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Cultural Relativism, Economic Development and International Human Rights in the Asian Context

Richard Klein*

I. Introduction

The Universal Declaration of Human Rights was adopted after the Second World War when the world had become aware of the horrors that Nazi Germany had inflicted on the Jewish people that had lived in German-occupied Europe.¹ Many countries reached the conclusion that it would no longer be acceptable under international law for any country to do whatever

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¹ See, e.g., Berta E. Hernandez-Truyol, *Sex, Culture, and Rights: A Re/conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 611 (1997) ("Conventional wisdom places the watershed, transforming and defining event in modern human rights law at the world community's reaction to the tragedy of the Holocaust.") See also UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217A, pmbl., U.N. DOC. A/180 (1948) ("Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . ."). The Preamble of the United Nations Charter makes it immediately clear that the furtherance of human rights was to be a primary objective of the new world order: "We The Peoples of the United Nations determined. . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . do hereby establish an international organization to be known as the United Nations." U.N. CHARTER pmbl. (1945), *reprinted in* CENTER FOR THE STUDY OF HUMAN RIGHTS, COLUMBIA UNIVERSITY, TWENTY FOUR HUMAN RIGHTS DOCUMENTS at 1 (1992). The Charter, however, goes no farther--there is no enumeration of what were to be considered "human rights"; such elaboration was to be the job of the Universal Declaration.

it chose to within its own borders.² The Universal Declaration made it clear that the international community expects countries to act respectfully to all its citizens, and abuse of individuals by their governments would, under most circumstances, not be tolerated.³

The Declaration was conceived of as affording protections and rights that apply to all wherever one might have been born--someone residing in China has no less of a right to certain basic

² See UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217A, art. 2, U.N. DOC. A/180 (1948) (“[N]o distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”). Prior to the Declaration, international law recognized one exception to the concept of territorial sovereignty: the treatment of a national of one country while in another state was deemed to be the appropriate concern of the individual’s home country.

³ The Universal Declaration of Human Rights provides that “[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society;” and “[n]othing in this Declaration may be interpreted as implying for any State . . . any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth [in this Declaration].” UNIVERSAL DECLARATION OF HUMAN RIGHTS, *Id.* arts. 29(2) & 30. The Universal Declaration contains a far broader conception of human rights than the standards invoked during the Nuremberg Trials. See Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT’L L. 689, 704-05 (1998). The Nuremberg Charter and trials focused on “crimes against humanity”, a phrase which formed the basis for the development of the modern conception of human rights. One of the earliest acts of the newly-formed United Nations was to adopt a resolution affirming “the principles of international law” recognized by the judgment of the Nuremberg Tribunal. GENERAL ASSEMBLY RES. 95 (I), U.N. DOC. A/64/ADD.1, at 188 (1946). In 1950, the International Law Commission proceeded to adopt the Nuremberg Principles to form the basis of future prosecutions if necessary. REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, 5 U.N. GAOR SUPP. (NO. 12) at 11, U.N. DOC. A/1316 (1950).

freedoms than someone who may have been born in the United States.⁴ The enumerated rights were considered absolute and natural,⁵ and it was the job of the government to protect its

⁴ See Universal Declaration of Human Rights, *supra* note 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). By the time of the official proposal of the Declaration in 1947, there had been 18 drafts produced. KAREL VASAK, *Human Rights As a Legal Reality*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 21 (Karel Vasak ed., 1982).

⁵ To some degree, the concept of fundamental human rights enshrined in the Universal Declaration echoes the natural rights theories of John Locke. Compare UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 2, pmbl., arts. 1 & 3 (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”; “Everyone has the right to life, liberty and the security of the person.”; “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”; “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”), with JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT (1698), *reprinted in* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269-71, 402 (Peter Laslett, ed., 1988):

[W]e must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.

A *State* also of *Equality*, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal amongst one another without Subordination or Subjection

This *equality* of Men by Nature, the [Lord] looks upon as so evident in itself, and beyond all question, that he makes it the Foundation of that Obligation to mutual Love amongst Men, on which he Builds the Duties they owe one another

But though this be a *State of Liberty*, yet it is not a *State of License* The *State of Nature* has a Law of Nature to

people and protect those rights.⁶

There is no doubt that the Universal Declaration is a document rooted in western ideals and values.⁷ It reflects

govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions Every one as he is *bound to preserve himself*, and not to quit his Station willfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.

The Universal Declaration is also, however, a product of political thought since Locke. As one commentator notes:

At each historical point in the formulation of a list of natural rights, some items are unquestioned, for they are central to the movement that is producing the list: property in the Lockean explication of natural rights when the revolution of 1688 is waged by the propertied middle class, the career open to talents in the French declaration [of the Rights of Man] when the privileges of the old order are being overthrown, marked social welfare provisions in the UN declaration issuing from the 20th century experience of economic depression and unemployment and mass starvation [T]he UN declaration specifically includes universal suffrage (Art. 21), rules out slavery (Art. 4), and guarantees the right of association (Art. 20). There was no right to vote among the Lockean natural rights, no forbidding of slavery in the original ten amendments to the American constitution, and no freedom of association in the French declaration of the rights of man.

Abraham Edel, *Some Reflections on the Concept of Human Rights*, in HUMAN RIGHTS 1, 6 (Ervin O. Pollack ed., 1971).

⁶ See Universal Declaration of Human Rights, *supra*, note 2, pmbl. ("Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"); *id.* art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.")

European declarations of rights and the American Declaration of Independence,⁸ and was adopted by the United Nations by a vote of 48 to 0, with 8 abstentions.⁹

⁷ See, e.g., JOHN F. COPPER, FRANZ MICHAEL & YUAN-LI WU, HUMAN RIGHTS IN POST-MAO CHINA 3 (1985). Indeed, western commentators have noted that the western view of human rights rests on assumptions about human nature and the human good that may not be shared by all societies. Joanne R. Bauer & Daniel A. Bell, *Introduction* to THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 3, 11 (Joanne R. Bauer & Daniel A. Bell eds., 1999) [hereinafter THE EAST ASIAN CHALLENGE]. The notion of a "subjective right"--the idea that an individual has rights that in principle he or she can seek to have enforced by the state--is crucial to the western tradition and has been an important part of its jurisprudence since the Middle Ages. *Id.* at 11. Subjective rights have emphasized the individual's freedom and the right to consent to the political arrangements under which he or she lives, a view that has underpinned much of western democratic theory over the last three centuries. *Id.* Marxist-Leninist theory, as well as the claims of those representing the views of peoples living in Western-controlled colonies, was also important in formulating the Declaration. See John P. Humphreys, *The World Revolution and Human Rights* in HUMAN RIGHTS, FEDERALISM AND MINORITIES (A.E. Gottlieb ed., 1970). It would be inappropriate to regard Marxism as inherently antagonistic to human rights. For example, Chen Duxiu, the first General Secretary of the Chinese Communist Party has written that "if my countrymen desire to escape from the uncultured age. . . then they must lay equal stress on science and human rights." *Reported in* Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 2 (1996).

⁸ See Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 308 (1987).

⁹ A. H. ROBERTSON & J. G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 26 (1989). The fact that there were eight abstentions, but no opposing votes, does not mean that the Universal Declaration was adopted without disapproval of certain of its provisions. Specifically, in 1948, Afghanistan, Iraq, Pakistan, Saudi Arabia and Syria attempted to have the right to change one's religion (art. 18) deleted from the Declaration, and the Saudi delegate went so far as to criticize the Lebanese delegate for failing to oppose this provision and thus ignoring the rights of Lebanese Muslims. James Piscatori, *Comments* to Ernest Gellner, *Human Rights and the New Circle of Equity: Muslim Political Theory and the Rejection of Scepticism*, in HUMAN RIGHTS IN PERSPECTIVE: A GLOBAL ASSESSMENT 113, 129, 130-31 (Asbjorn Eide & Bernt Hagvet eds., 1992). Their opposition to the right to change religion was based on the traditional Shari'a law of apostasy, whereby

In recent years, the concept of universality of human rights has been under attack, most prominently perhaps, by China. At the most recent international conference on human rights, the Chinese position was made clear: "One should not and cannot think the human rights standard and model of certain countries as the only proper ones, and demand all other countries to comply with them."¹⁰ Cultural relativists emphasize the uniqueness of

a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense. *See id.* at 131; Abdullahi A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 23 (1990). These Islamic countries also objected to the Declaration's provisions on women's' rights (art. 16), arguing that because Islam is a complete system, guaranteeing wives the right to property and inheritance, there was no need for article 16's requirements that women be of "full age" and have "equal rights" in marriage. *See Piscatori, supra*, at 131. According to the representatives of these Moslem countries, if the international community were to contravene or disregard well-established Islamic laws such as these in the provisions of the Universal Declaration, this would violate the prohibition on interference in the domestic affairs of any state as specified in United Nations Charter article 2(7). *See id.* However, An-Na'im does point out in *Human Rights in the Muslim World, supra*, that "numerous verses of the Qur'an provide for freedom of choice and non-compulsion in religious belief and conscience," although "[t]hese verses have been either de-emphasized as having been 'overruled' by other verses which were understood to legitimize coercion, or 'interpreted' in ways which permitted such coercion." An-Na'im, *supra*, at 48.

¹⁰ H.E. Mr. Liu Hiaqiu, Head of the Chinese Delegation, Address at the World Conference on Human Rights, Vienna, (June 14-25, 1993). One Chinese scholar has written that "there was no open declaration of human rights in China, either by individual thinkers or by political constitutions, until this concept was introduced from the West. In fact, the early translators of Western political thought found it difficult to arrive at a Chinese equivalent for the term 'rights.'" Chung-Sho Lo, *Human Rights in the Chinese Tradition*, in UNESCO, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS at 186 (1949). *See also* See Lee Manwo, *North Korea and the Western Notion of Human Rights*, in HUMAN RIGHTS IN AN EAST ASIAN PERSPECTIVE at 132 (James C. Hsiung ed., 1985) (East Asian states were concerned "not with the rights of individuals, but with their duties."). *But see* Michael Davis, *Chinese Perspectives on Human Rights* in HUMAN RIGHTS AND CHINESE VALUES at 13 (Michael Davis ed., 1995) (some Chinese scholars who have carefully

traditions, values and ways of life in diverse societies and conclude that a universalist perspective of human rights doesn't properly acknowledge and respect cultural variations. Criticisms, therefore, of certain cultural or religious practices such as assigning different roles to men and women in a society, is considered inappropriate and unwarranted.

II. Economic and Political Rights at Conflict

The United Nations faced the task of giving greater specificity to the principles established by the Universal Declaration¹¹ and, since the Declaration was not a *treaty*¹² to be ratified, of creating legal obligations and responsibilities for its signatories.¹³ The General Assembly, therefore, proceeded to develop a covenant on human rights, which subsequently evolved into two separate

examined classical Confucian thought have found ideas consistent with modern human rights values). Japan, which also has a strong tradition of Confucian thought, has been a constitutional democracy since the end of the Second World War. The one-party domination of the government for 40 years was finally terminated in 1993 as a result of a series of scandals revealing widespread corruption.

¹¹ There were few limits to the praise (and hopes) afforded to the Declaration at the time of its presentation. Eleanor Roosevelt, a major contributor to the effort that produced the Declaration, stated that the document "set up a common standard of achievement for all peoples and all nations" and "might well become the international Magna Carta of all mankind." *Reported in* Thomas Risse, Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in TOMAS RISSE, STEPHEN C. ROPP, KATHRYN SIKKINK, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORM, AND DOMESTIC CHANGE* at 1 (1999). The Declaration was handicapped, however, not only in its lack of specificity, but also in its failure to contain monitoring and enforcement provisions.

¹² The first treaty of the modern human rights era, approved by the United Nations General Assembly the day before adoption of the Universal Declaration, was the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. Article VIII provides for any Contracting Party to call upon the United Nations to take appropriate measures to suppress acts of genocide. *See* 78 U.N.T.S. 277.

¹³ *See, e.g.,* Asbjorn Eide & Gudmundur Alfredsson, *Introduction to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 5, 6 (Asbjorn Eide et al. eds., 1992).

covenants¹⁴--one focusing on political rights (the Political Covenant)¹⁵ and another on economic, social, and cultural rights (the Economic Covenant.)¹⁶ The Political Covenant addresses what the West generally identifies as civil rights--the freedom of religion, freedom of speech, equal protection of the laws, the ability to criticize one's government, due process protections, and respect for the rights of minorities.¹⁷ The Economic Covenant focuses on the State as the promoter and the protector of the economic and social well-being of its citizens,¹⁸ and permits some

¹⁴ See generally David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 210-11 (Theodor Meron ed., 1984).

¹⁵ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 993 U.N.T.S. 171 (1966), in HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS 35 (Christopher Gane & Mark Mackarel eds., 1997). See Robertson & Merrills, *supra* note 9, at 27-32; Trubek, *supra* note 14, at 211. Article 2 requires states to enact legislation or adopt other measures to ensure the stated rights. The Covenant created the Human Rights Committee to monitor compliance; each state that is a signator to the Covenant must submit periodic reports to the Committee.

¹⁶ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, G.A. Res. 2200A, 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966), in HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS 39 (Christopher Gane & Mark Mackarel eds., 1997). See Robertson & Merrills, *supra* note 9, at 229-55; Trubek, *supra* note 14, at 211.

¹⁷ See Robertson & Merrills, *supra* note 9, at 32-37.

¹⁸ The Economic Covenant, unlike the Political one, uses vague language which can be claimed by some to indicate that the "rights" are more appropriately deemed long-term "goals". Article 2, for example, declares that "Each State Party. . . undertakes to take steps . . . to the maximum of its available resources, with a view to *achieving progressively the full realization* of the rights recognized in the present covenant." (emphasis added). The United Nations Committee on Economic, Social and Cultural Rights attempted to explain why, unlike the Political Covenant, the economic rights were more aspirational in nature:

While the full realization of the relevant rights may be achieved progressively, steps toward that goal must be taken within a reasonably short time after the Covenant's entry into

to claim that political rights may not be of supreme importance if the citizens of that country are unable to afford food, shelter, or health care.¹⁹ In the United States, for example, minority groups won the right to sit at the lunch counter, but, if someone doesn't have money for the hamburger, the "right" may be insignificant.²⁰ There is most assuredly the political right in India

force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

. . .
The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. . .

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. . . Nevertheless. . . [this] should not be misinterpreted as depriving the obligation of all meaningful content. . . In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, GENERAL COMMENT NO. 3 (1990), UN Doc. E/1991/23, Annex III.

¹⁹ See ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 59 (1990) (in examining the differences between the Socialist "statist" conception of human rights and the western international view, *id.* at 54, he states that one point of confrontation "concerns the *relationship between two classes of human rights*: civil and political rights on the one hand, and economic, social and cultural ones on the other." According to some developing countries and many Socialist states as well, the second group of rights is intrinsically more important, since "[w]hat sense is there in talking of freedom of expression when one is hungry, jobless or homeless?") (emphasis in original).

²⁰ The Foreign Minister of Singapore has stated: "Only those who have forgotten the pangs of hunger will think of consoling the hungry by telling them that they should be free before they can eat." Foreign Minister Wong Kah Seng Address to the World Conference on Human Rights (1993). The Minister has, I suggest, falsely presented the issue: no advocate of international human rights norms would advocate that a developing country should not begin to proceed down the path of economic growth until there has been the guaranteed protection of political civil liberties. There has been

for people to stand up on a soap box and articulate their dissent,²¹ but if individuals are starving, the right to criticize the government pales in comparison to the economic right of sustenance.²² China has been, perhaps, the most vocal in its emphasis on the primacy of economic rights. For example, the Head of the Chinese Delegation at the 1993 World Conference on Human Rights in Vienna stated: "When poverty and lack of proper food are commonplace, and people's basic needs are not guaranteed, priority should be given to economic development."²³

increasing acknowledgment that the right to development is itself an inalienable human right. After passing resolutions in 1950 (UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 421 E (V) OF 4 DECEMBER 1950), 1966 (RESOLUTION 2200 A (XXI) OF 16 DECEMBER 1966), and 1969 (RESOLUTION 2542 (XXIV) OF 11 DECEMBER 1969), the General Assembly of the United Nations adopted the DECLARATION ON THE RIGHT TO DEVELOPMENT in 1986. The 1993 World Conference on Human Rights in Vienna reaffirmed commitment to the DECLARATION ON DEVELOPMENT and declared the right to development to be "an integral part of fundamental human rights." WORLD CONFERENCE, *supra* note 10, PARAGRAPH 1.10 OF THE VIENNA DECLARATION AND PROGRAMME OF ACTION.

²¹ See, e.g., Vijayashi Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 430 (1998) (citing INDIA CONST., pt. III art. 19 cl. 1).

²² One commentator has referred to this, in the Sub-Saharan African context, as the "Full-belly" Thesis--until one's belly is full, one can't engage in the luxury of worrying about political rights. Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights?* 5 HUM. RTS. Q. 467, 469 (1983).

²³ H. E. Mr. Liu Hiaqui *supra* note 10. Mr. Liu Hiaqui added that "the major criteria for judging the human rights situation in a developing country should be whether its policies and measures help to promote economic and social progress." *Id.* The position of the United States is very different. At the same World Conference, the U.S. DELEGATION FACT SHEET asserted that the protection of individual human rights "must be the basis for economic growth and development -- not an end product of prosperity." FACT SHEET: U.S. HUMAN RIGHTS GOALS AND OBJECTIVES, cited in Melanne Civic, *A Comparative Analysis of International and Chinese Human Rights Law*, 2 BUFF. J. INT'L L. 285, 319 (1995-1996). See also HUMAN RIGHTS WATCH, *INDIVISIBLE HUMAN RIGHTS: THE RELATIONSHIP OF POLITICAL AND CIVIL RIGHTS TO SURVIVAL, SUBSISTENCE AND POVERTY* (1992) (political and civil

Economic and political rights ought most appropriately be viewed as interrelated with one another.²⁴ The fifth session of the General Assembly first stated the principle that the “enjoyment of civil and political freedoms and that of economic, social and cultural rights are interdependent” and whenever “the individual is deprived of his economic, social and cultural rights, he does not represent the human person who is considered by the Declaration to be the ideal of the free man.”²⁵ The welfare states of western and northern Europe are testimonials to the ability and desirability of states to realize the interrelationship of economic and political rights and to act to protect and enforce each. If one looks at what has occurred recently in Indonesia, the danger of focusing exclusively on economic rights becomes clear. Indonesia has been a country which, in recent years, has championed itself as a state where there has been an impressive record of economic development. But the Suharto regime governing Indonesia had, while adopting a rhetoric of political openness, relegated freedom of the press and the right of citizens to criticize their government to a status of uncertain existence under arbitrary controls.²⁶ However, had there been actual

rights are basic to survival and not luxuries to be had only after a certain amount of economic growth has occurred).

