11
A Plea for a Global Community Grounded in a Core of Human Rights

Antonio Cassese

SUMMARY

Although the doctrine of human rights is inherently universalistic, the stark reality of the world society shows that there is huge variety in the implementation of human rights by the various states. To promote the gradual formation of a world community based on a core of universal values, it is suggested that a double-track approach should be taken, dealing both with the values at stake and with the means for translating them into living reality. As for values, one should emphasize the existence of peremptory rules of international law (jus cogens) on human rights, which are at the summit of the international legal order and may not be derogated from by any state. Such rules are gradually constituting the constitutional principles of the world society. As for means for implementing those rules of jus cogens, three distinct avenues are suggested. First, one should set up a system of inquiry capable of verifying how and when violations occur. Secondly, one should enhance the criminal responsibility of the authors of gross violations of those fundamental values. Thirdly, one should rely upon international civil society to tenaciously and steadily prod all international subjects to abide by the law.

1. The doctrine of human rights is inherently universalistic

The doctrine of human rights has aspired from the outset to be universal, to be a doctrine that applies everywhere to everyone, irrespective of nationality, culture, tradition, ideology, or social conditions. The Frenchman René Cassin, one of the fathers of the Universal Declaration of Human Rights who so much contributed to the drafting of that text, looked at human rights from a universal perspective in a groundbreaking and seminal article he wrote in
1. The doctrine of human rights is inherently universalistic

1940. He wrote that the existence of Leviathan-states embracing ideologies based on violence, oppressing individuals, and only aiming at expansionist hegemonies was a pernicious phenomenon of our age. He hoped that at the end of the Second World War the world community would be ready to adopt a universal declaration that would put people before states. In his view it was necessary, among other things, to create 'rules common to all human groupings, whether regional or universal'.

In the same vein, when President Roosevelt, on 6 January 1941, made his celebrated State of the Union Address to the US Congress propounding the four freedoms (freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear), he described the new doctrine as valid for the whole world, declaring: 'In the future days, which we seek to make secure, we look forward to a world founded upon these freedoms.' And he deliberately repeated four times the phrase 'everywhere in the world'.

Also, during the drafting process of the Universal Declaration, René Cassin was aware that one could not simply transpose onto the international level the bill of rights of one or another country. In a report of 27 February 1947 to the French Foreign Ministry he wisely noted that 'a Universal Declaration cannot be the simple photographic enlargement of a national declaration. It cannot ignore the calling of any human being to have a native country or, if he expatriates voluntarily or by force, to have a homeland or to be granted asylum.' The rights in the Declaration would transcend the cultural or political framework of any one country.

The Universal Declaration of 1948 confirms this outlook not only by its very name, but also in its contents. It envisages the same human rights for all individuals of the earth, whatever their historical conditions and traditions. It addresses itself to 'all members of the human family' and posits itself as 'a common standard of achievement for all peoples and all nations'.

This universalistic aspiration, I believe, was right. You cannot proclaim a new religion, albeit secular, which should be valid for any human being, and then start drawing distinctions between the various categories of persons, peoples, or states, lest the new set of principles should lose its moral force as a corpus of imperative guiding standards. However, the drafters of the Universal Declaration were aware that they were not speaking to an amorphous mass of individuals. Their awareness that individuals of the earth were distributed among states, and that states were not equal in condition and history is reflected in Article 2, which proclaims among other things that 'no distinction shall be made on the basis of the political, juridical 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.' Nevertheless those drafters, while aware of the *bic et nunc* (here and

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now), that is, of the prevailing historical conditions, deliberately chose, and rightly so, to speak *sub specie aeternitatis* (for eternity).

2. The stark realities of the world

We all know that the 'common standard of achievement' is far from realized: not only do human rights continue to be violated if not unabated, with stunning frequency, but the values preached by Roosevelt and Cassin and enshrined in the Universal Declaration have also not trickled down to all states of our planet. Too many governments still turn a blind eye to the universal values that should guide all countries of the world. Consider Sudan as an example. When I was in Sudan in 2004 for the UN Security Council Commission of Inquiry on Darfur, I was told by the Minister of Justice and some senior judges that crucifixion is still one of the legal penalties for the most serious crimes (it is provided for in Art. 27(3) of the Criminal Act 1991), although such penalty—he added—is rarely inflicted and only in the countryside, not in towns. Sudan’s Criminal Code also does not uphold the principle that criminal responsibility is personal: it provides in Article 30(1) that 'an individual shall be executed for a group and a group for an individual'. Let me add that also in the New Sudan (that is, South Sudan), where a more modern Criminal Code was adopted in 2003, this Code nonetheless includes a provision (Art. 76) which authorizes courts to pass 'a sentence of whipping not exceeding ten strokes' on male offenders in lieu of imprisonment.

