistent objector status.

Unlike many treaty-based human rights norms, customary norms, such as the prohibitions against slavery, torture, genocide, apartheid, and summary execution, have fairly clear and discernible cores of meaning, not easily susceptible to social, cultural, or political variations. This does not mean that disputes over the interpretation and specific content of such norms never arise, but rather that governments find it difficult to justify divergent interpretations or excuse alleged violations. In the limited instances in which fora have applied customary international law norms, little evidence indicates that a relativistic view of those obligations has been or could be adopted.

The above discussion indicates that international human rights law appears to maintain that human rights norms are universal and cross-cultural, while at the same time embracing divergent domestic interpretations of what those rights specifically mean and require. While limited international oversight and state-to-state posturing over the “proper” interpretation of rights may temper the degree of resulting variation, reliance on domestic implementation ultimately seems to build a significant degree of relativity into the current international human rights system, at least in terms of result.

This facet of international human rights law perhaps reflects the reality that a certain degree of cultural and political relativity is necessary, as a practical matter, to achieve human rights values in a diverse, pluralistic world. Governments must be willing to

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129 For example, disputes commonly arise regarding whether a particular act or omission constitutes torture, slavery, or governmental complicity in disappearances. See, e.g., Velasquez Rodriguez Case, 4 Inter-Am. Ct. H.R. (ser. C) (1988); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978). Few states, however, will attempt to justify a particular interpretation in such disputes by citing special social, cultural, or ideological circumstances. But see Tyrer Case, 26 Eur. Ct. H.R. (ser. A) (1978), at 17-19 (rejecting the United Kingdom’s argument that corporal punishment on the Isle of Man was justified by the community’s special social traditions). States will inevitably more often deny the factual basis for such alleged violations or plead special exigent circumstances. See P. Alston, supra note 11, at 62.

130 This observation leaves aside the question of whether cultural relativity is benefi-
comply with human rights standards to fulfill the human values that they reflect. Such fulfillment requires the society not only to believe in the values being promoted, but also to consider the specific content and interpretive meaning of those values to be appropriate to the cultural, political, and social conditions of that society. Because of the world’s great diversity it seems improbable, if not impossible, that a complete set of uniform and detailed codes of conduct could (or should) ever be generated or uniformly applied. As detail increases, the possibility of consensus over what rights precisely entail and require becomes too remote. Thus, several factors, such as the tendency for common understanding of rights to be limited to abstract expressions, the inevitable and varied influence of cultural and political conceptions on the meaning of rights, and the potential myriad of ways to satisfy rights all suggest that some degree of relativity is not only a practical reality within the diverse international legal order, but also is necessary for the advancement of human rights.

To recognize that a degree of relativity in the specific content and interpretive meaning of rights is inherent to the international human rights system does not, however, resolve the tension between universality and relativism, nor does it identify whether that conflict may be irreconcilable. It merely demonstrates that the current international regime simultaneously embraces both seemingly contradictory characteristics of universal standards and the diverse or relative interpretations of how to fulfill such standards.

B. The Irreducible Tension Between Relativity and Universality Over the Meaning of Rights: The Limitations of Relativism

As mentioned above, there are some strong practical and legal considerations which support some degree of relativism in international human rights. However, there are two related sets of contrary reasons which indicate that the specific content and interpretive meaning of general, abstract rights should not be left to state discretion and thereby left subject to national social in the anthropological, social, or normative senses. There are many plausible reasons to believe that a significant degree of pluralism is healthy and necessary. Some scholars have also persuasively argued that pluralism is not merely healthy but necessary to any successful international human rights system. See, e.g., R. Panikkar, supra note 25; J. Gobah, supra note 14, at 310-11, 325-31. However, the value of pluralism is not necessarily evidence that a significant degree of relativism is equally valuable given the specific context and purposes of international human rights. See infra text accompanying notes 131-39.
idiosyncracies.\textsuperscript{131}  

The first set of reasons consists of a series of adverse consequences which result from allowing states significant discretion in determining the specific content and interpretive meaning of rights. To the extent that the specific content and interpretive meaning of an abstract right is relative to national conditions, the international community abandons the basis for its collective, critical scrutiny and concerted efforts to promote the realization of that right. Relativism on this level both eliminates the critical content of human rights and obligates the international community to maintain a degree of indifference towards state practices which may actually render the right meaningless.\textsuperscript{132} Furthermore, it makes legitimate, informed judgments about states' human rights performance—judgments critical to the realization of rights and the purposes which justify their internationalization—nearly impossible, since each state will in fact have differing obligations depending upon its particular national conditions.