²⁴ See, e.g., Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 HUM. RTS. Q. 641, 645 (1996).

²⁵ UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 543 (VI). At the time that this Resolution was adopted--1950--it was assumed that *one* covenant establishing both political and economic rights would be written, but the next year, the Assembly decided instead to draft two separate covenants. The third paragraphs of the Preambles of each Covenant use identical language to enforce the view of the interconnectedness of political and economic rights.

²⁶ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, at 126-30 (1997). See also, *Rights Issues Aside, Asia Deals Rise*, N.Y. TIMES, Aug. 1, 1994 at D1 (three of Indonesia's most influential magazines were shut down by the Government, and a subsequent protest was broken up and 56 people beaten and arrested).

freedom of the press, had journalists and Suharto-opponents been able to demonstrate how Prime Minister Suharto and his family had stolen money from the people who live in that country, there may have been a far more equitable distribution of the wealth.²⁷

²⁷ See UNITED STATES DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996: INDONESIA 658, 658 (1997). Since the downfall of Indonesian President Suharto in May 1998, the increased scrutiny of Suharto and his family by successive Indonesian regimes which were pressured by student protesters, a newly empowered and vocal electorate, and a freer Indonesian and international press to investigate the Suharto regime, has revealed the existence of a vast commercial empire amassed by Suharto, members of his family, and political cronies comprising billions of dollars in foreign bank deposits, real estate and substantial interests in Indonesian and foreign companies, a financial empire that was launched when Suharto first seized power in the 1960s. See, e.g., John Colmey et al., *The Family Firm*, TIME, May 24, 1999, at 16 (uncovering a \$15 billion fortune in cash, property, companies, art, jewelry, and jets held by Suharto and his children); Tom McCawley, *State "to Take" Suharto Fortune*, FIN. TIMES (London), June 20, 2000, at 14 (Abdurrahman Wahid, successor to Habibie as Indonesian President, stated that Suharto's family fortune of \$25 billion will be handed over to the state); *Suharto Answers Questions, As the Noose Tightens*, IRISH TIMES, Dec. 10, 1998, at 13 (demonstrations by Indonesian students prompt then-President Habibie to pursue the investigation of Suharto more vigorously); *Suharto Used High Office to Gain Profit for Family*, AAP NEWSFEED, Dec. 8, 1998 (LEXIS News Library) (Indonesia's Attorney-General, perhaps reacting to pressure from student demonstrators, cited a national car company owned by Suharto's youngest son as an example of nepotism that cost Indonesia \$1.55 billion in lost tax revenue). Moreover, increased freedom of expression in Indonesia led to Suharto's immediate successor as Indonesian President, B.J. Habibie, to be subjected to charges of corruption as well. See, e.g., Liz Sly, *Students' Rallying Cry: Ousted Suharto Still the Power Behind Corruption; Din Rises as Indonesians Increase Heat on President*, CHI. TRIB., Dec. 3, 1998, at N6 (Habibie's pledges to investigate Suharto's finances are being met with increasing skepticism by many Indonesians); *President Habibie Ready to Face Inquiry Into Suharto's Wealth*, DEUTSCHE PRESSE-AGENTUR, Dec. 14, 1998. When Habibie, whom Suharto had handpicked as Vice President before resigning in May 1998, finally declared that there was no evidence of corruption against Suharto, Abdurrahman Wahid replaced Habibie, becoming President in October 1999. See, e.g., Shoeb Kagda, *Jakarta to File Graft Charges Against Suharto*, BUS. TIMES (Singapore), July 27, 2000, at 1; David Lamb, *Indonesia Files Its Embezzlement Case Against Suharto*, L.A. TIMES, Aug. 9, 2000, pt. A pt. 1,

The *political* right of freedom of the press would have operated as a check on governmental corruption and may have consequently impacted very positively on the *economic* well-being of the citizens.²⁸ Greater respect by the Indonesian government of the right of individuals to associate freely would also have permitted labor union activists to make more progress in obtaining better salaries and improving working conditions for Indonesia's factory workers.²⁹

Malaysia is another example of a government denying political freedoms while claiming to be focused on the economic betterment of its citizens.³⁰ In a visit to Malaysia, then-Vice

at 6. Since being elected however, President Wahid has announced that because of his infirmity, he would cede day-to-day administration of the Indonesian Government to Vice President Megawati Sukarnoputri. See, e.g., Seth Mydans, *Wahid's Last Hurrah*, N.Y. TIMES, Aug. 13, 2000, sec. 4, at 2.

²⁸ Cf. THE EAST ASIAN CHALLENGE, *supra* note 7, at 645 ("Systematic cross-national statistical studies do not support the claim that there is a correlation or a causal connection between authoritarianism and economic success. In fact, civil and political rights may help to safeguard economic security in the sense that such rights draw attention to major social disasters and induce an appropriate political response . . ."). The political right of freedom of the press in Indonesia might have also served to reduce the gross violations of human rights by the Indonesian military in East Timor and prevented the world, including the United States, from turning a blind eye to the genocide that has taken place since Indonesia annexed East Timor in 1975. See Frederick J. Petersen, *The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. L. 871, 898-99 (1995).

²⁹ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE, *supra* note 26, at 122-24. However, the organization Human Rights Watch has more recently noted that "[f]or the first time in twenty-five years, independent political parties, labor unions, and professional organizations were being allowed to form." HUMAN RIGHTS WATCH, ACADEMIC FREEDOM IN INDONESIA: DISMANTLING SOEHARTO-ERA BARRIERS 5 (1998).

³⁰ See, e.g., 1 UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998: MALAYSIA 986, 995 (1999) [hereinafter STATE DEPARTMENT MALAYSIA REPORT](stating that in 1997, the Malaysian government prohibited academics from making any public statements or publishing any writings on Malaysia's air pollution crisis because of concern that unauthorized remarks on the air pollution crisis might harm the country's image and hurt tourism); Mark Landler, *Trial in Malaysia Provokes Political Crisis*, N.Y. TIMES, Nov. 4, 1998, at A12; Seth Mydans, *Malaysia*

Jails Opposition Legislator for Criticizing the Judiciary, N.Y. TIMES, Aug. 27, 1998, at A5.

One notorious example of the denial of political freedoms in Malaysia can be noted by the recent Anwar Ibrahim affair. Anwar Ibrahim, Deputy Prime Minister and Finance Minister under Malaysian Prime Minister Mahathir Mohamad, was dismissed from both posts by Prime Minister Mahathir Mohamad on September 2, 1998. See AMNESTY INTERNATIONAL, MALAYSIA ANNUAL REPORT, ASIA PACIFIC REGION, 1999, at <http://www.amnesty.org/ailib/aireport/ar99/asa28.htm> (visited Sept. 5, 2000); AGENCE FRANCE PRESSE, Sept. 5, 2000 (LEXIS News Library). Although Mr. Mahathir claimed to have discharged Mr. Anwar on the grounds of being morally unfit, see Seth Mydans, *Malaysia Sex Trial Reopens, and Adjourns*, N.Y. TIMES, Jan. 26, 2000, at A9, the true cause for Anwar's dismissal was his apparent willingness, under the circumstances of Malaysia's financial crisis in 1998, to work closely with the IMF to promote domestic reforms and tight monetary and fiscal policies, whereas Mahathir blamed Malaysia's economic troubles on all manner of things, mostly foreigners, hedge fund managers and Jews, and refused IMF assistance and introduced selective currency controls. See, e.g., *A Prickly Pair*, ECONOMIST (U.S. Edition), Feb. 12, 2000 (LEXIS News Library); *U.S. Outraged by Anwar Verdict*, ASIAN POLITICAL NEWS, Aug. 14, 2000 (LEXIS News Library); *U.S. Outraged by Anwar Verdict*, JAPAN ECONOMIC NEWswire, Aug. 8, 2000 (LEXIS News Library). By the summer of 1998, Mr. Anwar had started attacking cronyism, corruption, and nepotism in the Malaysian government. See, e.g., *A Prickly Pair*, ECONOMIST (U.S. Edition), Feb. 12, 2000 (LEXIS News Library), *supra*; *Sex Sentence "A Conspiracy,"* BIRMINGHAM POST, Aug. 9, 2000 (LEXIS News Library). After Prime Minister Mahathir Mohamad fired Anwar from the cabinet, Anwar was arrested under the Internal Security Act for having presided over a large rally of supporters in a protest meeting that took place after his removal. See Eric Watkins, *Upset by Opposition Gains, Malaysia Invokes Draconian Laws*, BRIDGE NEWS, Jan. 19, 2000 (LEXIS News Library). The Internal Security Act has been described as a British colonial-era statute imposed upon Malaysia and retained after Malaysia gained independence in 1957. See *id.* But see Focus: *Influencing Court Decisions: Malaysian Justice System Is Placed in Jeopardy*, BANGKOK POST, April 25, 2000 (LEXIS News Library) (describing the findings of a group of international legal bodies, which issued a report suggesting "repeal of the . . . Internal Security Act 1960"). The Internal Security Act has also been said to permit indefinite detention without trial. See *Rights Groups Slam Malaysian Crackdown on Opposition*, ASIAN POL. NEWS, Jan. 17, 2000 (LEXIS News Library).

After Anwar Ibrahim was arrested, he was beaten while in police custody, an act for which the Inspector General of Police was ultimately prosecuted. See *Amnesty International: Malaysia--Authorities Must Respect Human Rights at*

Rally to Mark Anwar Verdict, M2 PRESSWIRE, Aug. 7, 2000 (LEXIS News Library) (noting that Malaysia's Police Act and Penal Code outlaw attendance at any unauthorized gathering of more than three people and five people, respectively, and that, in Malaysia, "there are persistent reports of ill-treatment, including beating and kicking of protestors [sic], immediately after arrest and in police detention cells"). Anwar was then charged with "corrupt practices," allegedly for having used his ministerial office to interfere with a police investigation of sexual misconduct (notably, sodomy), charges that Anwar denied, attributing it to political conspiracy. See AMNESTY INTERNATIONAL, MALAYSIA ANNUAL REPORT, ASIA PACIFIC REGION, 2000, at <http://www.web.amnesty.org/web/ar2000web.nsf/countries/2301ed6961f05356802568f200552947?OpenDocument> (visited Sept. 5, 2000); M. Jegathesan, *Lawyers Rally Behind Anwar Counsel, Urge Sedition Charge Be Dropped*, AGENCE FRANCE PRESSE, March 25, 2000 (LEXIS News Library); Sheila McNulty, *Malaysia's Great Survivor Retains Place at the Top*, FIN. TIMES (London), May 11, 2000, at 14. Eileen Ng, *Anwar Testifies About Political Conspiracy as Supporters Arrested*, AGENCE FRANCE PRESSE, Jan. 25, 2000 (LEXIS News Library). Following a trial on these charges in April 1999, in proceedings criticized by international legal organizations as raising "serious concerns" about fairness, Anwar was sentenced to six years' imprisonment. See *International Lawyers "Rap" Interference in Malaysian Legal System*, AGENCE FRANCE PRESSE, Apr. 6, 2000 (LEXIS News Library). Amnesty International has concluded that the "corrupt practices" charges were "politically motivated and a pretext to remove [Anwar] from public life," a conclusion "reinforced by the unfair conduct of his trial, including the public undermining by government leaders of his right to be presumed innocent, the intimidation of his defense team, and procedural decisions during the trial." AMNESTY INTERNATIONAL, MALAYSIA ANNUAL REPORT, ASIA PACIFIC REGION, 2000, *supra*.

The separate proceedings against Anwar Ibrahim for sodomy shone an even harsher light on the suppression of political freedoms in Malaysia. Malaysian law punishes sodomy by up to twenty years' imprisonment. See John Pilger, *Untitled Article*, NEW STATESMAN, June 12, 2000, at 17. The two men, one of them Mr. Anwar's adopted brother, who confessed to participating in Anwar's alleged acts of sodomy, said they pleaded guilty under duress. See *id.* See also AMNESTY INTERNATIONAL, MALAYSIA ANNUAL REPORT, ASIA PACIFIC REGION, 2000, *supra* (the judge in Anwar's sodomy trial ruled that the 1998 confession of Anwar's adopted brother, on joint trial for sodomy with Anwar, was admissible as evidence despite his testimony of "serious physical and psychological ill-treatment by police"). The case drew even more attention when Anwar's defense counsel in the sodomy trial, Karpal Singh (who is also a prominent opposition politician), was arrested and charged under the Sedition Act of 1948, another relic of British colonial rule amended in 1970, and the Official Secrets Act, for having told the trial court about

President Albert Gore had so offended the Malaysian President by saying little more than that it was important, as the millennium approached, to focus on the right of a people to criticize their government when they think it is warranted.³¹ If Al Gore had not been the Vice President of the United States, he may very have been arrested in Malaysia because Malaysia, like many countries in Asia, has a broadly interpreted crime of incitement.³² Freedom

possible attempts to poison Anwar Ibrahim with arsenic. *See Anwar's Lawyer Questions Sedition Charge Against Him*, DEUTSCHE PRESSE-AGENTUR, Jan. 25, 2000 (LEXIS News Library); Eileen Ng, *supra*; *Vengeance Is Mahathir's*, ECONOMIST (U.S. Edition), Jan. 22, 2000 (LEXIS News Library); Watkins, *supra*. When, in August 2000, Anwar Ibrahim was convicted of sodomy and sentenced to nine years in jail, to be served consecutively with the six-year corruption sentence, the U.S. State Department criticized the verdict on grounds of the "questionable fairness" of the trial, including changes in dates of the alleged offenses, police coaching of key prosecution witnesses, the charging of Karpal Singh with sedition for statements made in court, and the court's refusal to permit Anwar to call key witnesses in support of him. The State Department spokesman declared that "Anwar's conviction in [the sodomy] case, and his previous conviction on four counts of corruption in April 1999, cast serious doubt on the impartiality and the independence of the Malaysian judiciary." *U.S. Outraged by Anwar Verdict*, ASIAN POLITICAL NEWS, Aug. 14, 2000, *supra*; *U.S. Outraged by Anwar Verdict*, JAPAN ECONOMIC NEWswire, Aug. 8, 2000, *supra*. In response to other U.S. State Department criticism of arrests of Malaysian opposition politicians, Malaysia's Deputy Prime Minister Abdullah Ahmad Badawi accused the United States of "telling us how to enforce our laws," and stating, "Why are [the Americans] being such smart alics in questioning our country's laws and being such busybodies? It is not like they are so good in their ways." *Don't Meddle, Malaysia Tells U.S. Over Arrests of Politicians*, DEUTSCHE PRESSE-AGENTUR, Jan. 17, 2000 (LEXIS News Library). *See also* Kamarul Yunus, *Don't Interfere in Our Affairs, Abdullah Tells US*, BUS. TIMES (MALAYSIA), Jan. 17, 2000, at 1 (quoting Deputy Prime Minister Abdullah as saying "Don't interfere in our affairs. There is democracy and we practice democracy.").

³¹ *See* Mark Landler, *Gore Scolded in Malaysia for Defense of Dissenters*, N.Y. TIMES, Nov. 18, 1998, at A14.

³² *See* STATE DEPARTMENT MALAYSIA REPORT, *supra* note 30, at 993 (describing the Sedition Act, which prohibits public comment on issues defined as "sensitive"). *See also* Seth Mydans, *Malaysia Jails Opposition Legislator for Criticizing the Judiciary*, N.Y. TIMES, Aug. 27, 1998, at A5 (describing the condemnation by Amnesty International of Malaysia's "arbitrary and

of speech is restricted because if one is deemed to have "incited" the passions and emotions of the people against the government, that individual can be arrested and jailed for a significant amount of time.³³

Whereas many Asian countries highlight the import of economic rights to the detriment of political freedoms, the United States errs in the other direction. The U.S. has never accepted the legitimacy of the existence of the fundamental *economic* rights to housing, health care or employment, and the United States Senate has simply never ratified the International Covenant on Economic, Social and Cultural Rights. The U.S. continues to identify human rights exclusively with the *political* freedoms which are enshrined in the American Constitution.

III. Cultural Relativism: The Asian Perspective

The Asian view on human rights has been influenced by a couple of factors in recent years; most significant, perhaps, was China's reaction to the world condemnation of the Tiananmen Square Massacre. In May and early June of 1989, student protestors were demonstrating for more democracy in China³⁴ and there was an occupation of Tiananmen Square, the main public gathering place in China.³⁵ China declared a state of martial law

selective' use of sedition and publishing laws 'to intimidate those who express dissenting opinions and to engender public reluctance to criticize those in power'").

³³ See STATE DEPARTMENT MALAYSIA REPORT, *supra* note 30, at 993. (in 1997, the Malaysian government filed criminal charges against a youth opposition leader for violating the Sedition Act and the Printing Presses and Publications Act; the opposition leader was convicted and, on appeal, his sentence was *increased* to two concurrent 18-month prison terms instead of a fine); *supra* note 32 and accompanying text.

³⁴ One Australian scholar has concluded that the student protests were "the outcome of a dual revolution of rising expectations in the arena of civil and political rights and of relative deprivation, and rising expectations, in the area of socioeconomic rights." ANN KENT, HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA: NATIONAL AND INTERNATIONAL DIMENSIONS 67 (1990).

³⁵ See *Sino-American Relations: One Year After the Massacre at Tiananmen Square: Hearing Before the Subcomm. on East Asian and Pacific Affairs of the*

and sent troops and tanks into the Square and hundreds, if not thousands, of injuries and deaths resulted.³⁶ Reaction, worldwide, was extremely critical of China's use of force against the students.³⁷ The Chinese government responded by developing a kind of damn-you, we-will-do-what-we-want and you-don't-understand-the-Asian-people-and-the-Asian-way-of-mind philosophy,³⁸ while also asserting that the true goal of the Tiananmen Square demonstrators was to overthrow China's socialist system and the rule of the Chinese Communist Party.³⁹

Senate Comm. on Foreign Relations, 101st Cong. 14-15 (1990) (Comm. Print 1991, S. Hrg. 101-1125, Cong. Info. Serv. No. S381-23) [hereinafter *Sino-American Relations*] (statement of Richard Solomon, Assistant Secretary of State for East Asian and Pacific Affairs); Amnesty International, 1990 Report 66 (1990).