Sudan is not the only country whose penal code still regards stoning and mutilation of parts of the body as lawful ways of punishing culprits. Furthermore, sexual mutilation of women is a legal practice in many countries. The same applies to some forms of modern slavery. A few years ago Iran asserted that, if it were to choose between the Universal Declaration and shari’a law, it would opt for the latter. In many states freedom of expression and of assembly are not considered as important as the right to work. In addition, in spite of all the international customary and treaty rules prohibiting torture, even major Western countries sometimes condone this practice, either by putting forward odd and manipulative interpretations of the international ban, or by simply refraining from punishing those who engage in torture (a clear signal to torturers that what they do will not fall under the sword of the law).

In short, human rights are not truly universal in practice. Even the most fundamental rights are subjected to cultural, religious, and ideological constraints—as well as political expediency. What are the principal reasons for this intolerable state of affairs? There are many, of course, but I will emphasize only two: the *persistent impact of sovereignty*, and the *in eradicable role of self-interest* resulting in the lack of a real community sentiment in the world society.

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3 ‘Death sentence with crucifixion shall not be passed except for armed robbery (*hiraba*).’
3. **What should be done to move gradually towards a global community of human rights?**

If we do not want to resemble persons painting still lifes on the walls of a sinking ship (to take up a famous metaphor by Bertolt Brecht) we must strive to move, even if slowly, towards a global community where human rights tend to be universally upheld. Thus, even if human rights are (and they undoubtedly will be) violated, at least there will be an awareness that they are breached, and public opinion can raise its voice and call the perpetrators to account.

What type of action should we endeavour to engage in? I would suggest that we should take a double-track approach, dealing both with the values at stake and with the means for translating them into living reality.

**(A) Enhancing fundamental and intransgressible values**

We should first of all draw a distinction between (i) a core of fundamental values which must be common to all nations, states, and individuals and may not, therefore, be derogated from and (ii) other values, the application of which may need to take into account national conditions. The fundamental values of the world society are those enshrined in that core of rules that constitute the international *jus cogens*, a set of peremptory norms that may not be derogated from.

As I have pointed out in another chapter in this volume, in the 1960s for the first time in world history the notion was accepted that there should be a hierarchy in the body of rules of the international community and that some principles or norms should be at the summit of the legal system. States could not transgress or derogate from these principles inter se. This marked a conspicuous progress. For the first time a set of legal principles having a higher rank than any other international rule was contemplated. They could be equated to the constitutional principles of a domestic legal order: that is, principles that are higher than laws normally adopted by parliaments and may not be deviated from or infringed upon except by subsequent norms having the same rank. Thus, for the first time in the world society peremptory norms restrained the hitherto unlimited lawmaking power of states.

With this new development came a clear understanding that *jus cogens* rules included norms concerning human rights: those banning genocide, slavery, racial discrimination, and forcible denial of self-determination. Over the years national or international bodies have suggested that other international rules also enjoy the status of peremptory norms: the ban on torture, the prohibition of the slave trade, the right to life, the right of access to justice, the right of any person arrested or detained to be brought promptly before a judge (the so-called habeas corpus right), the ban on *refoulement* (refusal of entry of refugees at the frontier), the prohibition of collective penalties, and the principle of personal responsibility in criminal matters. I would also add the right to a fair trial. Other norms are likely gradually to rise to the level of *jus cogens* through a process of accretion. This normative process
unfolds through judicial decisions (be they national or international), pronouncements by collective bodies such as the UN General Assembly, and declarations of states and other international legal subjects. The formation of a norm possessed with *jus cogens* force results from the convergence of a wide number of factors, all expressing in different forms and to varying degrees the legal view (the *opinio juris*) that the international rule at issue enshrines values so fundamental that no deviation from it is admissible.

The existence of a host of norms on human rights having the nature of *jus cogens* shows that there exists in the international society a two-tier set of values: some rights are regarded as more crucial than others, and are therefore enshrined in peremptory norms. These norms can be considered as those which have universal scope and bearing. They must be obeyed by all nations, states, and individuals of the planet. Other values, consecrated instead in international rules deprived of the nature of *jus cogens*, although still important, can be restrained in their incidence and scope by individual states, or adjusted to some extent to national conditions—as long as, however, such interpretation or adjustment does not appear to be absolutely arbitrary or unwarranted to other states or the relevant international bodies.