In addition, to the extent that relativism leaves the precise content and meaning of human rights to state discretion, the rights have a strong tendency simply to mimic preexisting domestic law and practice.\textsuperscript{133} In this sense, it is an inherently con-

\textsuperscript{131} Based on the idea that the requirements for human dignity are culturally variable, Jack Donnelly argues that a "weak" degree of relativism should be recognized regarding the "form" of rights. J. Donnelly, supra note 2, at 407-09, 417; see supra note 65. Although it is not entirely clear what Donnelly means by "form" or who would determine these issues, he is apparently referring to what I have termed the specific content of rights. J. Donnelly, supra note 2, at 407-09, 417. If this is so, the analysis presented here disagrees with his conclusions, for this article argues that substantial agreement over the specific content of rights is essential in order to render rights meaningful. See infra text accompanying notes 140-66. The extent of this disagreement, however, appears to depend on which abstract right one considers and on the degree of specificity one includes in the terms "specific content" and "form."\textsuperscript{132} See infra text accompanying notes 140-64.\textsuperscript{133} Some authors have suggested that state compliance with human rights standards should be judged only in terms of the specific promises that the state makes to its own citizens in light of prevailing social and cultural conditions. See, e.g., H. Berman, American and Soviet Perspectives on Human Rights, 22 Worldview 15-17 (1979) (suggesting the "criterion of progress" rather than adherence to "rules"); N. Pollis, supra note 14, at 93-97, 103; see also Anthropocentric Theory, supra note 14, at 501. In essence, these authors envision a human rights system in which the international community would do no more than insist that each state "be good" to its citizens by that state's own criteria. This conception of international human rights scrutiny reflects a radical version of relativism, which ultimately allows for state compliance according to each state's own domestic law. It also leads to the anomalous result that a state which promises and gives few rights would fully comply with its human rights obligations. Moreover, since all states, including Pol Pot's Cambodia, presume to "be good" to their citizens, the single operative principle of this conception would result only in the maintenance of the status quo and
servative doctrine. This tendency to preserve the status quo contrasts sharply with the goals of eliminating governmental abuse of human beings and promoting an improvement in the human condition through concerted international effort.\textsuperscript{134}

Finally, a relativistic framework which ultimately allows each state to determine the interpretive meaning and specific content of rights literally leaves the determination of the actual meaning of rights in the hands of the violators. Given that human rights primarily seek to influence and control governments, it seems somewhat imprudent to give each government wide discretion to define for itself the boundaries of acceptable state behavior and the meaning of essential human rights. Relativism clearly has a tremendous capacity to serve as the rhetorical justification for repressive practices by ruling elites. The fact that relativism is most often supported by repressive regimes whose activities are viewed as inconsistent with prevailing human rights standards by a diverse group of states is ample grounds for a healthy skepticism regarding vague claims of cultural or ideological necessity for deviations from the specific requirements of human rights norms.\textsuperscript{135} The Tiananmen Square massacre on June 4, 1989 in Beijing\textsuperscript{136} and the recent democracy movements in Eastern Europe\textsuperscript{137} demonstrate that government interpretations of human rights often differ greatly from those of its citizens.\textsuperscript{138} To fully

virtually eliminate the benefits of collective international judgments. As a result, the ability of the human rights system to protect human beings from repressive regimes and to promote improved living conditions would largely be lost.

\textsuperscript{134} Rhoda Howard astutely points out that relativism in this sense relies upon the erroneous assumption that cultural and political conditions are themselves neutral and unchanging. R. HOWARD, supra note 7, at 23-25. Just as the state in every society reflects the interests of the ruling elite and economically powerful, so too does culture carry with it elements which advance some interests within the group over others. Indeed, cultural mores, such as those which may define the "appropriate" role for women, dissidents, and minorities, may at times be a fundamental cause of alleged human rights abuses. An over-commitment to the sanctity of traditional cultural mores and practices ignores this problem and the dynamics of modern societies. E. HATCH, supra note 2, ch. 5 (citing the findings of anthropologists which demonstrate that nearly all people exhibit a strong desire for, or openness to, changes in their cultural and social circumstances).