³⁶ The exact number of casualties is simply not known. See *Sino-American Relations*, *supra* note 35, at 429-46 (*Massacre in Beijing*, an article included in the appendix to the Hearings); Amnesty International, 1990 Report, *supra* note 35, at 66; W. Gary Vause, *Tibet to Tienanmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1603 (1989); David E. Sanger, *At Tiananmen Exhibit, Fables from the Party*, N.Y. TIMES, Sept. 9, 1989, at 4.

³⁷ See Vause, *supra* note 36, at 1603. See also *Sino-American Relations*, *supra* note 35, at 5 (stating that other democratic countries took actions in parallel with the Bush Administration and Congress in imposing a series of sanctions on China after the Tiananmen Square massacre); *id.* at 15 (describing the reactions of Canada, France, Japan, the United Kingdom, Germany, and Italy as generally adopting the same approach as the United States in imposing sanctions on China after the Tiananmen Square massacre).

³⁸ It was maintained that China's use of force was "the proper, rational and lawful action of a sovereign nation", and that "there are no universal and abstract human rights"; those countries which were critical of China had "wantonly interfered with this country's internal affairs". Yi Ding, *Opposing Interference in Other Countries' Internal Affairs Through Human Rights*, BEIJING REVIEW (Nov. 1989) reprinted in THE CHINA READER 415, 416 (Orville Schell, David Shambaugh eds., 1999). See Guo Luoji, Essay, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 4 (1996) (citing STATE COUNCIL WHITE PAPER ON HUMAN RIGHTS: HUMAN RIGHTS IN CHINA 83-84 (INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA 1991) [hereinafter WHITE PAPER]).

³⁹ Appendix E to *Massacre in Beijing*, *supra* note 36, which sets forth a speech given by Deng Xiaoping on June 9, 1989, published in the *Beijing*

A second factor leading to the development of the claim of a uniquely Asian perspective of human rights has been the incredible economic growth of many countries in Asia--the Asian economic miracle.⁴⁰ Many countries, notably Thailand, Singapore, Indonesia, and Malaysia, were claiming to be showing the rest of the world that they knew how to do it.⁴¹ They had

Review of July 10-14, 1989, contains the following remarks by Mr. Deng on quelling the "rebellion" in Beijing:

Actually, what we faced was not just some ordinary people who were misguided, but also a rebellious clique and a large number of the dregs of society. The key point is that they wanted to overthrow our state and the Party. Failing to understand this means failing to understand the nature of the matter . . . The nature of the matter became clear soon after it erupted. They had two main slogans: to overthrow the Communist Party and topple the socialist system. Their goal was to establish a bourgeois republic entirely dependent on the West . . .

Id. at 486. See *Sino-American Relations*, *supra* note 35, at 469 (criticizing the Chinese government's claim that the legitimate needs of public order and national security justified the military and police repression of demonstrators in Tiananmen Square).

⁴⁰ Even with the sharp downturn in the Asian economies which began in 1997-98, the overall economic gains that have been achieved are most impressive; how much of the *per capita* growth has trickled down to the general citizenry may be another question entirely. Even those citizens who did become part of the new workforce, were not particularly well off. See FREDERICK DEYO, *BENEATH THE MIRACLE: LABOR SUBORDINATION IN THE NEW ASIAN INDUSTRIALISM* 8 (1989) (the new employment opportunities were characterized by "low pay, tedium, minimal job security and lack of career mobility").

⁴¹ See Sharon K. Hom, Commentary, *Re-Positioning Human Rights Discourse on "Asian" Perspectives*, 3 BUFF. J. INT'L L. 209, 209-10 (1996) (mentioning that accusations of cultural imperialism against the West are being made "from the economically smug position of [East Asian] nation-states who are widely touted as 'high performance' economies who have engineered the economic miracle of rising GNPs that has apparently made many developed countries nervous"). See also Nicholas D. Kristof, *A Changing Asia: Economic Growth, Especially, Fosters Demands for Political Liberalization*, N.Y. TIMES, May 22, 1992, at A2 ("Other East Asian countries, like Malaysia, Thailand and Indonesia, while not at the same income level [as South Korea, Hong Kong and Singapore], have had per capita growth rates in

gone from being relatively poor countries to becoming places that had accumulated a great deal of wealth in a relatively short period of time.⁴² They developed a new arrogance that often comes with the feeling of economic well-being.⁴³ The comments of the Foreign Minister of Singapore perhaps best exemplify the sense of entitlement resulting from economic success:

We make no apology for doing what we believe is correct rather than what our critics advise. . . . We justify ourselves to our people, not by abstract theories or the approbation of foreigners, but by the more rigorous test of practical success. Our citizens live with freedom and dignity in an environment that is safe, healthy, clean and incorrupt. They have easy access to cultural, recreational and social amenities, good standards of education for our children and prospect of a better life for future generations. I can say without false modesty that many of our well meaning critics cannot claim as much.⁴⁴

In April of 1993, a number of Asian countries gathered together to formulate what was called the "Bangkok

the last 25 years of between 4.0 percent and 4.5 percent, about twice the level of most countries in other regions.").

⁴² See Pete Engardio, *Know-Nothings at the Barricades*, BUS. WK., May 1, 2000, at 48 ("By any measure--the percentage of people living below the poverty line, life span, infant mortality rates, education levels--the standard of East Asian nations has improved astoundingly since they began entering the global economy by adopting export strategies, inviting foreign capital, and lowering tariff barriers in the 1960s. The financial collapse of 1997 set back many of those gains, but the net improvement is still breathtaking.").

⁴³ See Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in *The East Asian Challenge*, *supra* note 7, at 28; Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 407, 407-08 (1998).

⁴⁴ Foreign Minister Wong Kan Seng of Singapore *supra* note 20.

Declaration.”⁴⁵ This meeting was in preparation for a United Nations international human rights conference that was taking place in Vienna a couple of months thereafter,⁴⁶ and the Bangkok Declaration maintained that there was a uniquely Asian perception of human rights.⁴⁷ The Asian states maintained that

⁴⁵ REPORT OF THE REGIONAL MEETING FOR ASIA OF THE WORLD CONFERENCE ON HUMAN RIGHTS, U.N. DOC. A/CONF. 157/ASRM/8A/PC/59 (1993) [hereinafter *Bangkok Declaration*].

⁴⁶ See Donna J. Sullivan, Note, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 152-53 (1994). The United Nations World Conference on Human Rights in Vienna produced the VIENNA DECLARATION AND PROGRAMME OF ACTION, 32 I.L.M. 1661 (1993).

⁴⁷ See *Bangkok Declaration*, *supra* note 45, pt. I, Final Declaration, pmb. (adopting the *Bangkok Declaration*, “which contains the aspirations and commitments of the Asian region”) and sec. 8 (recognizing that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, *bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds*”) (emphasis added); Anja Jetschke, *Linking the Unlinkable?: International Norms and Nationalism in Indonesia and the Philippines*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 134, 143 (Thomas Risse et al. eds., 1999) (stating that, as a partial response to international condemnation of its military actions in East Timor in 1976, Indonesia resorted to “the ‘Asian values’ argument claiming that human rights had to be seen in their social, economic, and cultural aspects”); Sullivan, *supra* note 46, at 153, n.6 and accompanying text.

There have been, however, several prominent Asian jurists who have expressed a profound skepticism about any distinct Asian approach to human rights. Yash Ghai, a law professor at the University of Hong Kong, see Yash Ghai, *Comment, A Play in Two Acts: Reflections on the Theatre of the Law*, 29 H.K. L.J. 5 (1999), has affirmed that the diversity of Asian cultures and economic systems themselves would preclude the emergence of any single “Asian” view of human rights. Yash Ghai has stated:

It would be surprising if there were indeed one Asian perspective, since neither Asian culture nor Asian realities are homogenous throughout the continent. All the world's major religions are represented in Asia, and are in one place or another State religions To this list we may add political ideologies like socialism, democracy or feudalism which animate peoples and governments of the region. Even apart from religious differences, there are other factors which have produced a rich diversity of cultures Nor are the economic circumstances of all the Asian countries

similar There are similarly differences in their economic systems Perceptions of human rights are undoubtedly reflective of these conditions, and suggest that they would vary from country to country.

Yash Ghai, *Human Rights and Governance: The Asia Debate*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 236, 237 (Henry J. Steiner & Philip Alston eds., 1996) [hereinafter *Human Rights and Governance*]. Susan Sim, a Singaporean journalist, elaborated on the idea of an East-West cultural gap and a singularly Asian conception of human rights:

Singapore diplomats like Mr. Kishore Mahbubani and Bilahari Kausikan, who both spent several months in the United States researching human rights issues, have written articles, published in American journals, which call for a reassertion of indigenous Asian values and traditions that have contributed to the prosperity and stability of many Southeast and East Asian countries.

Their articles have also suggested that the absence of such values might explain the social decay in the West, especially the United States. . . .

In a sense the Singapore Government's differences with the international human rights groups--which tend not to like being tagged as "western groups" even though their members and financial sources are primarily from the West--are a reflection of an East-West gulf.

Many Western commentators dismiss this notion as simplistic and intellectually dishonest, pointing to the many commonalities in Asian and Western intellectual traditions. Asians, they argue, do not have a stranglehold on communitarianism or strong work ethics. Confucianism as perpetuated by present-day Asian governments is remarkably similar to the Protestant work ethic.

Yet a survey conducted by American political analyst David Hitchcock . . . shows that Asian academics, think tank experts, officials, businessmen, journalists, religious and cultural leaders do tend to have different moral perspectives from their American counterparts.

Asian respondents in his study picked as their top three choices of societal values, in descending order: orderly society, harmony and accountability of public officials.

Americans, on the other hand, chose freedom of expression, personal freedom and rights of the individual.

what the West deems to be human rights is *not* really universal, but rather is a reflection of western culture and values.⁴⁸ Lee

They also did not think that an orderly society, harmony, rights of society, respect for authority and consensus were of critical importance to fellow Americans.

Susan Sim, *Human Rights: Bridging the Gulf*, STRAITS TIMES (Singapore), Oct. 21, 1995, at 32.

⁴⁸ See Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44-45 (Abdullah A. An-Na'im ed., 1992) (while many human rights specialists believe that a universal normative order based on the dignity of the individual is the only acceptable basis for political governance, "one finds cultural relativists who take their cues from societal tradition, specific religious teachings, and the primacy of cultural settings"); Graham Thompson, *Human Rights in Southeast Asia--"Free Elections" or "Rice Before Rights,"* 1 J. SOC. SCI. STUDENTS, No. 2, 1, 3 (Aug. 1997) (Southeast Asian governments argue that cultural practices in this region differ completely from those in the West, and that since the Universal Declaration of Human Rights "originated as a response to events in the West ([i.e.,] the end of World War Two), it was tailored more to Western needs. In other words, the Universal Declaration was part of a natural historical progression in the West, while Southeast Asian nations feel that they have had the Universal Declaration thrust upon them from the 'outside'. They see it as being full of ideals which have no real historical/cultural significance in Southeast Asia.") (footnote omitted); Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305 (1987) (Sompong Sucharitkul, a former representative of Thailand in the Sixth (Legal) Committee of the U.N. General Assembly, noted that "[a]fter all, the international instruments proclaiming the Rights of Man or the International Covenants of Human Rights merely incorporate the views and concepts advocated by the authors and draftsmen of those instruments, who have invariably been trained in Western or European legal traditions"); Daniel C. Turack, *The Projected Hong Kong Special Administrative Region Human Rights Record in the Post-British Era*, 31 AKRON L. REV. 77, 83 (1997) (the People's Republic of China "claims that universal human rights are representative of the 'Western' liberal approach"). See also *infra* note 92 (discussing a Chinese author's dismissal as mere hypocrisy the West's insistence that human rights in criminal law must rest on the principle of *nullum crimen sine lege*, as opposed to China's reliance on the concept of analogy in its criminal law). In the debate over whether China should disregard any "universal" notion of human rights in shaping its criminal law system, other Chinese jurists have defended a "restrictive" use of the Chinese concept of analogy as necessary and realistic, but also proposed that China

Kuan Yew, the former Prime Minister and “father” of modern-day Singapore, has, in an attempt to buttress the Asian claim, provided what is a most negative (and certainly revisionist) description of the genesis of the Declaration:

It (the Declaration) was written up by the victorious powers at the end of World War II, which meant the US and the British primarily, as well as the French, the Russians and the Chinese. The Russians did not believe a single word of what they signed in the declaration. The Chinese were in such a mess they had to pretend they were espousing the inalienable rights and liberties of man to get American aid to fight the communists, who were threatening them in 1945. So the victors settled the Universal Declaration of Human Rights, and every nations that joined the UN was presumed to have subscribed to it.⁴⁹

work to adopt the ideal of *nullum crimen sine lege*. See SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 129 (1995). China's 1997 Criminal Law seems to have abandoned the use of application by analogy, only to rely heavily on vague, undefined, or residual catch-all formulations open to a wide range of interpretations. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW 40-41 (1998). Even though such vagueness in Chinese criminal statutes is likewise antithetical to the “universal” concept of due process, *see id.* at 41, the reliance on vagueness in China's criminal law has been defended by a Chinese commentator as “necessary and appropriate to China's national circumstances.” *Id.* (citing Zeng Qingmin, “*Guanyu xin xing fa de jiben yuanze*” [On the Basic Principles of the New Criminal Law], 3 GONGAN YANJIU (1997), at 18).

⁴⁹ Sandra Burton, *Society versus the Individual*, Interview with Lee Kwan Yew, TIME, June 14, 1993 at 21. Contrast this with the comments of Charles Malik who was the Chair of the committee which authored the final text of the Declaration:

The Declaration was a composite product of all cultures and nations pooling in their wisdom and insight. The Atlantic world stressed principally civil, political, and personal liberties; the Soviet world advocated economic and social

Several Asian political leaders, as well as some Asian and western jurists, have, therefore, relied on a concept of “cultural relativism” to explain that any evaluation of the level of freedoms and rights existing in a particular country must consider the unique culture of that land--the history, the society, the traditions,⁵⁰ and the level of economic development.⁵¹ The

rights; the Latin American world concerned itself with the rule of law; the Scandinavians underlined equality between the sexes; India and China stood for non-discrimination, especially in relation to the downtrodden, underdeveloped, and underprivileged, and were also intensely interested in the right to education; others argued for the origin of these rights in the very nature of man itself; those with a dominant religious outlook wanted to safeguard religious freedoms.

ADDRESS TO THE OPENING SESSION OF THE CONFERENCE ON NON-GOVERNMENTAL ORGANIZATIONS, IN OBSERVANCE OF THE 25TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AT THE U.N. HEADQUARTERS, NEW YORK, DECEMBER 10, 1993, cited in Christine Loh, *The Vienna Process and the Importance of Universal Standards in Asia* in HUMAN RIGHTS AND CHINESE VALUES 147 (Michael C. Davis ed., 1995).

⁵⁰ A Professor of Law at Chinese University of Hong Kong, after a careful analysis of the political traditions in China, has concluded that “traditional values do not appear to play any significant role in China’s [current] choice of its constitutional and human rights regime.” Michael C. Davis, *Constitutionalism and Political Culture*, 11 HARV. HUM. RTS. J. 109, 146 (1998).

⁵¹ See Melanne A. Civic, *A Comparative Analysis of International and Chinese Human Rights Law--Universality Versus Cultural Relativism*, 2 BUFF. J. INT’L L. 285, 314-15 (1995); Dinah PoKempner, *Asia’s Activists and the Future of Human Rights*, 66 FORDHAM L. REV. 677, 679 (1997). See also KATHARINA PISTOR ET AL., *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT, 1960-1995*, at 13-14 (1999):

Comparisons between “Asia” and the “West” tend to focus on differences in culture, history, and tradition. These differences and their implications for legal systems should not be underestimated. Legal systems are embedded in the social, economic, and political life of a people, and are therefore influenced by their culture, history, and tradition. However, [one must] weigh the relevance of culture in the context of other factors [such as economic development and the varying roles of the state and market forces in economic development] that shape a legal system.

Chinese Government's *on Human Rights*⁵² explains this perspective:

In his new book, *From Third World to First*, Lee Kuan Yew, former Prime Minister of Singapore, explains his adherence to "Confucian values" in governing Singapore, and their rejection by many in the West:

Freedom could only exist in an orderly state, not when there was continuous contention and anarchy. In Eastern societies, the main objective is to have a well-ordered society so that everyone can enjoy freedom to the maximum. Parts of contemporary American society were totally unacceptable to Asians because they represented a breakdown of civil society with guns, drugs, violent crime, vagrancy, and vulgar public behavior. America should not foist its system indiscriminately on other societies where it would not work.

...

[I]n the early 1950s . . . I discovered the cultural gulf between the Chinese-educated and the English-educated in Singapore. A people steeped in Chinese values had more discipline, and was more courteous and respectful to others. The result was a more orderly society. When these values were diluted by an English education, the result was less vigor and discipline and more casual behavior

American liberal academics began to criticize us for our attitudes to the Western press circulating in Singapore. We were not following their pattern for development and progress, that as a country developed its free-market economy and enjoyed prosperity, it should become more like America, democratic and free, with no restrictions on the press. Because we do not comply with their norms, American liberals will not accept that our government, which Singaporeans have repeatedly voted for, can be good.

LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965-2000*, at 491-92 (2000). In his preface to *FROM THIRD WORLD TO FIRST*, Henry Kissinger echoes this view: "Lee Kuan Yew would not be true to himself were he less than frank about his analysis of the difference between the individualism of the West and the priority for social cohesion in countries such as his and in much of the rest of Asia. He does not ask us to change our patterns, only to refrain from imposing them on societies with different histories and necessities." Dr. Henry A. Kissinger, *Preface to Lee, supra*, at xi.

⁵² WHITE PAPER, *supra* note 38.