\textsuperscript{135} See R. HOWARD, supra note 7, at 16-17, 23-24 (suggesting that, for this reason, the international community should allow only narrow, empirically demonstrable exceptions).


\textsuperscript{138} In constructing her arguments favoring relativism, Renteln reverses the more obvious implications of this discrepancy. According to Renteln, widespread governmental acceptance of human rights norms at the international level represents only the views of "elites" educated in the West and does not truly represent "native" moral values. A. RENTELN, supra note 2, at 38, 54, 92. Renteln, however, fails to provide any empirical support for her suppositions, nor does she explain why this alleged discrepancy between
endorse state control over the specific content and interpretive meaning of rights would render it difficult (if not impossible) to make reasonable empirical judgments and to separate such rhetoric from legitimate cultural concerns.\textsuperscript{139}

The second set of reasons why the specific content and interpretive meaning of human rights should not be significantly relative or left to state discretion rests upon the assertion that any distinction between agreement over abstract rights and their specific meaning and content is ultimately arbitrary and misleading. Governments can interpret general principles and abstract expressions of rights, such as those contained in the Universal Declaration, in conflicting ways.\textsuperscript{140} Thus, lists of abstract rights and vague expressions of cross-cultural values cannot by themselves meaningfully express human rights. Rather, only the specific content, interpretation and application of a right can determine its meaning. Only by examining states’ actual application of rights can one determine whether the international community has achieved a consensus with respect to a particular abstract

“native” moral values and government endorsement of human rights standards does not also apply to Western industrialized countries (whose national representatives are similarly composed of elites). Renteln also fails to identify groups or organizations within a state which she believes may be sufficiently populist to reflect accurately “native” values in the international arena. This failing reveals one of the fundamental problems of a relativistic framework for human rights: determining the appropriate groups by which to establish a society’s human rights values. Government rhetoric often diverges from popular sentiment, and within each society there are usually competing conceptions of morality and justice represented by diverse social groups with often conflicting interests. \textit{See, e.g.}, D. Forsythe, supra note 90, at 181; R. Howard, supra note 7, at 17-33; D. Kennedy, \textit{Form and Substance in Private Law Adjudication}, 89 Harv. L. Rev. 1685 (1976); J. Seymour, supra note 37, at 79-80.

\textsuperscript{139} See, \textit{e.g.}, R. Howard, \textit{Is There an African Concept of Human Rights?}, in FOREIGN POLICY AND HUMAN RIGHTS 15-16 (R. Vincent ed. 1986); M. Huang, \textit{Human Rights in a Revolutionary Society: A Case Study of the PRC}, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES, supra note 3, at 60; \textit{see also} A. Pollis, supra note 1, at 19 (although an extreme relativist, Pollis still recognizes that distinguishing rhetoric from reality is a problem). Renteln argues that empirical, anthropological data should be utilized to generate cross-cultural, universal values as a basis for developing human rights. A. Renteln, supra note 2, at 89-91, 138-41: Rhoda Howard similarly recognizes the need for empirical data, but she would use it for the much narrower purpose of distinguishing rhetoric from well-founded claims of cultural variation. \textit{See, e.g.}, R. Howard, supra note 7, at 16-17, 18, 24, 27-29. Howard suggests that any culturally-based justification for deviation from a human rights norm should be discounted whenever that justification would tend to serve the interests of the ruling elite or the powerful segments of society. \textit{Id.} at 24-29.

\textsuperscript{140} The significance of such indeterminacy in legal standards has long been recognized, even within a well developed systems of rights, such as that existing in the United States. \textit{See} F. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 Colum. L. Rev. 809 (1935); D. Kennedy, \textit{The Structure Of Blackstone’s Commentaries}, 28 Buffalo L. Rev. 209 (1979). This indeterminacy creates an infinitely more complex problem in the culturally and linguistically diverse international setting.
right.\textsuperscript{141}

Given the inevitable conflict which results from interpretive variations of indeterminate standards among diverse states, it remains highly debatable whether broad statements of rights and interests can actually reflect any significant degree of shared understanding about the meaning of rights. The potential variation in the interpretation of abstract rights is so great that one country's seemingly good faith interpretation of a right may result in practices deemed substantially inadequate from the viewpoint of other societies or the entire international community.\textsuperscript{142} Thus, a significant degree of relativism could potentially allow variations in a right, based on national conditions, to swallow up the universal value from which the right supposedly derives.

The divergent interpretations given many human rights in developing, socialist, and Western states reveal this paradox. A comparison of prevailing interpretations of free speech, political participation, and the right to work in the PRC and in industrialized Western nations provides a good example. Based directly (although perhaps not genuinely) upon Chinese cultural, social, and political traditions, the PRC interprets these rights in a way contrary to most Western countries.\textsuperscript{143}

Article 19 of the Universal Declaration provides that "[e]veryone has the right to freedom of opinion and expression;
this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.\textsuperscript{144} Western countries understand this right to guarantee the general freedom of individuals to express political opinions and critiques of government, limited only by those abridgments justified by significant threats to the state or public welfare.\textsuperscript{145}

While the PRC's 1982 Constitution also proclaims a right of free speech, the Chinese interpretation of what the right actually entails differs substantially from the Western interpretation.\textsuperscript{146} Under the Chinese view, the interests of society and the socialist state have primacy over any individual's interest in free expression. Thus, "a person is free to express any opinion... so long as he stands on the side of the people... [But] no one is allowed to air anti-party or anti-socialist views."\textsuperscript{147} Permissible free speech must adhere to the four basic principles: party leadership, socialism, Marxist political thought, and the dictatorship of the proletariat.\textsuperscript{148} The government may, and often has, subjected any speaker who airs disruptive critiques of government policy to criminal prosecution, job persecution, or reeducation through forced labor.\textsuperscript{149} Since the government grants rights to citizens in order to serve society's collective interests, the individual's right to free speech remains limited to ideas which further those ends.\textsuperscript{150} Limitations on individual expression, although far less stringent, also existed within the traditional Confucian value structure, which was based on the ideals of conformity to "orthodox truth," social harmony, and loyalty to group needs.\textsuperscript{151}

\textsuperscript{144} Universal Declaration, \textit{supra} note 1, art. 19.

\textsuperscript{145} Such limitations on the right to free speech are specified by article 19(3) of the CPRC, which provides that the right of free speech carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order... or of public health or morals.

\textsuperscript{146} CPRC, \textit{supra} note 42, art. 19, para. 3.


\textsuperscript{149} See J. Copper, F. Michael & Y. Wu, \textit{supra} note 37, at 77; R. Edwards, \textit{supra} note 38, at 58.

\textsuperscript{150} See \textit{CHINA RIGHTS ANNALS} 20-31 (J. Seymour ed. 1984); M. Huang, \textit{supra} note 139, at 72.

\textsuperscript{151} See S. Leng, \textit{supra} note 85, at 83; A. Nathan, \textit{supra} note 38, at 142.

Influenced by Western culture, individualism, and philosophy, modern Chinese
Discrepancies between the Western and Chinese interpretations of political participation also challenge the very existence of any consensus on the meaning of that abstract right. Political participation under Chinese socialism consists of support for the state and for the policies of the Communist Central Party (CCP), as executed by the National People’s Congress (NPC). In theory, the NPC represents the will of the proletariat in its struggle against class interests. Yet, although citizens may choose their own party representatives (from a prepared list), they cannot directly elect provincial or national representatives. Since the CCP, as vanguard of the proletariat, must lead the way toward transformation of society, the NPC submits absolutely to the dictates of the CCP and its “standing” and “central” committees (whose members are not popularly elected). Thus, the PRC’s socialist conception of the political process and the resulting marginal popular political participation defines and limits the individual’s political rights. These concepts of “democratic centralism,” so vital to political practice and theory in the PRC, remain inadequate in the view of most Western democracies.