[T]he evolution of the situation in regard to human rights is circumscribed by historical, social, economic and cultural conditions of various nations, and involves a process of historical development. Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights. From their different situations, they have taken different attitudes towards the relevant UN conventions. Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country. Therefore, a country's human rights situation should not be judged in total disregard of its history and national conditions, nor can it be evaluated according to a preconceived model or the conditions of another country or region. Such is the practical attitude, the attitude of seeking truth from facts.⁵³

Accordingly, despite the apparent failure of Marxism, as illustrated by the collapse of the Soviet Union and its East European client regimes, leaders of several Asian governments and a number of jurists have refused to accept the view that

⁵³ *Id.* at 5. However, the argument of cultural relativism was not adopted by all Asian governments. One author has noted that in the Philippines, even during the Marcos regime, due to the strong support for the U.S.-Philippine relationship among the ruling elite, the national rhetoric, with its emphasis on the rule of law, displayed American and European value orientations from the start and were part of the political culture. See Jetschke, *supra* note 47, at 142, 166. In fact, human rights groups, western and domestic, had a more visible impact in the Philippines under Marcos because the whole Philippine national identity discourse, as promoted by Marcos himself, presented the country as a state governed by the rule of law and a legitimate member of the international community. *Id.* at 150-51. When pressured on human rights grounds, the Philippine government under Marcos did not have a rhetorical defense based on anti-western nationalism, *id.* at 151, but could only combat assertions of human rights abuses on the grounds of non-intervention in domestic affairs, an argument which, in the Philippine case, received limited acceptance. See *id.* at 142.

liberal democracy is the sole ideological option adequate to confront the challenges of economic development and industrialization, and have instead advocated an alternative--the "Asian way."⁵⁴ Inoue Tatsuo, a professor of law at Tokyo University, explains that the "Asian way" is a combination of capitalist economics and "Asian values" which are embedded in traditional Asian cultures and are incompatible with the core values of liberal democracy, most specifically, the right to criticize and to change the government.⁵⁵

The "Asian way" thus promotes economic modernization, but dismisses political liberalization.⁵⁶ The "Asian values" discourse bases its claim not only on the notion of Asian uniqueness,⁵⁷ but also on the view that liberal democracy, a value system alien to Asian culture, represents a western attempt to dominate Asian countries, and thereby constitutes "cultural imperialism."⁵⁸ The West's apparent failure at the June, 1993 Vienna conference to

⁵⁴ See Tatsuo, *supra* note 43, at 27.

⁵⁵ *Id.* at 28. See also Bette Bao Lord, Editorial, *Gore Had It Right*, N.Y. TIMES, Nov. 22, 1998, sec. 4, at 17 (supporting Al Gore's criticism of certain Asian leaders at an Asian-Pacific economic meeting because "[s]ome leaders present deserved [Gore's] reminder because they had pontificated about 'Asian values,' a doctrine that makes allowances for certain societies because they are said to thrive under autocratic, not democratic, rule").

⁵⁶ See Tatsuo, *supra* note 43, at 28.

⁵⁷ This claimed "uniqueness" often focuses on a history of authoritarian rule, subservience to hierarchy, discipline, conformity, and the importance of achieving harmony. Few observers have been as condemning of the concept of "Asian Values" as has Chris Patton, the last British Governor of Hong Kong who engaged in extensive, multi-year negotiations with the Chinese regarding the transition of Hong Kong in 1997 to Chinese rule. Governor Patton's book, *EAST AND WEST*, deemed "Asian values" as "shorthand for the justification of authoritarianism, bossiness, and closed collusion." See Nathan Glazer, *Two Cheers for Asian Values*, THE NATIONAL INTEREST (Fall 1999) at 30.

⁵⁸ See *id.* at 30; Falk, *supra* note 48, at 45 (the cultural relativist position "may also be accompanied by the ideological counterpoint in non-Western societies that alleged human rights standards are more properly understood to be disguised hegemonic claims by the West that, in a postcolonial era, are no longer entitled to respect and should more properly be repudiated").

overcome the gap that truly exists between Asian and western perceptions of human rights, and the Conference's acknowledgement and implicit acceptance of some aspect of cultural relativism, may have intensified the refusal to accede to the western notion of universality and seems to have minimized the advancement of human rights that might otherwise have been achieved at that world conference.⁵⁹

Asia is the only continent where there is no regional human rights enforcement agency.⁶⁰ In Europe,⁶¹ in the Americas,⁶² and

⁵⁹ See Bilahari Kausikan, *Asia's Different Standard*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 226, 229 (Henry J. Steiner & Philip Alston eds., 1996); Christina M. Cerna, *East Asian Approaches to Human Rights*, 2 BUFF. J. INT'L L. 201, 207-08 (1995-96)

⁶⁰ See Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215, 228 (1995-96); Muntarbhorn, *supra* note 43, at 413-14; Sripathi, *supra* note 21, at 460.

⁶¹ CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 25(1), in HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS 58 (Christopher Gane & Mark Mackarel eds.), 1997 ("The [European] Commission [of Human Rights] may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the [signatory states] of the rights set forth in this Convention, provided that the [signatory state] against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the [signatory states] who have made such a declaration undertake not to hinder in any way the effective exercise of this right."). The European Court of Human Rights has been in the forefront of establishing legal protections and remedies for those who claim that their rights have been violated. See e.g. *Norris v. Ireland*, Ser. A, No. 142, 13 EHRR 186 (1989) (Ireland's laws criminalizing homosexual relations violated the petitioner's right to live a private life).

⁶² REGULATIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, art. 26(1), in FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 268 (1990) ("Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the Organization [of American States] may submit petitions to the Commission . . . on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man.").

in Africa,⁶³ there are independent enforcement entities where an individual claiming that his or her human rights have been violated can file a complaint.⁶⁴ A hearing or a trial can be held where the individual can attempt to support his or her claim that the government is curtailing human rights.⁶⁵ Asian countries have refused to institute such a regional agency in spite of an annual appeal by the United Nations for Asian countries to form such an association; a non-governmental organization, the Asian Human Rights Commission, has gone so far as to provide a Draft Asian Human Rights Charter.⁶⁶ Furthermore, Asia has the

⁶³ RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, PT. II, RULE 114(1), *in* HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: INTERNATIONAL INSTRUMENTS 351 (Christopher Gane & Mark Mackarel eds., 1997) ("Communications may be submitted to the Commission by: (a) An alleged victim of a violation by a State party to the [African] Charter [on Human and Peoples' Rights] of one of the rights enunciated in the Charter, or in his name, when it appears that he is unable to submit the communication himself; (b) An individual or an organization alleging, with supporting evidence, cases of serious or gross violations of human and peoples' rights.").

⁶⁴ *See supra* notes 61-63.

⁶⁵ There were some in the U.N. who had initially regarded these regional organizations negatively and as a threat to the concept of universality of rights. After the adoption of both the Political and Economic Covenants in 1966, however, the General Assembly began to encourage such enforcement agents; in 1977, the Assembly called for regions to establish "suitable regional machinery for the promotion and protection of human rights." G. A. Res. 32/127, 32 U.N. GAOR, 105th plen. mtg., U.N. Doc. A/32/458/(1977).

⁶⁶ For the most recent draft, see Asian Human Rights Commission, The Draft Asian Human Rights Charter, at http://www.ahrchk.net/charter/draft_content.html (visited May 31, 2000). The Charter accepts the universality and indivisibility of human rights and a number of Asian NGOs have accepted the charter as their position on human rights. *See* Vitit Muntarbhorn, *Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?* 8 TRANSNAT'L L. & CONTEMP. PROBS. 413 (1998). *See generally* Ralph Wilde, *New Development: NGO Proposals for an Asia-Pacific Human Rights System*, 1 YALE HUM. RTS. & DEV. L.J. 137 (1998) (analyzing the Draft Asian Human Rights Charter).

One author explained the difficulties encountered by Asian countries in forming a regional human rights enforcement agency as follows:

smallest percentage of countries, when compared to those in any other continent, that have signed the International Covenant on Civil and Political Rights.⁶⁷

Many Asian countries, in a justification of their claim that economic rights are more important than political rights, argue that at different stages of a country's development it is necessary to focus on different rights.⁶⁸ At the current level of development of Asian countries, it is, therefore, maintained that a people's economic well-being must assume primary importance.⁶⁹ China

One reason for the absence of a regional [human rights] structure is the wide variety of countries within Asia which includes Japan, India, and Iraq. So far, Asian governments have only agreed to "explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia." Discussions so far indicate serious problems in coming up with a conception of human rights both acceptable to Asian governments and agreeable to the outside world.

Christine Loh, *The Vienna Process and the Importance of Universal Standards in Asia*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 145, 151 (Michael C. Davis ed., 1995) (quoting from *Bangkok Declaration*, *supra* note 45, pt. I, Final Declaration sec. 26).

⁶⁷ See RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: A COMPILATION OF TREATIES, AGREEMENTS AND DECLARATIONS OF ESPECIAL INTEREST TO THE UNITED STATES 170.50-170.51 (2d ed. 1990). See also Muntarbhorn, *supra* note 43, at 408-09 ("Although Asian countries voted for the 1948 Universal Declaration of Human Rights, many of them have not yet acceded to other key international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights.").

⁶⁸ See Bell, *infra* note 69 (describing the priority given to eradication of poverty and the reduction of political rights to secondary status by Lee Kuan Yew as Prime Minister of Singapore). See also Yash Ghai, *Human Rights and Governance*, *supra* note 47, at 237 ("It is also sometimes argued that economic underdevelopment renders most of the political and civil rights (emphasized in the West) irrelevant in Asia.").

⁶⁹ See Copper *et al.*, *supra* note 7, at 3; Kausikan, *supra* note 59, at 230; Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 HUM. RTS. Q. 641, 644 (1996). Daniel Bell thus describes the position of a number of Asian governments:

A common East Asian argument is that Western-style civil and political liberties need to be sacrificed in order to meet

points to the fact that only since 1949 has any Chinese government guaranteed the right to all its citizens to sustenance--to be able to have enough to eat to survive.⁷⁰ Many Asian countries also claim that political *stability* is of primary import,

more basic material needs. Most famously, Lee Kuan Yew argues that political leaders in developing countries should be committed to the eradication of poverty above all else: "As prime minister of Singapore, my first task was to lift my country out of the degradation that poverty, ignorance and disease had wrought. Since it was dire poverty that made for such a low priority given to human life, all other things became secondary." If factional opposition threatens to slow down the government's efforts to promote economic development or to plunge the country into civil strife, then in Lee's view tough measures can and should be taken to ensure political stability. Such is the message Lee delivers to receptive audiences in China, Japan, Vietnam, and the Philippines.

Id. (footnote omitted). See also WHITE PAPER, *supra* note 38, at 6 ("To solve their human rights problems, the first thing for the Chinese people to do is, for historical reasons, to secure the right to subsistence.").

In *From Third World to First*, Lee Kuan Yew seems to justify the rejection of Western criticism on human rights issues and Singapore's emphasis on political stability by noting the benefit to Singapore of minimal corruption, with its attendant economic rewards. After claiming that because Singapore does not comply with American norms of democracy, American liberals do not accept the fact that Singapore's government can have virtues, he states:

No critic has been able to fault the Singaporean government for corruption, nepotism, or immorality. For many years in the 1990s, business risk-assessment organizations such as Political and Economic Risk Consultancy based in Hong Kong have rated Singapore as the least corrupt country in Asia; Transparency International based in Berlin rated Singapore as the seventh least corrupt in the world, ahead of Britain, Germany, and the United States.

Lee, *supra* note 51, at 492.

⁷⁰ See WHITE PAPER, *supra* note 38, at 9 ("Ever since the founding of the People's Republic of China in 1949, the Communist Party of China and the Chinese government have always placed the task of helping the people get enough to wear and eat on the top of the agenda."). See also 1954 CONST. OF PEOPLE'S REPUBLIC OF CHINA, pmbl., in ALBERT P. BLAUSTEIN, FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 3 (1962).

and an authoritarian government with strong support of the military may be best able to assure the required stability.⁷¹

⁷¹ See Bell, *supra* note 69, at 645 (“Similar to Lee Kuan Yew [the then Prime Minister of Singapore quoted *supra* note 51], the Burmese military junta argues that rights must be curtailed in order to provide the political stability said to underpin economic progress.”) (footnote omitted); PoKempner, *supra* note 51, at 678-79 (describing the “so-called Asian concept of human rights” as follows: “political and social stability is necessary for economic development, which, in turn, is a precondition for human dignity and other civil and political rights; economic rights, particularly the economic development of the state, should take primacy over civil and political rights; the West’s undue emphasis on individual rights is socially destructive; and an emphasis on individual duties and the rights of collectivities is more in tune with Asian cultural traditions”); Yash Ghai, *Rights, Social Justice, and Globalization in East Asia*, in *THE EAST ASIAN CHALLENGE*, *supra* note 7, at 241, 254-55 (in addition to using “Asian values” to counter the concept and content of human rights, Asian government leaders have justified the suppression of human rights in terms of stability and economic competitiveness). See also HUMAN RIGHTS WATCH, *ACADEMIC FREEDOM IN INDONESIA: DISMANTLING SOEHARTO-ERA BARRIERS* 4 (1998) (asserting that the Indonesian military continues to have authority to monitor academic affairs and to intervene on university campuses whenever it deems necessary in the interest of “national stability”); Mary Shi, *China*, in *HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK* 1994, at 150, 165 (Peter Baehr et al. eds., 1994) (in September 1993, the Chinese press announced that the Chinese government would not fear sending troops into Hong Kong even before the reversion of that British colony to Chinese rule on July 1, 1997, “in case there was chaos, that might endanger the stability of the People’s Republic”). In examining the importance that Asian governments place on political stability, one notes a connection sometimes made in the Asian context between political stability, economic stability, and Asian cultural preferences. One commentator, while not completely accepting the cultural relativist argument, observes that:

The argument from Singapore and some other Asian governments is that, while many human rights are now accepted as universal aspirations, their form, priority and scope of applicability will vary. Asian societies, it is said, place the community in priority to the individual and proceed by “consensus”, not conflict. The authority and dominance of state leaders are not suspect and limited, but trusted and enhanced. Asian approaches to human rights, it is argued, emphasize economic and social rights and are legitimized by

Economic progress, it is maintained, can best be achieved by a government which need not deal with a political opposition.⁷² To be sure, multinational corporations *are* more likely to invest in those Asian countries which are viewed as being able to provide a stable and secure environment, and there may be a reluctance by some to invest in a county where the government needs to put itself up to the popular will every four years.⁷³

Many Asian nations also assert that their circumstances are unique in that they are forced to confront heightened and

the continued enjoyment of stability and good economic progress, which is what Asians value.

Simon S. C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 746 (1996).

⁷² But see Ambrose Leung, *Tolerance Essential For Future*, Says Anson, SOUTH CHINA MORNING POST, May 21, 2001 at 6 (the former Chief Secretary for Administration in the government which took office after Hong Kong became part of China in 1997, stated that in order to attract foreign investment, Hong Kong should be tolerant of different opinions and protect the rule of law). It is only a small step then to claim that political and civil rights constitute an actual threat to economic growth.

⁷³ See Kausikan, *supra* note 59, at 230 (East and Southeast Asian governments would find western arguments that political and civil rights, especially those related to democratic accountability, are basic to survival and not luxuries to be enjoyed only after a certain level of economic development has been reached, "to be grossly overstated"; such an argument does not accord with the historical experience of Asian governments, which "sees order and stability as preconditions for economic growth, and growth as the necessary foundation of any political order that claims to advance human dignity"). Cf. SUZANNE OGDEN, CHINA'S UNRESOLVED ISSUES: POLITICS, DEVELOPMENT, AND CULTURE 291 (1989) ("the relatively recent development of the concept of 'corporate social responsibility' in the West is still viewed by many managers of enterprises as something that interferes with profits") (footnote omitted). However, an authoritarian regime such as that in China may not always succeed in providing such a "stable and secure environment." See *id.* at 296 ("The foreign business community has been leary of the political risk of investment in China. It has also been unwilling or unable to do business in a country where many necessary items for doing business . . . cannot be bought by a foreigner in a free market, but must instead be negotiated for through local and provincial suppliers in what remains a predominantly centrally controlled and planned economy, in which having connections is all . . . and where legal protection is limited.").

numerous threats of secessionist movements, a fear perhaps exacerbated by the disintegration of the former Soviet Union.⁷⁴ If minority ethnic or religious groups which reside in a particular area of a country were to attain full political rights and self-determination, many of these areas may, in fact, choose to break away from the main body of the country--a very serious threat to the well-being of any nation.⁷⁵ Asian governments have

⁷⁴ See Shi, *supra* note 71, at 150, 156 ("The break-up of the Soviet Union intensified China's attention on nationalist movements within its borders."). Ms. Shi specifically noted the following with respect to the post-1997 autonomy promised Hong Kong by the British and Chinese governments, and the apprehensions of Chinese authorities regarding other Chinese provinces that might seek more autonomy (although not necessarily independence):

[F]ormer commitments that the 1995 elected [Hong Kong Legislative Council] representatives would be allowed to stay on after 1997 until 1999, when their term would come to an end, have now been rejected [by China's central authorities]. In the eyes of the Chinese Central Government, a democratization process in the Hong Kong Administrative Region would be a serious threat to the already eroding power of the [Chinese Communist Party]. The economically well developed southern provinces of Fujian and Guangdong have since economic reform continuously protested against interference in their economic affairs by the central authorities. Any attempt at democratization in neighbouring Hong Kong would result in a similar attempt in these provinces or the *Special Economic Zones*

Id. at 165 (emphasis in original). Subsequent to Ms. Shi's observations on the Chinese reaction to the threat posed by democracy in Hong Kong, several commentators have expressed varying degrees of pessimism that China will maintain democracy and political autonomy for Hong Kong. See, e.g., Alison W. Conner, *Human Rights in Post-1997 Hong Kong: Still a Key Role for International Law?*, 22 S. ILL. U. L.J. 307, 313-16, 323-24 (1998); Michael C. Davis, *International Commitments to Keep: Hong Kong Beyond 1997*, 22 S. ILL. U. L.J. 293, 296, 302-03 (1998); Carole J. Petersen, *Preserving Institutions of Autonomy in Hong Kong: The Impact of 1997 on Academia and the Legal Profession*, 22 S. ILL. U. L.J. 337, 337-38 (1998).