Even among economic and social rights, which the entire developing world views as the most important human rights, the various interpretations of the requirements of such rights differ sufficiently to raise serious questions as to whether any agreement about these rights actually exists. For example, article 23 of the Universal Declaration recognizes that “[e]veryone has the right to work, to free choice of employment, to just and

society is no longer a mere reflection of its socialist, nationalist, and Confucian traditions. See, e.g., S. Leng, supra note 85, at 81-82; J. Seymour, supra note 37, at 79-80. Precise empirical information about prevailing Chinese social conditions and cultural attitudes is needed to evaluate deviations from human rights standards based upon claims of divergent cultural conditions. See R. Howard, supra note 7, at 27-29; P. Hountongdji, supra note 4, at 331.


155 See A. Nathan, supra note 38, at 107-08, 122.

156 This political practice is also clearly contrary to rather specific provisions of article 21 of the Universal Declaration, which requires “equal access to public service” and “periodic . . . elections . . . by universal suffrage . . . held by secret vote.” Universal Declaration, supra note 1, art. 21.

157 The PRC, like many other developing states, has often argued that its pursuit of these rights justifies restrictions on its citizens’ political and civil liberties. R. Edwards, supra note 38, at 64, 67. For a comprehensive review of economic, social, and cultural rights in the PRC, see China Rights Annals, supra note 149, at 48-104.
favorable conditions of work and to protection against unemployment" as well as to "equal pay for equal work," "favorable remuneration ensuring . . . an existence worthy of human dignity" and "other means of social protection." The ESCRC and CPRC add to this list the freedom to move residence in pursuit of new work and the freedom to demand better terms from an employer. While the PRC enthusiastically endorses the concept of a right to work, it does not consider any of the freedoms proclaimed in these international agreements to be legitimate individual entitlements, at least under current economic conditions. Similarly, the Chinese would view the United States' interpretation of the right to work as meaningless without a commitment by government to provide training, assistance, and actual employment. The right to work in the United States primarily prohibits government interference with an individual's freedom to exploit private property and enjoy the opportunities of a free market.

The PRC and other nations have adopted similar interpretations of the specific contents of many other rights, including criminal due process, the right to life (death penalty), and education. These examples demonstrate that the specific content, institutional form, interpretation, and application of abstract rights ultimately determine what each right actually means. Nations often disagree so much that their interpretations of rights become essentially incompatible. Therefore, it is completely insufficient to conclude that agreement over the basic general description of human rights renders them universal and

158 Universal Declaration, supra note 1, art. 23.
159 See CRPC, supra note 42, art. 12; ESCRC, supra note 10, art. 8.
160 See J. COPPER, F. MICHAEL & Y. WU, supra note 37, at 57-58; R. Edwards, supra note 38, at 67-69; see also J. Seymour, supra note 37, at 86-87; B. Shen, C. Wang & Z. LI, supra note 14, at 17, 22.
161 See P. Alston & B. Simma, supra note 117, at 614, citing U.N. Doc. A/C.3/42/SR.32, para. 1 (1987) (Statement of U.S. Representative to UN General Assembly Third Committee, repudiating the 1969 Declaration on Social Progress and Development); Human Rights Idea, supra note 15, at 32. Article 6 of the ESCRC also requires "state parties" to provide job training but does not spell out the breadth, detail, or conditions necessary to satisfy this provision. ESCRC, supra note 10, art. 6.
162 See Y. Cheng, supra note 38, at 207; R. Edwards, supra note 38, at 63-66; F. Leung, supra note 38, at 114-15.
164 J. COPPER, F. MICHAEL & Y. WU, supra note 37, at 59-61; R. Edwards, supra note 38, at 71-72.
meaningful if relative national conditions govern their specific content and interpretation.

C. Resolving the Dilemma: The Development and Interpretation of Content Specific Human Rights Standards

The contradiction between specificity and generality, a conflict substantially built into the present international system, lies at the heart of a critical dilemma for international human rights. The more the international community mandates the specific content of abstract rights and assigns their interpretation to international fora, the more concrete and meaningful those rights become to the people they are intended to protect. Yet the more specific human rights requirements become, the more difficult it is to attain the widespread state support needed to render the rights effective. Further, the specific content of rights must ultimately be compatible with a society's cultural, political, and social circumstances in order to be accepted and effectively realized. Therefore, overly detailed standards will not further the realization of human rights values, and at the same time, they may violate cultural autonomy and diversity.