⁷⁵ Cf. Yash Ghai, *Human Rights and Governance*, *supra* note 47, at 237 ("Indeed, it is sometimes alleged that [political and civil rights] are dangerous [in Asia] in view of fragmented nationalism and fragile Statehood.").

Religious conflict often plays an important role, sometimes greater than, sometimes lesser than, ethnic differences in secessionist movements in Asian

accordingly stressed the great importance of state sovereignty and territorial integrity when confronted with human rights agencies calling for more political power for minority ethnic groups.⁷⁶ For

countries. *See, e.g.*, HUMAN RIGHTS WATCH, WORLD REPORT 2000, at 182-83 (1999) (role of Buddhism in Tibetan efforts to seek autonomy from China); *Id.* at 192 (Christian East Timorese struggle to regain independence from mostly Moslem Indonesia); AMNESTY INTERNATIONAL, SRI LANKA—THE NORTHEAST: HUMAN RIGHTS VIOLATIONS IN A CONTEXT OF ARMED CONFLICT 5 (1991) (civil war between Sri Lankan forces and Tamil separatist groups involving attempts to create a Tamil Hindu state independent from the mostly Buddhist, Sinhalese Sri Lanka); Celia W. Dugger, *Sri Lanka, Limiting Reports, Says It Pushed Back Rebels*, N.Y. TIMES, May 6, 2000; *Europe Moves to Help 21 Rebels Hold in Philippines*, N.Y. TIMES, May 7, 2000 (LEXIS News Library), sec. 1, at 18 (Islamic groups fighting for an independent Islamic state in the region of Mindanao, which has a mostly Moslem population in the Christian-dominated Philippines); Seth Mydans, *Innocents in Web of Philippine Terror*, N.Y. TIMES, May 6, 2000, at A3.

⁷⁶ *See* Tatsuo, *supra* note 43, at 30-31. Inoue Tatsuo has voiced strong criticism of the “sanctification” of state sovereignty by those who seek to promote an Asian value ideology. First, he observes that “ ‘[i]n origins and evolution, sovereignty is definitely a Western concept, and was not shared by other regions until [the twentieth] century.’ ” *Id.* (quoting Richard Falk, *Sovereignty*, in THE OXFORD COMPANION TO POLITICS OF THE WORLD 851 (Joel Krieger ed., 1993)). Second, Inoue Tatsuo points out that the Asian values discourse exploits the concept of state sovereignty “as an omnipotent talisman for silencing annoying human rights demands,” citing the Bangkok Declaration as an example. *See id.* at 30-31. This exploitation of state sovereignty to quell individual rights poses a special conceptual problem that Tatsuo explains as follows:

[T]he equal and autonomous status of the sovereign state in international relations is a conceptual extrapolation of the equality and autonomy of the individual rights holder in interpersonal relations. The principle of sovereignty protects minor and weaker states against the oppression of major and hegemonic states, just as human rights protect weaker individuals and minorities against stronger political and social forces

The conceptual homology of sovereignty and human rights not only requires people in the developed countries to be more sensitive to the importance of sovereignty for the developing countries, it also reveals the deceptiveness of those leaders of developing states who use sovereignty to

this reason, the Bangkok Declaration⁷⁷ emphasizes “the principles of respect for national sovereignty and territorial integrity as well as *non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.*”⁷⁸

There is special anger toward the expression of human rights concerns by the West as part of an attempt to exert political pressure and to chastise certain countries in Asia.⁷⁹ One Chinese scholar’s view, for example, is that the real point behind the emphasis on the universality of human rights is “to exert pressure on countries with different social systems and spread democracy

shield themselves from their response to their own violations of human rights. It is a moral if not a logical contradiction to uphold a devout faith in sovereignty as the normative resort for weaker states in the international context while being cynical about the demands for human rights pressed by weaker individuals and groups in the domestic context.

Id. at 31. As human rights, along with principle of the separation of powers, evolved in the West to replace the medieval safeguards, such as guilds and autonomous cities, with their special privileges and powers that shielded individuals to some extent from state tyranny, the same compensatory requirement for a system of human rights applies to those Asian countries that are erecting national governments which undermine more or less autonomous village communities and other traditional buffers against central authority. *Id.* at 32.

⁷⁷ *Bangkok Declaration*, *supra* note 45.

⁷⁸ *See id.*, pt. I, Final Declaration sec. 5 (emphasis added). It was left to the Head of the Chinese Delegation to the Vienna Conference to most forcibly present this concept: “If the sovereignty of a state is not safeguarded, the human rights of its citizens are out of the question, like a castle in the air. The views that the human rights question goes beyond boundary and that the principle of non-interference in other’s internal affairs is not applicable to it and actions on the premises are, in essence, a form of power politics.” *See* H.E Mr. Liu Hiaqiu, *supra* note 10.

⁷⁹ *See* Sim, *supra* note 47, at 32 (quoting a University of Singapore law lecturer in stating that while western human rights groups generally do a good job of educating people about their rights, “they often also provoke defensiveness in governments. ‘States will always defend their sovereign prerogative. They don’t like their skeletons unearthed, which is exactly what human rights groups like to do’”).

and freedom Western style.”⁸⁰ There is an absolute opposition by countries such as Thailand, Malaysia, Indonesia⁸¹ or China⁸² to the linking of political or economic rights with economic assistance to those countries.⁸³ The Bangkok Declaration

⁸⁰ Xin Chunying, *Can the Pluralistic World Have a Unified Concept of Human Rights*, in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES, 46 (Peter Baehr, Fried van Hoof, Liu Nanlai, Tao Zhenghua eds., 1996).

⁸¹ The Indonesian Minister of Foreign Affairs has stated that Indonesia “cannot accept linking questions of human rights to economic and development cooperation, by attaching human rights implementation as political conditionalities to such cooperation. Such a linkage will only detract from the value of both.” See H.E. Mr. Alatas, Minister of Foreign Affairs and Head of the Delegation of the Republic of Indonesia, Address at the World Conference in Human Rights, Vienna (1993).

⁸² China articulated this position to the 1993 World Conference: “It is neither realistic nor workable to make international economic assistance or even international economic cooperation conditional on [human rights standards].” See H.E. Mr. Alatas, Minister, *supra* note 81. In May of 2001, China was instrumental in ousting the United States from the United Nations Human Rights Commission; an official statement from the Chinese Government stated that the time had arrived for the United States to “enter into dialogue on equal footing with other countries, rich or poor, strong or weak” and to stop using “human rights issues as a tool to pursue its power politics and hegemonism.” Roger Cohen, *America the Roughneck*, N.Y. TIMES, May 7, 2001 at A10.

In spite of all the talk in America about denying most-favored-nation (MFN) treatment to China unless there were to be improvements in China’s human rights record, presidents have opposed such a response. When for example, Congress passed the United States-China Act of 1992 prohibiting any recommendation by the President granting MFN status unless the President reported that China had taken steps to “begin adhering” to the Universal Declaration of Human Rights, President Bush vetoed the Act. The House of Representatives overrode the veto but the Senate did not.

⁸³ See *Bangkok Declaration*, *supra* note 45, pt. I; Final Declaration sec. 4. See, e.g., HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1995, *supra* note 95, at 73, 80 (President Suharto explained Indonesia’s renunciation in 1992 of all future aid from the Netherlands as having been provoked by the Dutch “colonial” attitude, and characterized the linking of human rights to economic aid as “typically ‘western’”). Another author describes Suharto’s reaction to criticism by the Netherlands of Indonesia’s failure to negotiate with the U.N. Secretary General over East Timor:

expressed this sentiment by strongly criticizing “any attempt to use human rights as a conditionality for extending development assistance.”⁸⁴

One must look at just who gains by this Asian emphasis on “Asian values,” “leave us alone,” “we know what we are doing”; it is *certainly not* the critics or opponents of the government. The stated lack of need for political rights for the population as a whole may be just a rationalization for those in power to keep out of power those who oppose the government.⁸⁵

The Indonesian government launched a diplomatic offensive and virtually singled out the government of the Netherlands, the former colonial power, to punish it for interfering in Indonesian domestic affairs. On April 25, 1992, the Indonesian President Suharto ended the development cooperation with the Dutch. He demanded the dissolution of the Dutch-led international donor consortium and its reconstruction under the World Bank. The gesture carried great symbolic weight and allowed the Suharto government to mobilize nationalist sentiments in Indonesia against foreign intervention.

Jetschke, *supra* note 47, at 147-48 (references omitted).

⁸⁴ See *Bangkok Declaration*, *supra* note 45, pt. I, Final Declaration sec. 4. The Declaration, however, did not provide answers for why economic assistance ought to be provided to governments that are dictatorships and abuse the rights of most of its citizens and persecute religious and ethnic minorities.

⁸⁵ Professor Yash Ghai, in addition to questioning the solidity of a uniform Asian approach to human rights has also cast doubt on the perception that the notion of an Asian approach to human rights reflects the views of ordinary Asians, stating as follows:

Perceptions of human rights are reflective of social and class positions in society. What conveys an apparent picture of a uniform Asian perspective on human rights is that it is the perspective of a particular group, that of the ruling elites, which gets international attention. What unites these elites is their notion of governance and the expediency of their rule. For the most part, the political systems they represent are not open or democratic, and their publicly expressed views on human rights are an emanation of these systems, of the need to justify authoritarianism and occasional repression. It is their views which are given wide publicity domestically and internationally.

Yash Ghai, *Human Rights and Governance*, *supra* note 47, at 237.

It is in the interest of the current political leaders to have the status quo continue and to not risk having elections. The privileged and powerful believe that they are most likely to remain the privileged and powerful and wealthy if they don't allow any kind of opposition movement to develop.⁸⁶ It is not the jailed and tortured dissidents in these countries who are opposing the "western" view of the universality of human rights.⁸⁷

In fact, at the *non-governmental* level in Asia, there has been an acceptance of the concept of the universality of human rights. In the days immediately preceding the Bangkok Conference,⁸⁸ more than one hundred non-governmental organizations⁸⁹ from

⁸⁶ However, economic growth such as has occurred in much of East Asia may itself lead to the downfall of authoritarian elites. As one commentator noted in *Business Week*, "the rise of the middle class that resulted from decades of 8% to 9% annual growth directly led to the downfall of repressive regimes in South Korea, Taiwan, Thailand, and Indonesia." Pete Engardio, Commentary, *Know-Nothings at the Barricades*, BUS. WK., May 1, 2000, at 48. But see Yash Ghai, *supra* note 71, at 259 ("Capitalism in Asia has managed with rather truncated forms of legality, relying more on executive favors and interventions than judicial adjudications. The market has not generated an ideology of equality or rights."); Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 344 n.9 (1995) ("The conviction that democracy and a successful market economy are linked is in part a polemical claim and a reaction to the failures of the Soviet statist approach to economic policy. . . . The prevalence of the market should not be confused with the spread of democratic Constitutionalism; the Pacific Rim countries of South Asia have enjoyed extraordinary economic success in [the 1990s] while continuing to resist democratization.").

⁸⁷ It was the *executives* of the *governments* of Asia that formulated the *Bangkok Declaration*, *supra* note 45.

⁸⁸ See *supra* note 45-47 and the accompanying text.

⁸⁹ Non-governmental organizations (NGO's) play an increasingly important role in the human rights arena. Amnesty International is perhaps the best known, but national NGOs which limit their concerns to one country and often to a single issue (such as the status of women or child labor) can have great impact on governmental policy by monitoring and publicizing existing human rights violations. Those countries, however, which are most notorious for prohibiting political dissent, may prohibit NGOs as well. China's laws prohibiting counter-revolutionary activity have been applied to an NGO which

throughout Asia convened, and in anticipation of what was likely to result from the official meeting of government leaders, issued their own non-governmental Bangkok Declaration on Human Rights.⁹⁰ The NGO Declaration was straightforward:

We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights including women's rights, must not be tolerated. As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.⁹¹

The statement made it clear that not only must cultural relativism not provide an excuse for human rights violations, but when traditional cultural practices did in fact conflict with human rights norms, it was the human rights standards which must prevail.

IV. The Art of Not Practicing What You Preach

In any examination of the Asian perspective on human rights, it is important to understand how the West is perceived by many countries in Asia. One primary perception is that the West is hypocritical when it comes to its espousal of human rights.⁹² It

has been critical of governmental actions. See Michael Posner and Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L.REV. 269, 272 (1994).

⁹⁰ OUR VOICE: BANGKOK NGO DECLARATION ON HUMAN RIGHTS. (Asian Cultural Forum on Development ed., 1993).

⁹¹ *Id.* at 199.

⁹² See Virginia A. Leary, *Postliberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 107-08 (Abdullah A.

was the western colonial powers whose missionaries regarded themselves as morally superior to the “primitives” who had lived in the Asian countries before the European powers arrived and established their dominance. Equality of rights--a prime focus of today's western human rights advocates--for the “natives” with those of the colonizers⁹³ was not the guiding principle of imperialist rule.⁹⁴

An-Na'im ed., 1992) (“Western rights theory has been criticized by non-Westerners more fully conscious of the glaring disparity between wealth and poverty in the world.”). *See also supra* note 68 and accompanying text (containing the observation by Bilahari Kausikan that economic concerns influence, at least in part, western attitudes on human rights violations in Asian countries).

A Chinese commentator accused the West of hypocrisy in its criticism of human rights violations allegedly embodied in China's criminal law, specifically, the reliance of China's legal system on the concept of analogy in criminal law, as opposed to the western principle of *nullum crimen sine lege*. *See* WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW 38 (Lawyer's Committee for Human Rights 1998) (citing Huo Guoyun, “*Shichang jingji xia zuixing fadeng yu leitui de jiazhi quxiang*” [The Value Trend of Analogy and *Nullum Crimen Sine Lege* Under the Market Economy], 3 *Faxue* (1995), at 65. Huo Guoyun asserted that “Western countries long ago abandoned any real commitment to the principle [of *nullum crimen sine lege*] and adopted, in various guises, institutions similar to analogy.” *Id.* (footnote omitted). Thus, “China should not attempt to reach a standard that Western countries has found unattainable and maintained only in name, and . . . should not concern itself with the carping of others in constructing its system of criminal law ‘with Chinese characteristics.’” *Id.*

⁹³ The colored natives of Haiti, in their first uprising against French rule in 1790, used the French Declaration of Human Rights as part of their demands for equality. *See* Liu Nanlai, *Developing Countries and Human Rights in HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES supra* note 80, at 104. The calls went on deaf ears, yet the former colonizers now use the same principles articulated in the French Declaration to demand compliance from others.

⁹⁴ *Cf., e.g.,* Count J. A. Gobineau, *Influence of Christianity Upon Moral and Intellectual Diversity of Races* (1856), in IMPERIALISM AND ORIENTALISM: A DOCUMENTARY SOURCEBOOK 263 (Barbara Harlow & Mia Carter eds., 1999). Although Count Gobineau did not, in his essay, concentrate specifically on the peoples of Asia, he explained European superiority over other, non-European peoples as a matter of racial determinism, which even conversion to

Some countries in Asia respond to western criticism of their human rights record by noting that memories of colonization are very, very recent and very, very clear.⁹⁵ Much of Asia--with the

Christianity presumably could not erase, and which was widely accepted in the West in the 19th and early 20th centuries: "Nay, the very hostilities of race survive the adoption of a common religion The Christian religion, then, does not equalize the intellectual disparities of races." *Id.* at 267.

⁹⁵ See, e.g., Cohen, *infra* note 70, at 463 (describing the harsh official Chinese reaction to western criticism of China's human rights record despite the abuses committed by the West in China during the imperialist epoch); Falk, *supra* note 48, at 45; Bilahari Kausikan, *An East Asian Approach to Human Rights*, 2 BUFF. J. INT'L L. 263, 277 (1995-96) ("Asian values have been a balm for the cultural wounds inflicted by western colonialism."); Tatsuo, *supra* note 43, at 31 (the notion of state sovereignty, which imposes the "fiction" of an equal and autonomous status for states, thereby "protecting" weaker states against the oppression of stronger, more dominant states, has been deployed by less developed former Asian colonies against claims of human rights abuses by their more developed former colonial masters, and partly explains why the developing countries in Asia and other regions that still have fresh memories of their struggles against western and Japanese colonialism are more adamant in the assertion of sovereignty than are the powerful nations, which at times articulate a fashionable tendency to look down upon the idea of sovereignty as being obsolete). See also Peter Baehr et al., *Responses to Human Rights Criticism: Kenya-Norway and Indonesia-The Netherlands*, in HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1995, at 57, 73-82 (Peter Baehr et al. eds., 1995) (the renunciation by Indonesia in 1992 of all future aid from the Netherlands occurred largely "because of the colonial history and the great difficulty with which the colonial relationship had been brought to an end"); Di Jiang-Schuerger, Comment, *The Most Favored Nation Trade Status and China: The Debate Should Stop Here*, 31 JOHN MARSHALL L. REV. 1321, 1335-36 (1998), noting that the renewal of China's "Most Favored Nation" (MFN) status by the United States Congress has long been linked in part to China's record on human rights:

China's reaction to the U.S. threat of terminating its MFN status is "emotionally charged." The Chinese government has described the threat of MFN revocation as "bullying" by the United States One may understand these reactions to the MFN issue within the historical context of China's trade relations with the West. With a history of Western hegemony in the 19th and early 20th century, China is suspicious of any foreign influence on its domestic policies.

Di Jiang-Schuerger, *supra*, at 1335-36 (footnotes omitted). Lee Kuan Yew has also opined that the Chinese view America's criticisms of China's lack of

exception of the interior provinces of China--had been carved up and ruled by Europe and Japan until the end of the Second World War.⁹⁶ Asian countries, therefore, criticize the West for daring to lecture Asia about human rights when the West had done so much to oppress the Asian people and to exploit their natural and economic resources during the colonial period.⁹⁷ Additionally,

democracy and human rights as "bullying." See Lee, *supra* note 51, at 658-59.

⁹⁶ See generally, JOHN M. JENNINGS, *THE OPIUM EMPIRE: JAPANESE IMPERIALISM AND DRUG TRAFFICKING IN ASIA, 1895-1946* (1997) (describing Japan's involvement in and control of the opium and narcotics trade in the portions of Asia that it dominated, including Taiwan, Kwantung, Korea and Manchuria); JOHN G. ROBERTS, *THE COLONIAL CONQUEST OF ASIA* (1976) (portraying European, Japanese and American imperialism in Asia from the sixteenth century until after World War II).