The challenge is to make the content of rights specific enough to render those rights meaningful and universally understood, but not so specific as to eliminate state consent because of legitimate cultural, political, and social differences. The international community should generate only those minimum elements necessary to satisfy the values reflected in each right. The in-
ternational community should regard these minimums as essentially absolute and should, therefore, give little if any weight to contrary cultural or political traditions. These minimum elements should also be detailed enough to constitute the basis for reasoned judgments regarding a state's compliance with international standards.

Such minimums could, for example, take the form of elaborate guidelines, protocols to existing treaties, or new single topic treaties, such as the Convention Against Torture. The specificity of any guidelines should vary depending upon the right involved. Thus, rights involving physical integrity, such as prohibitions against torture, summary execution, and disappearances, could be defined with significant specificity without threatening legitimate concerns for political and cultural diversity.

Other rights, such as free speech, political participation, and educational opportunity, are subject to greater legitimate cultural and political variations. Minimum guidelines for such rights should be less specific to allow for such variations. The international community could, for example, choose to create minimum guidelines for the right to political participation which would require specified rules on universal suffrage and the elimination of age, sex, property, or literacy-based voting barriers. Such guidelines might also create minimum safeguards regarding access to political office, including liberal guidelines on who may run for office and assuring media access for candidates. Variations beyond these minimum guidelines, however, would still be permissible. The critical matter is the development of specific minimum requirements for rights which are capable of preserving "lowest common denominator." See, e.g., J. Donnelly, supra note 56, at 85. Yet elsewhere Donnelly argues that a "weak" degree of relativism is required at the level of specific contents of rights. See J. Donnelly, supra note 2, at 405-07, 417. The practical effect of this suggestion seems to be essentially the same as the "least common denominator" result, for which he criticizes Pollis and Schwab.


These variations themselves would often be controversial. For example, in the area of political participation, the use of "at large" elections versus districting may involve claims of discrimination and dilution of minority voting rights. Yet, that variation on the right to political participation could be justified by important, overriding social, cultural, or political goals. Thus, in such contexts, the international community is faced with the difficult task of creating an appropriate balance between the desire to preserve
ing the underlying values without trampling unnecessarily on states' legitimate cultural and political needs.

The international community may choose from among a variety of plausible alternative sources from which to generate culturally and politically neutral minimum specific contents for rights. One approach would be to rely on the most common specific content given such rights by various states under their domestic constitutions or pursuant to international obligations. However, although this approach may generate useful evidence, there is serious doubt about its practical utility. First, to the extent that this approach involves consideration of specific rules of municipal law, it would utilize the formal promises of various states to their own citizens as a basis for determining the minimum content of international obligations. Yet the interpretation of such domestic promises is to a large extent culturally specific. The PRC, for example, promises a substantial number of rights in its 1982 Constitution, yet such rights remain programmatic and were not intended to be enforced by individuals against the government. Further, those internal promises which might reflect general principles are nearly always made in terms no more specific than current human rights agreements. Thus, this proposal would require a fairly intensive interpretive process in order to arrive at accurate general principles, a capacity which the international system, as currently constituted, clearly lacks.

Another approach would be to generate absolute minimums based upon the judgment and experience of the two regional human rights networks currently in full operation in Europe and the integrity of the right and the need to recognize legitimate cultural and political variations.


172 This idea sets out to discover common practices leading to universal guidelines and is, on that basis, clearly distinguishable from suggestions that human rights norms should vary with and that compliance should be determined by the domestic promises of states. See supra notes 68, 133 and accompanying text. Domestic practices would not determine each state's varying international obligations, but rather they would help to identify by non-controversial means some of the universal minimums by which the compliance of all states could be measured regardless of national circumstances.
the Americas. Although the experience of these regional human rights regimes would prove useful, these systems are arguably of limited utility in defining the universal minimum content of rights because of the general similarities in cultural, political, and social traditions among the countries within their jurisdictions.

A final approach would be to emphasize and continue the United Nations’ attempts to generate specific “single issue” covenants, such as those on torture, genocide, children, and refugees. Under this approach, international fora would concentrate on developing minimum requirements for those human rights least subject to cultural and political variation.