⁹⁷ This hostile response to the West's criticism has been particularly forceful in the case of China. See Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. 447, 463 (1987) (*Renmin Ribao*, the People's Daily, in 1979 questioned the West's right to preach to China on human rights quite harshly, "in particular when [the West] had committed so many abuses in China in the 19th century." Western "imperialists," the official daily charged, brought the Chinese people "death instead of human rights." Westerners "instructed the Manchu emperors, the northern war lords and the autocrat Chiang Kai-shek to kill the Chinese people and sometimes even did it themselves. How can they be in a position to lecture us on human rights?") (footnote omitted).

Ms. Cohen also noted that China's subjugation by imperialist powers in the 19th century has contributed to the subdued reaction of many westerners to China's human rights record:

The forcible opening and the shameful exploitation of China in the nineteenth century and thereafter, by the West, Russia, and Japan, frequently has been invoked [by westerners] as a reason for the West to move slowly on human rights issues. In hearings before the United States Congress in 1980 and 1982, many who testified on China cited exploitation by foreigners and China's past humiliation as a basis for inaction

Id. The alleged deep-rooted Chinese mistrust of foreigners has led many in the West to conclude that it not only would be unwise but counterproductive for outsiders to raise human rights issues with the Chinese authorities. *Id.* at 463-64. This special treatment of China has meant that greater deference had

several Asian commentators have pointed out that western countries' promotion of human rights stems not only from moral and humanitarian concerns, but is also motivated by economic factors.⁹⁸

The United States is certainly not exempt from the accusations of hypocrisy that have greatly diminished the West's moral authority in the eyes of influential Asians on the question of human rights.⁹⁹ It was the United States, a country founded on

previously been shown to its government in the area of human rights than has been shown to other Asian governments. "While international human rights energies have focused readily on the Indonesians, Koreans, Filipinos, and even Taiwanese without too much sensitivity to their histories, traditions, or customs, the view has prevailed that China is 'different.'" *Id.* at 464.

⁹⁸ See Kausikan, *supra* note 59, at 227-28. Mr. Kausikan, a Singaporean diplomat, observed that while the West is not necessarily insincere in its commitment to human rights, the West may use human rights as an instrument of economic competition:

[P]olicy motivations are rarely simple; and it is difficult to believe that economic considerations do not to some degree influence Western attitudes toward such issues as, say, the prison labor component of Chinese exports, child labor in Thailand, or some of the AFL-CIO complaints against Malaysian labor practices.

Kausikan, *supra* note 59, at 227-28. See also Sim, *supra* note 47, at 32 ("There is also a suspicion, shared by several Asian governments, that some Western countries are actually using human rights issues as leverage in trade and development assistance, and to interfere in the internal affairs of other states. For example, the annual wrangle in the United States Congress over China's Most-Favoured-Nation status is perceived in some circles as a smokescreen for partisan American attempts to contain the largest economy in the Asia Pacific.").

A slightly different claim of self-serving motives underlying the western emphasis on human rights, based on an alleged western desire to influence the political future of China, has been made by Singapore's Lee Kuan Yew: "Americans have joined issue with China over Hong Kong's 'democracy' more to influence the future of China than that of Hong Kong. Similarly, American liberals criticize Singapore not because they are concerned about democracy and human rights for our 3 million people but because they believe we are setting the wrong example for China." Lee, *supra* note 51, at 495.

⁹⁹ One commentator, Daniel Bell, has made the following forceful observation about the Asian perception of American hypocrisy in the human rights arena:

the principles of democracy, republican government and the political equality of its citizens, that enslaved African-Americans. Although there have been many far-reaching judicial decisions and statutes of fundamental importance prohibiting the racial discrimination that survived as a legacy of the slavery outlawed by Constitutional amendment in 1865, many would claim that modern America is still a harsh, unequal society.¹⁰⁰ The United

The tendency to carry out abominable deeds under the name of promoting freedom, as in the case of the Vietnam War; to subordinate human rights concerns when these conflict with commercial and security considerations, as in the case of renewing Most Favored Nation status with China in response to pressure by American business interests; and the passive acquiescence, if not active support for, gross human rights violations, as in the case of East Timor . . . contributes to some cynicism in Asian circles as to the true motivation of US policymakers. Thus, Prime Minister Mahathir of Malaysia is able to argue forcibly that the United States campaigns for workers' rights in Asia in order to undermine the competitiveness of Asian companies and to maintain US economic dominance in the region. The fact that US domestic drug problems lead the government to support regimes with atrocious human rights records, such as the decision in June 1995 to cooperate with the Burmese military junta in its fight against drug trafficking, also undermines US moral credibility in the human rights field. Furthermore, the United States refusal to make amends for the Vietnam War may undermine its moral authority in a similar way that Japan's refusal to fully accept responsibility for its war of aggression weakens its own moral authority in Asia.

Bell, *supra* note 69, at 654 (footnotes omitted). Mr. Bell also asserts that nongovernmental agencies in the United States officially committed to certain rights also subordinate human rights concerns when these conflict with commercial considerations. *See id.* at 654 n.35. *See also supra* note 71 and accompanying text (containing statements by Bilahari Kausikan and Susan Sim that economic concerns influence, at least in part, western attitudes on human rights violations in Asian countries).

¹⁰⁰ *See, e.g.,* Robert J. Goldstein, *United States*, in INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 429, 445-50 (Jack Donnelly & Rhoda E. Howard eds., 1987); Amnesty International, USA: Race, Rights and Police Brutality 7 (Sept. 1999), at

States currently has one of the highest rates of incarceration in the world,¹⁰¹ and members of American racial and ethnic minorities collectively form a much higher proportion of the American prison population than do members of America's white majority.¹⁰² The United States is one of a handful of countries, most of them notorious human rights abusers, that continues to have the death penalty.

With regard to conduct of its foreign policy, the United States likewise has often failed to adhere to its ideals of human rights.¹⁰³ The United States, especially during the years of the Cold War,

<http://www.web.amnesty.org/ai.nsf/index/AMR511471999> (visited Aug. 30, 2000). ("In jurisdictions across the USA, the overwhelming number of victims of police brutality, unjustified shootings and deaths are members of racial or ethnic minorities. Evidence of discriminatory treatment and bias in police contacts with members of the black, Latino and Asian communities is widely documented by NGO[s], commissions of inquiry, in court cases and lawsuits and by countless individual testimonies."); Amnesty International, *Killing with Prejudice: Race and the Death Penalty in the USA 2* (May 20, 1999), at <http://www.amnesty.org/ailib/aipub/1999/AMR/25105299.htm> (visited Aug. 30, 2000) ("It is undeniable that the death penalty in the USA is applied disproportionately on the basis of race, ethnicity and social status.").

¹⁰¹ In 1997, the combined prison and jail rate in the United States reached 645 per 100,000 residents, the second-highest known rate of incarceration in the world; only Russia's is known to be higher. THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 12 (1998). An earlier study, reported in 1991, placed the United States first in the world in rate of incarceration, with apartheid-dominated South Africa placing second, and the former Soviet Union ranking third. See Sharon LaFraniere, *U.S. Has Most Prisoners Per Capita in the World*, WASH. POST, Jan. 5, 1991, at A3 (cited in Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2550 n.373 (1996)).

¹⁰² See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS--1998*, at 483 (Hindelang Criminal Justice Research Center ed., 1999). This disproportionate imprisonment of members of racial and ethnic minorities in the United States has occurred for every year covered by the 1998 Sourcebook: 1990 through 1998. See *id.* For a discussion of the disparate treatment of African-American males by the American justice system, see generally Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994).

¹⁰³ See *supra* note 99.

but also afterward, *has* militarily and economically supported dictatorships that have most certainly failed to respect the rights of the citizens--as long as support of those dictatorships has served American political or economic interests.¹⁰⁴ The American Central Intelligence Agency (CIA) has, throughout much of its history, assisted in fomenting social and/or political disruption in certain countries with governments that American leaders did not view as being sufficiently pro-capitalist or pro-western; Guatemala,¹⁰⁵ Nicaragua,¹⁰⁶ and Haiti¹⁰⁷ are some

¹⁰⁴ See Falk, *supra* note 86, at 345 n.23 ("In fact, U.S. foreign policy, even during the last several years, has been awkwardly selective about support for democracy, straining to sustain a positive attitude towards Yeltsin's Russia, Fujimori's Peru, and such highly authoritarian governments as those in China and India; even more notable was the tacit support accorded to the military takeover in Algeria following the FIS electoral victories in December 1993."). Professor Falk also notes that "[i]n the Cold War era often the 'safest' choice for U.S. foreign policy in Third World settings seemed to be the anti-democratic option." *Id.* See also *supra* note 99 (containing Daniel Bell's reference to the 1995 American decision to cooperate with the Burmese military junta, with its atrocious human rights record, in order to combat drug trafficking).

One commentator described the effect of the Cold War in promoting American support of repressive regimes as follows:

[W]hat the Cold War actually allowed us to do was to remove much of the moral component from our conduct of international affairs. Rather than weighing the costs and benefits of both our ends and means, and instead of examining the nature of the regimes with which we were aligning ourselves, we blindly assumed that our actions were legitimate, and so were our means. This way of thinking, in turn, placed the U.S. Government in alliance with a host of regimes that systematically violated human rights. The litmus test was simply whether or not the regime rejected communism [I]f these regimes shared this ideological trait with us, we would align ourselves with them, no matter how repressive or genocidal they happened to be.

Mark Gibney, *United States' Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1966*, 7 J. TRANSNAT'L L. & POLICY 77, 89 (1977).

¹⁰⁵ See, e.g., Gibney, *supra* note 104, at 80-86, 90-93 (describing how opposition by both the United Fruit Company and the U.S. Government to a

notorious examples. There is certainly antagonism to the United States' portraying itself as the policeman of the world.¹⁰⁸ America is seen by some as not desiring to *cooperate* with other countries, but instead seeking to *dominate* them and to dictate the kind of government that they must have.

land reform policy inaugurated by democratically elected Guatemalan president Jacobo Arbenz Guzman in 1952 led to a CIA-engineered overthrow of Arbenz in 1954 and decades of CIA involvement in a civil war in Guatemala that was portrayed as a struggle against "Communist aggression"). In March 1999, President Bill Clinton formally apologized to the Guatemalan people for the American role in ousting Arbenz--who gained power by not-altogether-free elections--and the American participation in Guatemala's ensuing civil war and repression of leftist politicians. See, e.g., Mark Falcoff, *Why We Were in Central America; US Involvement in Guatemalan Politics in the 20th Century*, COMMENTARY, May 1, 1999, at 42; Mary McGrory, *Apologies Are U.S.*, WASH. POST, Mar. 14, 1999, at B1.

¹⁰⁶ See, e.g., Kathleen M. Whitney, *SIN, FRAPH, and the CIA: U.S. Covert Action in Haiti*, 3 SW. J. L. & TRADE AM. 303, 311-13 (1996) (stating that when the Sandinista government in Nicaragua filed an application before the International Court of Justice (ICJ) in 1984 claiming that the United States armed and financed the Contra rebels, the ICJ's review of facts confirmed reports that the CIA armed and trained the Contras, who were accused by other reports of torturing, raping, kidnapping and killing civilians and government soldiers; however the ICJ could not conclude that the United States had "effective control" of the Contras' actions).

¹⁰⁷ See, e.g., *id.* at 303 (alleging that "[t]he CIA has provided training, funds, and equipment to the corrupt Haitian military; created SIN, a Haitian intelligence service that engaged in drug trafficking and political violence; investigated and falsely reported about the democratically-elected Haitian President; financially supported and protected individuals and groups responsible for the 1991 military coup and its aftermath, including FRAPH, the violent paramilitary group that is responsible for thousands of human rights violations; and intervened in the UN mission established to reinstate the legitimate government").

¹⁰⁸ See Susan Sim, *ASEAN Voices Concern Over US Sanctions*, STRAITS TIMES (Singapore), Sept. 12, 1996, at 2 (describing the protests of ASEAN countries against the extra-territorial reach of a U.S. law imposing sanctions on companies which deal with Libya and Iran, two countries that the U.S. views as state sponsors of terrorism, as "the law of one state being imposed on another").

V. The Role of Multi-National Corporations as an Example of Western Hypocrisy

Asians may also point to the labor practices of western multinational corporations (MNCs) in their third-world operations, including those in Asia, as another instance of western hypocrisy in dealing with human rights.¹⁰⁹ Many MNCs headquartered in the West have launched operations in Asia with the goal of finding the cheapest labor available with minimal regulatory constraints.¹¹⁰ This allows the MNCs to manufacture their products at the lowest cost possible, thereby maximizing their profits; however, their practices--despite adoption of corporate codes of conduct by some western MNCs¹¹¹-- are alleged to lead

¹⁰⁹ See *infra* note 113 (discussing allegations of Burmese civilians that Unocal Corporation collaborated with the Burmese military government in perpetrating human rights violations).

¹¹⁰ See, e.g., Lena Ayoub, *Nike Just Does It--And Why the United States Shouldn't: The United States International Obligation to Hold MNCs Accountable for Their Labor Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 422 (1999); Ryan B. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905, 906 (1998).

¹¹¹ See Ayoub, *supra* note 110, at 406-07 (discussing Nike's adoption and enforcement of its code of conduct: "as a company which thrives on public image . . . Nike, following media and public outcry towards its gross violations [of workers' rights in factories outside the U.S.], assumed the forefront in adopting and advertising its own code of conduct"); Toftoy, *supra* note 110, at 907 (in examining corporate codes of conduct, the author notes that "[d]ue largely to pressure on the apparel industry from consumers, foreign employees, human rights groups, and the media's demand for improvements in the treatment of foreign workers, members of the apparel industry have responded by voluntarily adopting various types of 'codes of conduct' to meet this demand") (footnotes omitted); Michael Shari & Sheri Prasso, *A Pit of Trouble: Can Freeport-McMoRan Make Peace With Critics of Its Indonesian Mine?*, BUS. WK., Aug. 7, 2000, at 60, 60-61 (relating that in February 1999, Freeport-McMoRan Copper & Gold Inc. ("Freeport") instituted a "human rights policy" requiring that the company's employees working in the area of a gold mine in West Papua, a territory controlled by Indonesia, "refrain from participating in human rights abuses and . . . report any violations they might witness"; this "human rights policy" was adopted

to systematic abuses, including sweatshop conditions, utilization of child labor, payment of unfair and unlivable wages, unreasonable work hours, unsafe working conditions, physical and mental abuse of employees by supervisors, and environmental pollution.¹¹²

mainly in order to convince local Papuans and western activists that Freeport is addressing their concerns about human rights violations and environmental degradation that have accompanied Freeport's exploitation of the gold mine).

¹¹² See e.g. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (involving suits brought by Nigerian émigrés alleging that Dutch and British MNCs instigated the imprisonment, torture, and murder of the plaintiffs and/or their kin by the Nigerian government in reprisal for protests by the plaintiffs and others against the defendant MNCs' coercive appropriation of land without adequate compensation and their pollution of the air and water in the Ogoni region of Nigeria; the Second Circuit overruled the lower court's dismissal of the case on grounds of forum non conveniens and held that under the Alien Tort Claims Act, 28 U.S.C. § 1350, and the Torture Victim Prevention Act, 28 U.S.C. § 1350 App., the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations); Ayoub, *supra* note 110, at 406-11 (detailing allegations of Nike factory workers in Vietnam, Indonesia and China being subjected, as of the time of publication in 1999, to underpayment, demands that they work 12 to 14 hours per day, 7 days per week, overtime work in violation of laws regulating overtime wages, physical and mental abuse, and sexual harassment, as well as of Nike's employment of underage workers, despite Nike's having adopted a code of conduct in 1992 that prohibits the above-mentioned practices and Nike's claims in brochures that the company fully adheres to its code of conduct); Shari & Prasso, *supra* note 111, at 60-63 (reporting claims that Freeport has, despite its "human rights policy," 1) collaborated with the Indonesian military--most notably, by providing equipment and funds--in suppressing a Papuan independence movement; 2) drawn only 3% of its local employees from the tribe inhabiting the region surrounding the mine; 3) permitted its security guards to beat local residents; and 4) dumped mine tailings into a nearby river system, turning a 90-square-mile lowland delta into a desert of dead trees); Toftoy, *supra* note 110, at 905-08 ("[t]he apparel and garment industry has recently undergone severe criticism, as companies like Nike Inc. . . . encounter allegations and reports of sweatshop labor practices, unfair and unlivable wages, unreasonable hours, unsafe working conditions, and physical and mental abuse [of workers] by supervisors" in factories in economically developing regions such as Southeast Asia, China and South Korea, despite the fact that since 1992, Nike "has purported to adopt and follow a 'code of conduct,' a statement detailing the basis of the relationship between Nike, plant ownership, management, and its workers").

Some multinational corporations have benefited from human rights abuses perpetrated by authoritarian regimes in Asia, one recent example being the alleged misconduct of the Unocal Corporation in Myanmar (Burma).¹¹³ MNCs, in selecting locations for their manufacturing operations, exert pressure on countries to restrict their citizens' right to unionize,¹¹⁴ or choose

¹¹³ See, e.g., *National Coalition Gov't of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 348 (C. D. Cal. 1997) (holding that the individual plaintiffs' allegations were sufficient to support subject-matter jurisdiction over Unocal under the Alien Tort Claims Act because, when construed in the light most favorable to the plaintiffs, the allegations suggested that Unocal may have been a willful participant in joint action with the Burmese regime in its human rights violations; this case is discussed in Ayoub, *supra* note 110, at 425 n.135), *dismissed on other grounds sub nom. Roe v. Unocal Corp.*, 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (dismissing, on grounds of the act of state doctrine, a former Burmese soldier's claim of forced labor in connection with Unocal's pipeline as a violation of international law); *Doe v. Unocal Corp.*, 110 F. Supp. 1294 (C.D. Cal. 2000) (holding that although there was evidence that defendant Unocal, in participating in a natural gas joint venture in Burma with the Burmese military regime as well as another Western oil company, knew or should have known that the Burmese military committed human rights violations in connection with its role in the joint venture and that the joint venture benefited from the commission of these human rights abuses, because defendant Unocal neither participated in, influenced nor conspired with the Burmese military in the commission of these human rights abuses, there was insufficient evidence to establish Unocal's liability under the Alien Tort Claims Act, and thus Unocal was entitled to summary judgment); John C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 468-69, 496 (2000).

¹¹⁴ See Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 390 n.35 (1996). Generally, only when a government is in a position to take a strong stand in its relations with foreign investors and is faced with the prospect of major industrial unrest will it then consider the rights of workers to form independent unions. See Arne Wangel, *The ILO and Protection of Trade Union Rights: The Electronics Industry in Malaysia*, in *TRADE UNIONS AND THE NEW INDUSTRIALIZATION OF THE THIRD WORLD* 287, 294-300 (Roger Southall ed., 1988), which provides an example of such an apparently isolated episode as it occurred in Malaysia's electronics industry, where the Malaysian government was dragged into recognizing an

countries that do not enforce their domestic labor laws or exempt MNCs from their application.¹¹⁵ Thus, the wealth and power of the western MNCs enable them to exploit the fears of governments of many developing countries that they would lose the benefits of western investment if they sought to retain or exercise control over economic and labor policies.¹¹⁶ Moreover,

effective, independent union to represent workers in a few foreign-owned factories, despite the opposition of the foreign, mostly American, owners.

¹¹⁵ See Ayoub, *supra* note 110, at 422-23; Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 152 (1998).

¹¹⁶ See Yash Ghai, *supra* note 47, at 250-52; Ayoub, *supra* note 110, at 422-23; Liubicic, *supra* note 115, at 152. The Malaysian government, for example, has maintained a campaign to fragment and limit the scope of trade union activity in its rapidly expanding electronics sector, despite some isolated victories of independent unions in obtaining government recognition of their representation of workers in American-owned electronics factories, the owners of which had opposed the presence of independent unions. See Arne Wangel, *The ILO and Protection of Trade Union Rights: The Electronics Industry in Malaysia*, in TRADE UNIONS AND THE NEW INDUSTRIALIZATION OF THE THIRD WORLD 287, 294-300 (Roger Southall ed., 1988). Some companies operating there--notably, American MNCs--have threatened to move their operations out of Malaysia if this anti-union policy is changed. See PETITION BEFORE THE U.S. TRADE REPRESENTATIVE FOR MALAYSIA'S VIOLATION OF THE WORKERS' RIGHTS PROVISION OF THE GENERALIZED SYSTEM OF PREFERENCES 3, 7-10 (May 31, 1990) (describing multinational electronics firms' threatening to leave Malaysia unless the Malaysian government continued to protect the electronics industry from union organizing, which would constitute violations by Malaysia of the conditions under which products imported from developing countries into the United States are accorded duty-free status pursuant to the Generalized System of Preferences, 19 U.S.C. §§ 2461 et seq.) (on file with the International Labor Rights Fund, an organization that seeks to ensure that labor laws are understood, implemented and enforced worldwide; this organization is located at 733 15th St. N.W., Suite 920, Washington DC 20005-2112; tel. 202-347-4100). See also UNITED STATES DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991: MALAYSIA 915, 925 (1992) ("Dominated by American and Japanese firms, Malaysia's electronic components industry has been the focus of unsuccessful union registration efforts since the late 1970's."). American MNCs with operations in Malaysia have also taken other steps to thwart the formation of independent unions by their Malaysian employees, such as threatening workers with dismissal and blacklisting if they joined a union; firing and blacklisting

the United States itself is not a signatory to the International Covenant on Economic, Social, and Cultural Rights,¹¹⁷ the Convention on the Elimination of All Forms of Discrimination Against Women,¹¹⁸ or the Convention on the Rights of the Child,¹¹⁹ which are the three main treaties that address the protection of international labor rights¹²⁰ and which prohibit many of the unfair labor practices in which MNCs are claimed to engage.¹²¹ The United States compounds its hypocrisy in the arena of human rights by exempting employees of American companies within a foreign country from the labor protections granted by the U.S. Fair Labor Standards Act.¹²²

Some Asians also point, as another example of western hypocrisy, to the conduct of western nations in degrading their own natural environments and contributing to global pollution, while nevertheless chiding Asian countries for ecological damage

supervisors who answer basic questions by employees about unions (what unions were, how to form one, etc.); paying informants to identify union organizers and to denounce unions at regular meetings; and refusing to hire applicants who had previously joined a union. *See* PETITION BEFORE THE U.S. TRADE REPRESENTATIVE, *supra*, at 30-31. Although the International Labor Rights Education and Research Fund filed with the U.S. Trade Representative (USTR) in May 1991 a petition condemning the labor rights situation in Malaysia's electronics industry, the USTR rejected the petition without explanation in August of that same year. *See* HUMAN RIGHTS WATCH, WORLD REPORT 1992, at 441 (1991). Even at present, the Malaysian government obstructs the formation of independent unions in the Malaysian electronics sector. *See* UNITED STATES DEPT. OF STATE, 1 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999: MALAYSIA 1199, 1224 (2000).

¹¹⁷ *Supra* note 13.

¹¹⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

¹¹⁹ Adopted by the United Nations General Assembly on November 20, 1989.

¹²⁰ Ayoub, *supra* note 110, at 414.

¹²¹ *Id.* at 424.

¹²² *See* 29 U.S.C. sec. 213(f) (1994); Ayoub, *supra* note 110, at 424-25

that *they* cause as they pursue economic development.¹²³ This view has been considerably strengthened by a series of studies emerging in June of 2001. Data released by the United States Department of Energy revealed that over the last decade, carbon dioxide emissions from the burning of fossil fuels have climbed at a more rapid rate in the United States than in China, even though the Chinese economy has expanded far more rapidly than has America's.¹²⁴ And researchers at the National Laboratory in California found that in recent years, emissions of carbon dioxide in China have actually shrunk by 17%.¹²⁵ Furthermore, a report of the Natural Resources Defense Council concluded that "there is a good basis to argue that China has done more to combat climate change over the past decade than has the United States."¹²⁶

¹²³ See Homer Sun, *Controlling the Environmental Consequences of Power Development in the People's Republic of China*, 17 MICH. J. INT'L L. 1015, 1038 (1996). The author of this article states as follows:

Chinese officials view international pressure to curb the environmental harm that comes with development as hypocritical and instead view the issue as a question of equity. While Europe and the United States fueled their industrializations by exploiting their resources and polluting the global environment, the argument goes, these same countries now seek to disallow developing countries from following the same course. It is in the context of China's view of its right to rapid development that the sensitive issue of who should pay for China's environmental degradation evokes a nationalistic response from China's leadership.

Id. (footnotes omitted).

¹²⁴ Erik Eckholm, *China Said to Sharply Reduce Carbon Dioxide Emissions*, N.Y. TIMES, June 15, 2001 at A1, A6.

¹²⁵ *Id.*

¹²⁶ *Id.* The Chinese government's official English-language newspaper responded that "The latest findings have proved that the United States will remain the biggest polluter for some time to come." *Paper: Greenhouse Gas Emissions Fall in China*, THE CHINA DAILY, June 18, 2001, at 1. China proceeded to attack the decision of President Bush in early 2001 to withdraw U. S. endorsement of the Kyoto Protocol's plan to limit global warming. A spokesman for the Chinese Foreign Ministry, claiming to speak on behalf of many, commented that "the international community will not accept" the United States' actions to "discard the Kyoto Protocol and begin all over

Moreover, the operations of western MNCs in *non-western* countries have caused significant environmental degradation; their facilities may often be responsible for pollution of the air and the water.¹²⁷ Increasingly, environmental concerns are being viewed as human rights issues.¹²⁸ People have a basic right to breathe

again". Shao Zonwei, *United States Urged to Abide by UN Convention*, THE CHINA DAILY, June 15, 2001, at 1.

¹²⁷ See, e.g., Ayoub, *supra* note 110, at 425 n.135; Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 263 n.4 (discussing the role of Union Carbide in the 1984 Bhopal, India tragedy), 264-71 (describing the role of several oil industry MNCs, the most prominent of which was Royal/Dutch Shell Group, in causing environmental devastation in Ogoniland, a region of Nigeria); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 286 (listing as examples the operations of Shell Oil in the Ogoniland region of Nigeria and the effects on the Ogoni people, and the operations of Texaco and Petroecuador in the Oriente region of Ecuador and the effects on the inhabitants of that region (citing at length *Jota v. Texaco*, *infra*), as "environmental situations which might be serious enough to be human rights violations"); Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 ECOLOGY L.Q. 477, 484-85 (1990). See also *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (residents of certain regions of Ecuador and Peru filed suit against Texaco alleging that Texaco polluted the rain forests and rivers in Ecuador and Peru during oil exploitation activities in Ecuador between 1964 and 1992, causing physical harm to the plaintiffs; the Second Circuit held that dismissal of the complaints on the grounds of forum non conveniens and comity by the district court was not appropriate, at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadoran courts for purposes of the action, and remanded the case so that the lower court could reconsider dismissal of the complaints for failure to join an indispensable party (the Ecuadoran government, which had unsuccessfully moved to intervene in the case)), *on remand sub nom. Aguinda v. Texaco, Inc.*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000) (because of evidence that led the District Court to doubt the independence and impartiality of the Ecuadorian and Peruvian courts, the court refrained from deciding on whether to dismiss the cases on grounds of forum non conveniens and international comity premised on Texaco's consent to Ecuadorian and Peruvian jurisdiction).

¹²⁸ See, e.g., Eaton, *supra* note 127, at 293-95 (proposing the assertion of established human rights to protect the environment and victims of

fresh air and have the right to drink safe water,¹²⁹ and MNCs are perceived to be one of the primary violators of these rights.¹³⁰ These corporations may shore up weak, corrupt dictatorial governments in order to continue to receive the type of economic

environmental abuse), 300 (“[m]any commentators . . . see the protection of the right to a healthy environment as an essential prerequisite to the fulfillment of many other human rights”); Peggy Rodgers Kalas, *The Implications of Jota v. Texaco and the Accountability of Transnational Corporations*, 12 PACE INT’L L. REV. 47, 69-70 (2000) (“Although the human right to a healthy environment exists in principle, it is debatable as to whether it has crystallized to the level of customary international law. Many human rights treaties contain provisions that recognize emerging environmental rights, but there is no consensus as to what that right entails.”) (footnotes omitted); Lee, *supra* note 127, at 331-39 (noting that “[t]he right most frequently linked to a right to a healthy environment--the right to sustainable development--is itself a developing human right,” and advocating the establishment of “a narrowly and rigorously defined, internationally accepted human right to a healthy environment”); Sripathi, *supra* note 21, at 469 (discussing the Indian Supreme Court’s “predilection to use international human rights and environmental norms to inform Indian constitutional law”); Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT’L L. & POL’Y 689, 691, 699, 704, 733-39 (1994) (advocating that population displacement causes violations of human rights, that population displacement constitutes a human rights violation in itself, and that ecological disasters are a cause of population displacement). *See generally* Janusz Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT’L J. LEGAL INFO. 24 (1992).

¹²⁹ *See* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 105 (1991) (“environmental problems may be combatted through the assertion of existing human rights, such as the rights to life, personal security, health, and food”).

¹³⁰ In discussing Union Carbide’s risk-laden practices that led to the environmental disaster in Bhopal, India in 1984, one legal commentator noted:

The magnitude of the Bhopal disaster was unprecedented, but the circumstances that led to the tragedy are not uncommon. When firms headquartered in the United States operate in countries with less stringent environmental regulations, some companies will relax their operating standards, increasing the risk of causing harm to human health and the environment.

Neff, *supra* note 127, at 488 (footnote omitted). *See also* Kalas, *supra* note 128, at 67 (“With little international oversight, multinational corporations are left free to pursue their profits in developing countries without sufficient regulatory restrictions, resulting in human and environmental tragedies.”).

advantages, including lax environmental regulation, that brought them into those countries to start with.¹³¹

VI. Conclusion

In spite of the reluctance of a small but influential group of countries to accept the universality of human rights norms, the Declaration of Human Rights has had tremendous influence on the world and certain provisions have become part of customary international law.¹³² The Declaration has formed the basis for many of the constitutions of the states which have achieved independence since its enactment, and most human rights documents in the last fifty years make reference to and are clearly derivative of the Declaration.

¹³¹ Professor Neff has observed that political factors may intervene to make effective environmental regulation of private industry, including MNCs, difficult within the host countries:

In many countries, government regulators have close personal and financial ties with the business community and are reluctant to enforce environmental protection laws which may work against their self-interest. In some instances, the economic and political power of large transnational corporations may be greatly disproportionate to that of the government of the country in which a particular facility is based.

Neff, *supra* note 127, at 486-87.

¹³² See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS (1987). Some scholars have argued that the widespread acceptance of the Declaration has given it the force of customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L AND COMP.L. 287 (1995). States are obligated to conform to what is considered to be customary law even if no specific treaty has been signed. For example, the International Court of Justice has declared regarding the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: "The principles underlying the Convention are principles which are recognized by civilized nations as *binding on States* even without any conventional [treaty] obligation. ADVISORY OPINION ON RESERVATIONS, ICJ REPORTS (1951) at 15 (emphasis added).

Although the Declaration and other human rights instruments use the term “fundamental” rights,¹³³ there is no international document which enumerates what human rights are to be considered the fundamental ones.¹³⁴ However, the Political Covenant does declare that certain rights may not be derogated¹³⁵ from even were there to be a national public emergency which would allow a state to suspend most of the civil rights and liberties of its citizens.¹³⁶ One can conclude, therefore, that those

¹³³ See e.g. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 2, Article 1. To confuse the matter, international bodies have at times referred to what is fundamental as being *in addition* to human rights. For example, the United Nations Economic and Social Council authorized the Subcommission on Prevention of Discrimination and Protection of Minorities in 1967 to “examine information relevant to gross violations of human rights *and* fundamental freedoms as exemplified by the policy of apartheid as practiced in the Republic of South Africa.” UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, RESOLUTION 1235 (XLII), June 6, 1967. (emphasis added). One would hope that the concept of human rights encompassed all of the “fundamental freedoms.”

¹³⁴ The perception of which rights are fundamental may change as time passes; for example the right to the ownership of private property would not be deemed today to be a universal fundamental right, but it was considered sacrosanct in the 1789 FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN. Although the right to property was included in the UNIVERSAL DECLARATION (Article 17), it was omitted in both the Political and Economic Covenants.

¹³⁵ “Derogated” in this context is best understood as deviated from, or suspended or restricted; “derogation clauses” empower states to limit their responsibilities under a treaty if certain conditions have been met.

¹³⁶ Article 4 of the Political Covenant, *supra* note 15 provides that “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant make take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” The state’s initial determination that a “public emergency” does in fact exist may be challenged by another party to the Covenant, and the Human Rights Committee under Article 41 may determine whether the derogation was appropriate. The Committee has determined that the derogation of rights “may only last as long as the life of the nation concerned is threatened”, and any nation claiming a public

rights that under no circumstances can be derogated--to be free from torture,¹³⁷ to not be enslaved,¹³⁸ to not be imprisoned for debt,¹³⁹ the right to freedom of thought, conscience and religion,¹⁴⁰ the prohibition of ex post facto laws,¹⁴¹ and the right to be free from discrimination based on race, sex, language or national origin¹⁴²--are core human rights which all countries must honor and respect.¹⁴³ Enjoyment of these rights ought not to be dependent upon the laws enacted by any particular country; these basic concepts are the foundation of any civilized society.

It is, however, necessary to recognize distinctions among cultures, and there may well be tensions between compliance with some universal human rights norms and adherence to cultural traditions. There is room for certain local practices--e.g. the historic role of tribal chiefs or village leaders in certain Asian lands--to shape the form of adherence to international standards for democratic ideals. The mode in which China has sought to deal with the transfer of the population from desolate, impoverished parts of the country into the region of Tibet may

emergency must inform the other signatories to the Covenant of the reasons for the derogation and provide the appropriate documentation. GENERAL COMMENT 5 IN REPORT OF THE HUMAN RIGHTS COMMITTEE, U.N. GAOR HUMAN RIGHTS COMM., 36TH SESS. ANNEX VII, U.N. DOC. A/36/40 AT 110 (1981).

¹³⁷ International Covenant on Civil and Political Rights, *supra* note 15, Article 7.

¹³⁸ *Id.* Article 8.

¹³⁹ *Id.* Article 11.

¹⁴⁰ *Id.* Article 18.

¹⁴¹ *Id.* Article 15.

¹⁴² *Id.* Article 4 (1).

¹⁴³ In 1994 the Human Rights Committee considered but ultimately rejected adding the right to a prompt and fair trial to those rights which are not subject to derogation under Article 4 of the Covenant. Annual Report of the Human Rights Committee, U.N. GAOR, 49TH Sess., Supp. No. 40, at 120, U.N. DOC. A/49/40 (1994). The Universal Declaration of Human Rights, *supra* note 2, Article 29(2) provides for limitation of rights "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

indeed be comprehensible in spite of the diluting affect on the Tibetan culture and the threat to the continuation of a unique Tibetan way of life.¹⁴⁴ China may also have wished to have development in Tibet occur at a faster pace than some in Tibet would have wished.¹⁴⁵ Tibet has long been the poorest region in the People's Republic of China¹⁴⁶ and to hasten the development which human rights advocates have claimed to be very disruptive to the Tibetans, China in 1992 designated Tibet, and the capital city of Lhasa in particular, as a Special Economic Zone.¹⁴⁷

The historic role of the rule of law certainly has been different in China than in the West. The European and American traditions have respect for, and appreciate the need for, laws in ways that lead to the Universal Declaration and the International Covenant on Civil and Political Rights to be accepted and not viewed as foreign concepts. In semi-feudal, dynastic China there was no adherence to the rule of law, and in the early years

¹⁴⁴ Some population transfer occurred from densely populated areas of China into parts of Tibet where there is a lot of land with a low population. In 1995, the Chinese leader Deng Xiaoping responded to complaints by some international NGOs regarding the transfer of non-ethnic Tibetans into the Tibetan Autonomous Region:

Tibet is a region with a sparse population and has a vast expanse of land. The more than 2 million compatriots of Zang nationality alone are insufficient for construction. There is no harm for the Han (the dominant ethnic Chinese group) people to go and help them. Some more Han people there will be conducive to the development of the local nationality economy. This is not a bad thing.