Even absolute minimum requirements must, of course, be interpreted and applied in order actually to achieve meaningful human rights. Assume, for example, that the international community develops and adopts minimum requirements for the right to political participation similar to those mentioned above. States would have to interpret those guidelines and adapt them to their own particular political and cultural conditions. Although the international community may seek to tolerate wide variations under the guidelines in order to render them appropriate to diverse societies, it should not tolerate variations which subvert the right’s underlying values.

In Kenya, for example, the government often asserts that multiple political parties and open candidate access to electoral ballots would result in a resurgence of tribalism and thereby cause violence and disrupt economic development. Assuming that international guidelines on the specific content of political participation existed, the Kenyan government would presumably interpret those guidelines very narrowly. If, however, such interpretations prevented the formation of political organizations and created an oppressive “one-party state” (as now exists in Kenya), the underlying values reflected in the right of political participation would be subverted entirely. The international community could not tolerate such a great interpretive variation without destroying the underlying right and the values it protects.

Thus, in order to ensure the integrity of rights, the international community should delegate significant authority to appropriate international fora to monitor closely the state interpretations of the minimum guidelines. Similarly, interstate scrutiny within the international community would help to en-
sure the compatibility of these interpretive variations with the essential, underlying values reflected in the rights.

An important criterion in such monitoring is empirical verification. Interpretive variations based upon cultural or ideological justifications should be reasonably related to empirically verifiable conditions. A requirement for such verification would provide a necessary check against government abuse of human rights under the rhetoric of preserving divergent cultural and political traditions and would make international interpretations as culturally sensitive and accurate as possible.

The development of the essential specific content of rights and emphasis on international scrutiny of interpretive variations does not fully account for the relativist argument that political tolerance and cultural sensitivity are critically needed for a successful international human rights system.\textsuperscript{173} The international bodies which implement specific content minimums and monitor state interpretive variations must also develop mediating criteria which avoid ethnocentric judgment, tolerate legitimate diversity, and yet preserve the values protected by the rights. The development of such criteria is a daunting jurisprudential problem well beyond the scope of this article. One possibility, however, is the development of legal doctrines similar to the "margin of appreciation," used in the European human rights system, but refined to incorporate criteria which more specifically address the need for cultural and political sensitivity.\textsuperscript{174}

A related approach would be for the international community to place greater reliance on regional promotion and monitoring of human rights.\textsuperscript{175} Although this solution might negate a degree of universality, a more regional approach to human rights is potentially one of the most effective means of accommodating the relativist insight. Accepted regional organizations could make interpretations more appropriate to the relevant cultural traditions of the region. This approach would have the advantage of generating specific content guidelines and monitoring state interpretative variations within the most politically and culturally compatible forum currently available to diverse states. Such standards, being subject to the input of states with relatively similar cultural, economic, and political interests, would appear

\textsuperscript{173} See supra text accompanying note 130.

\textsuperscript{174} See supra note 120 and accompanying text.

\textsuperscript{175} See V. Mani, Regional Approaches to the Implementation of Human Rights, 21 Indian Int'L L.J. 96, 113-15 (1981); see also F. Tesón, supra note 2, at 875.
to increase the potential for realistic minimum requirements and for meaningful state acceptance.

Although helpful, none of these alternatives addresses the most important difficulty with establishing and applying culturally sensitive, minimum specific content standards: no authoritative body institutionally competent to implement, monitor, and interpret such minimum standards exists on the global level. Unlike national legal systems, the international community has no authoritative mechanism for dealing with disputes over culturally sensitive interpretations of the meaning of rights. While UN bodies, such as the Commission on Human Rights and its various sub-entities, could conceivably fill this role, the current politicized nature of these institutions seems to preclude effective development and interpretation of culturally sensitive minimum standards. Until the international community develops such mechanisms, it seems unlikely that the hope of generating uniform specific content for abstract rights in the form of culturally sensitive, minimum elements can be realized. The world must set as its most important goal the strengthening of existing international interpretative and monitoring mechanisms.

176 See D. Forsythe, supra note 90, at 31-32 (recognizing that the most serious problem with the current vague, flexible human rights standards is the “underdeveloped” international interpretation process); see also J. Watson, supra note 76. But see F. Tesón, supra note 2, at 875-77.

177 See, e.g., H. Tolley, Jr., supra note 12, at 87-96.