INTERNATIONAL COMMISSION OF JURISTS, TIBET: HUMAN RIGHTS AND THE RULE OF LAW 106-107 (1997) (quoting from Xizang Ribao, Aug. 11, 1995).

¹⁴⁵ See e.g. INFORMATION OFFICE OF THE STATE COUNCIL OF THE PRC, TIBET--ITS OWNERSHIP AND HUMAN RIGHTS SITUATION (1992) CH. X11, at 1 ("To speed up construction in the region, the central government in February 1984 organized manpower and materials from nine provinces and municipalities in the interior to aid 43 construction projects in Tibet.")

¹⁴⁶ MATERIAL TO PUBLICIZE THE THIRD FORUM ON WORK IN TIBET; A GOLDEN BRIDGE TO STRIDE INTO THE NEW CENTURY, IN INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET, LEGAL MATERIALS ON TIBET, 242 (2d ed. 1997).

¹⁴⁷ See INTERNATIONAL COMMISSION OF JURISTS, TIBET: HUMAN RIGHTS AND THE RULE OF LAW, *supra* note 144 at 107.

especially of Communist rule, the Communist ideology and the Communist Party were preeminent.¹⁴⁸ The leader Mao Zedong abolished all laws, and his teachings and doctrines were used to resolve disputes--with enforcement provided by his Red Guards.¹⁴⁹

The proper role and the amount of control to be exercised by the people's leader is also a concept where Chinese cultural and religious history diverges from that of the West. The Confucian benevolent patriarch, deserving of respect, deference and obedience, is quite at odds with the West's cynicism and fear of strong leaders exercising excessive power. Acceptance of hierarchy, and desire for balance and harmony pervade the cultural traditions and family structure in China and may be quite at odds with the West's focus on individual rights.

Concerns in China about the use by the United States of human rights themes as political tools to demean China certainly would be supported by an historical analysis of America's use of human rights issues as part of its Cold War strategy against the Soviet Union. Certainly, the annual review in Congress concerning whether the U.S. should grant China "most favored nation" treatment¹⁵⁰ provided American politicians with a

¹⁴⁸ The Preamble to the Constitution of the People's Republic of China, which was in force during the Mao years, emphasizes the overarching import of ideology:

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedung thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road.

P.R.C. CONST. pmbl.

¹⁴⁹ The 1958 Great Leap Forward and the 1966 Cultural Revolution emphasized class struggle, if not anarchy. See David F. Forte *Western Law and Communist Dictatorship* 32 EMORY L.J. 135, 204 (1983).

¹⁵⁰ China, along with American corporations desiring a foothold into the huge Chinese market, finally persuaded President Clinton to cease the annual MFN review. Prime Minister Li Peng responded to Secretary of State Warren Christopher's demand that China improve its human rights record in order to obtain MFN status, by stating: "History has already proven that it is futile to

platform to attack China's human rights record and turned sentiment against the Chinese.¹⁵¹

China has indeed, on paper at least, come a long way towards acknowledging human rights norms. Back in 1979, "human rights" were bad words, or in the Communist variation, "Human Rights is not a slogan of the proletariat."¹⁵² That same year, in response to the formation of the "Chinese Alliance for Human Rights," the Chinese leader Deng Xiaoping stated that the pursuit of human rights was in violation of the Four Cardinal Principles¹⁵³ that formed the basis of Chinese society.¹⁵⁴ The 1980s' claim by the Chinese that its conception of human rights was legitimate even though it differed from the West's, came directly up against the Tiananmen Square killings,¹⁵⁵ and *no* version of human rights could justify the shootings of the Chinese pro-democracy students. The 1991 official PRC White Paper on Human Rights¹⁵⁶ therefore, prioritized state sovereignty concerns:

apply pressure on China." Elaine Sciolino, *China Rejects Call from Christopher for Rights Gains*, N.Y. TIMES, March 13, 1994 at A1. Shortly thereafter, President Clinton agreed, due in part as a response to American business interests, to cease the annual MFN review. Douglas Jehl, *U.S. to Maintain Trade Privileges for China's Goods: A Policy Reversal*, N.Y. TIMES, May 27, 1994 at A1.

¹⁵¹ It was not human rights issues that led to firm U.S. action against the Chinese, rather it was the interests of American software, music and movie industries. In February of 1995, President Clinton announced the largest trade sanctions in American history--protective tariffs of more than \$1 billion on Chinese goods due to China's alleged refusal to crack down on piracy of American products. David E. Sanger, *President Imposes Trade Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995 at A1. By the date that the sanctions were to become effective--three weeks after they were announced--an agreement was signed to end the dispute. N.Y. TIMES, February 27, 1995 at A1.

¹⁵² See Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 3 (1996).

¹⁵³ The Four Cardinal Principles were socialism, democracy, dictatorship of the people, and leadership of the Communist Party and Marxist --Leminist -- Mao Zedung thought.

¹⁵⁴ Guo Luoji *supra* note 152 at 3.

¹⁵⁵ *Supra* notes 34-37 and the accompanying text.

¹⁵⁶ WHITE PAPER, *supra* note 38.

“Human rights are essentially matters within the domestic jurisdiction of a country.”¹⁵⁷

The language in recent years is much more accepting of universalist norms. The recent signing by China of the Political Covenant accompanies its ratification of the Economic Covenant. The day after a summit meeting with President Clinton in 1997, President Jiang Zemin stated that “we will further enlarge democracy, run the state according to law and turn China into a socialist country ruled by law.”¹⁵⁸

It is however, the April 2001 PRC official White Paper on Human Rights¹⁵⁹ that is perhaps the most revealing of China’s need to proclaim that it is now a partner in the worldwide efforts for human rights: “China will actively participate in international activities in the realm of human rights, carry out wide-ranging cooperation and exchanges with other countries, and make its due contribution to promoting the healthy development of the international human rights cause.”¹⁶⁰ The 2001 White Paper was not meant to infer that China’s attention would not be directed internally as well: “China will continuously push forward the development of the human rights cause in China.”¹⁶¹ The realities in China are far different, but still, one shouldn’t discount the import of China’s proclamations and, especially its signing of the Political Covenant. Holding

¹⁵⁷ *Id.* at 83-84.

¹⁵⁸ President Jiang Zemin Address to the Asia Society, (Oct. 30, 1997), www.AsiaSociety.org/speeches/Jiang-speech.html.

¹⁵⁹ INFORMATION OFFICE OF THE STATE COUNCIL, PROGRESS IN CHINA’S HUMAN RIGHTS COURSE IN 2000, 2001 WL 1884 1233.

¹⁶⁰ *Id.* at 21.

¹⁶¹ *Id.* at 20. The most recent incarnation of the Constitution of the People’s Republic of China also commits to civil and political rights – respect for freedoms of speech, press, assembly, association, religious belief, and autonomy of national minorities and the right to vote for all those over 18. See Jerome Cohen, *China’s Changing Constitution*, THE CHINA QUARTERLY, (December 1978) at 834 (China’s successive constitutions continue to assert these freedoms in contrast to the reality). See also Ann Kent *Waiting for rights: China’s Human Rights and China’s Constitutions 1949-1989* HUM. RTS. Q. 170 (1991).

China accountable for human rights violations may be a somewhat easier task in the future.

When a leader of one Asian country proclaims to speak for Asian countries and Asian values in general, it is suspect indeed. Asia is extraordinarily diverse and includes the predominantly Catholic Philippines, the Islamic countries of Pakistan, Malaysia, Indonesia, and Bangladesh, Buddhist Sri Lanka and Myanmar, Hindu India and Nepal. Mahathir Mohamad, the long-time leader of Malaysia, surely does not speak for the oft-imprisoned Aung San Sun Kyi, the Nobel Peace Prize recipient and Burmese human rights activist.

The political and economic systems of Asian countries also run across the spectrum--from the well-developed democracy in India to the Communist Viet Nam, from subsistent island economies in Indonesia to the thriving capitalist city-state of Singapore. Certainly, the fundamentalist Islamic Taliban government in Afghanistan doesn't speak even for the women in that land who are so oppressed and denied fundamental rights,¹⁶² and the Chinese Prime Minister doesn't speak on behalf of the jailed political dissidents.

The threat to traditional cultures and ways of life in Asia doesn't come from the existence of universal human rights standards; it is more likely that the rapid development of the market economy and the presence of multinational corporations¹⁶³ may constitute such a threat. The flight to urban areas and the increase in corruption in rapidly changing Asian societies has been a tremendous challenge to the maintenance of traditional values and practices.

In spite of the claims of some Asian leaders attempting to justify restrictions on political liberties in the name of furthering

¹⁶² See e.g. *Taliban Forces Raid Hospital*, N.Y. TIMES, May 19, 2001 (most women in Afghanistan are barred from schooling and employment and subjected to overall abuses of their human rights).

¹⁶³ See *supra* notes 112-125 and accompanying text. Because multinational corporations strive to achieve exemption from standard taxes as a bargaining tool to set up business in a particular country, the country has less money available to spend for the welfare of the population as a whole.

economic growth,¹⁶⁴ it has never been demonstrated that depriving citizens of their civil rights leads to an increase in the rate of economic growth of a country. And, in any event, the determination of appropriate priorities ought to be made by the citizens of that country and not by some unelected leader claiming to speak on the people's behalf.

But it is difficult for the United States to present itself as a model for others to emulate. America engages in a form of double-speak, claiming to champion the universality of human rights, but refusing to ratify the Economic Covenant, one of the prime, universally-recognized, international human rights documents.¹⁶⁵ In fact, America's failure to ratify what perhaps is the most widely accepted rights treaty--the Convention on the Rights of the Child¹⁶⁶--is illustrative of some isolationist, culture-centric aspect of America.¹⁶⁷ The U.S. didn't even ratify the Political Covenant,¹⁶⁸ which was adopted and open for signature in 1966,¹⁶⁹ until 1992--and this is the document which most closely resembles America's own constitution. And when it

¹⁶⁴ See *supra* notes 23, 30, 76.

¹⁶⁵ See *supra* note 18. Some in the U.S. have criticized the Covenant's provisions establishing the right to housing, health care and employment as "socialist". See Philip Alston, *A. S. Ratification of the Covenant on Economic, Social and Cultural Rights*, 84 AM. J. INT'L L. 365 (1990).

¹⁶⁶ Adopted by the United Nations General Assembly on November 20, 1989 and ratified by every member country of the United Nations except the United States and Somalia. In fact, 187 states have ratified the Convention, which is more than the number of UN members. Kofi A. Annan, *Strengthening the United Nation's Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1,3 (1997).

¹⁶⁷ The negative reactions, over the years, in Congress to the Rights of the Child Covenant, focus on themes such as "who does the world community think it is to tell us how to raise our children?" The actual thrust of the Covenant is more accurately revealed by the first substantive portion of the treaty which prohibits any discrimination against a child on account of his or her race, sex or religion. *Id.* art. 2.

¹⁶⁸ THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 15.

¹⁶⁹ THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 15. The Covenant took effect ten years later, in 1976.

finally was ratified by the U.S. Senate, there were "reservations,"¹⁷⁰ "declarations,"¹⁷¹ and "understandings"¹⁷² attached which certainly weakened the overall impact and value of the Covenant.¹⁷³

An acceptance of some of the defenses which have been explored in this article--a country's claim to state sovereignty, insistence on cultural relativism, or the primacy of economic rights--to alleged human rights violations, might well mean that abusive practices such as those which had existed in apartheid South Africa would be tolerated. Apartheid, separation of the races into white, colored, or negro, *was* part of the culture and

¹⁷⁰ THE VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331, U.S. No. 58 (1980), Article 2, explains that a "reservation means a unilateral statement, however phrased or named, made by a State, when, signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. . . ." The first U.S. reservation attached to its ratification of the Covenant served to preserve the higher degree of protection claimed to be guaranteed by the U.S. Constitution; the second reservation protected the right of the U.S., in direct contradiction to the Covenant, to impose the death penalty to those under the age of 18; the third, limited the prohibition in the Covenant of "cruel, inhuman, or degrading treatment or punishment" to what is defined in the 5th, 8th, and 14th Amendments to the Constitution; the fourth preserved the U.S. policy of permitting the imposition of a higher penalty than otherwise provided for as long as the higher penalty was in effect at the time of the commission of the offense; the fifth preserved the right to prosecute juveniles as adults. *See* 138 CONG. REC. S 4781-01 (April 2, 1992).

¹⁷¹ The most significant declaration proclaimed the Covenant not to be self-executing. *Id.*

¹⁷² The first understanding protected the practice of permitting distinctions based on certain characteristics of individuals when done to further affirmative action. The second was to clarify that any compensation for unlawful arrest would be subject to the reasonable requirements of domestic law; the final understanding limited the responsibility of the federal government's enforcement of the Covenant to the federal system. *Id.*

¹⁷³ There has been much criticism of these restrictions placed on the Covenant, *see e.g. Lawyers Committee for Human Rights, Statements on U.S. Ratification of the CCPR*, 14 HUM. RTS. L.J. 125 (1993). For a defense of the U.S. action, *see* David Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations* 14 HUM RTS. L. J. (1993).

tradition of the Afrikaaner-controlled government. The South African government could have buttressed its right to be free from international criticism by utilizing some of the economic claims discussed earlier¹⁷⁴--the government did believe that segregating the negro South Africans into bantustans (homelands) would be the fastest road to economic growth and development. And, the South African government could also have sought protection from the state sovereignty approach,¹⁷⁵ claiming that it is not appropriate for other countries to interfere with the internal policies of any state, including South Africa.

Disputes about human rights are increasingly entering into international political arenas. The United States in the spring of 2001 was, for the first time, kept off the United Nations Human Rights Commission.¹⁷⁶ It appears that China, in an attempt to retaliate against the U.S. for annually introducing resolutions to the Commission to condemn China for its human rights record, persuaded other voting members of the U.N. Economic and Social Council to vote for countries such as the Sudan, instead of the United States, to become members of the 2001 session of the Human Rights Commission.¹⁷⁷ And Viet Nam, in response to United States criticism of the treatment of Christians in Viet Nam, charged that the U.S. itself was guilty of war crimes as revealed in April 2001 by former Senator Robert Kerrey's

¹⁷⁴ See *supra* notes 53 and 82.

¹⁷⁵ Some Asian countries actually have a more understandable claim to the call for state sovereignty and territorial integrity. Unlike South Africa at the time of apartheid which was ruled by those Europeans who came and colonized the native Africans, many current Asian states had *been* colonies controlled by European countries. In many instances, independence was achieved only after hard-fought battles, and newly-independent Asian states may no longer wish to hear Europeans telling them how to act.

¹⁷⁶ Barbara Crosette, *Rudeness Awakens America*, N.Y. TIMES, May 13, 2001.

¹⁷⁷ The U.S. House of Representatives retaliated by voting to withhold \$244 million in overdue payments to the U.N. *Id.*

comments regarding the killing of civilian women and children during the Viet Nam War.¹⁷⁸

International human rights standards are not appropriately perceived of as *attacks* on any country's traditions. Human rights is about presenting *choices* to individuals; if women in Afghanistan *choose* not to work outside the home, then no international standards would be violated; but if a *country prohibits* girls from achieving an education or women from working, then it can well be claimed that the country is in violation of universally accepted standards of human rights. When Pakistan in the year 2001, sentences people to death for *speech* deemed by Islamic clerics to be blasphemy¹⁷⁹, universal human rights values *are* violated and there is no valid "cultural relativity" defense.

In a world of power politics,¹⁸⁰ where one country can intimidate another and silence any criticism of human rights practices for fear of economic or even military retaliation,¹⁸¹ the

¹⁷⁸ Barbara Crossette, *New Protests in Old Conflict in Viet Nam*, N.Y. TIMES, May 5, 2001 at B1. B2.

¹⁷⁹ Barry Bearak, *Death to Blasphemers: Islam's Grip on Pakistan*, N.Y. TIMES, May 12, 2001. In May of 2001, a doctor teaching in a Pakistani medical college was jailed and faces death under a law that makes any derogatory remarks about the Prophet Muhammed, whether intentional or not, punishable by the mandatory sentence of death. The doctor had told his students that the Prophet, like others living in his time, had not been circumcised before receiving God's revelations at age 40. *Id.* One of the students present in the Doctor's class at the time the remarks were made stated: "Only out of respect, because he was our teacher, did we not beat him to death on the spot." *Id.*

¹⁸⁰ The U.N. Human Rights Commission, *supra* note 176, has rejected every year the U.S. - sponsored resolution to condemn China for its human rights record. Member countries can't afford to alienate a country with one-fifth of the world's population and the world's most consistently rapidly growing economy. China carries a big stick, and others know it will be used.

¹⁸¹ THE WORLD CONFERENCE ON HUMAN RIGHTS that was held in Vienna in 1993, *supra* note 23, was a battle scene of global political combat. The Conference couldn't even agree on the creation of the post of U.N. High Commissioner for Human Rights to oversee the various and growing U.N. human rights activities. And the Conference's Final Declaration tries to

Non-Governmental Organization can take on new and greater significance. International NGOs, such as Amnesty International or Human Rights Watch, generally are immune from any threat by, for example, China, to retaliate. Monitoring of countries' practices is absolutely vital, laws on the books do not necessarily indicate reality. A deviant state, brought out to public scrutiny, may indeed alter its ways. Perhaps the country 1) doesn't wish to be perceived by the world as an outlaw, 2) truly is concerned about perceptions of other countries, 3) is wary of potential economic boycotts or trade embargoes, 4) fears diminished private investment from overseas, or 5) wants to receive economic development aid which might be tied to human rights practices. Motivations to avoid human rights violations may vary from country to country; what is crucial is that countries perceive improved political and economic rights for their citizens to be in that country's self-interest. Human rights are a mode of empowering citizens to claim basic liberties and freedoms, and to attain a true sense of dignity. We can't afford to go back to a pre - 1945 world where state sovereignty prevails, and the rest of the world simply shuts its eyes. When a State abandons its responsibility to safeguard all of its citizens and instead begins to violate basic civil liberties and freedoms, the international human rights community may be the sole recourse for the protection of those individuals whose rights are being abused by the State.

satisfy all, and therefore comes out nowhere on the universalism vs. cultural relativity division that permeated the Conference:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems to promote and protect all human rights and fundamental freedoms.

The first clause was designed to satisfy the Asian cultural relativists, the second, the universalists.