The existence of two different sets of values and corresponding international norms can make allowance for the coexistence of a core of indispensable and absolute values and a set of other, less imperative values. The gradual expansion over time of the first group of norms might eventually lead in the future to the formation of a global community where all the basic norms on human rights must be equally respected by everyone in any part of the planet.

This trend will be furthered by the meritorious work of the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights regarding the two 1966 Covenants on Human Rights. These Committees, as is well known, point in their General Comments and in the UN Human Rights Committee’s decisions on individual communications to the right interpretation to be placed on the various provisions of the Covenants. They thereby propound a notion of the various international rights that should be uniformly applied by all states.

Let me add that the existence of this two-tier system of human rights values in the international society is not per se a pernicious phenomenon. It simply reflects the reality of that society, where states with a different history, outlook, and philosophy coexist. In the interim, it is crucial to entrench in the international ethos and in the international legal mindset the notion that there exists a core of fundamental values which must be complied with by any state or other entity, whatever its history, culture, religion, or civilization.

**(B) Inducing compliance with *jus cogens* norms on human rights**

We must not, however, confine ourselves to discussing normative developments. The international society is teeming with impressive normative constructs that are not matched by reality and remain magnificent dreams. It is as if states, after much
discussion and interminable polemics on its placement and configuration, had built a stupendous skyscraper, provided with an entrance, floors, stairs, lifts, fully furnished rooms, and even vases overflowing with freshly cut flowers, and then left the building empty, for no one dares or wishes to enter and live there.

Hence, it is also necessary to propose that some sort of supervisory or enforcement mechanisms be set up, capable at least of ensuring respect for the *jus cogens* rules on human rights. I would like to point out that to my mind one should not pursue, or at least should entertain doubts about pursuing, two particular avenues for achieving this end: establishing a universal international court of human rights and providing for humanitarian intervention whenever human rights are grossly violated. The former option should be discarded because it is simply naïve to think that states will submit their own domestic relations with individuals living on their territory to binding international judicial scrutiny. The second option (humanitarian intervention) should be taken with a pinch of salt for it is likely to lend itself to dangerous abuses and manipulations. Nevertheless, the use of force has recently been authorized by the UN Security Council with regard to the Ivory Coast (where the Council authorized both the UN peacekeeping forces and the French forces supporting them to use force for the protection of civilians)\(^4\) and to Libya (where again all states were authorized to use force for the sake of protecting civilians).\(^5\) These are important precedents. Were the Security Council to insist on this approach in future instances, a new vista would open up and possible ways of conceptualizing and institutionalizing the Security Council’s authorization to use force to pursue humanitarian goals would be worth exploring.

Setting aside these two oft-suggested options, I would suggest three distinct avenues. First, one should set up a system of inquiry capable of verifying how and when violations occur. Secondly, one should enhance the criminal responsibility of the authors of gross violations of those fundamental values. Thirdly, one should rely upon international civil society tenaciously and steadfastly to prod all international subjects to abide by the law.

(i) Monitoring respect for *jus cogens* norms on human rights

I would first suggest the possible establishment of a Commission of Inquiry available to states and individuals alike. This suggestion is grounded on three assumptions. First, currently states are no less reluctant than in the past to submit the possible misconduct of their agents to international adjudication. Secondly, states are instead more amenable to fact-finding, which is felt to be less intrusive and hence less prejudicial to their sovereign prerogatives. Thirdly, fact-finding would have the great merit of establishing in an impartial and authoritative manner the

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\(^4\) See SC Res. 1967 of 19 January 2011 and SC Res. 1975 of 30 March 2001. The Security Council authorized the peacekeeping forces ‘to use all the necessary means to carry out its mandate to protect civilians’. France was included in the authorization.

\(^5\) See SC Res. 1973 of 17 March 2001, where states were authorized ‘to take all necessary measures to protect civilians’. 

facts at issue, thereby laying the indispensable ground for a peaceful settlement of
the matter and return to normality.

It would thus seem that an international non-judicial oversight mechanism could
usefully fulfil the task of rapidly establishing whether gross violations of human
rights norms of \textit{jus cogens}, in particular acts of torture, genocide, crimes against
humanity, or terrorism, have been perpetrated. A Commission of Inquiry made
up of independent experts having impeccable professional credentials and great
moral authority could be established by the UN Secretary-General. It could con-
sist of a roster of experts, from which in each case the Secretary-General could
draw a certain number of commissioners. The Commission could be activated
either by the victims or by the territorial state (or even by the national state of the
victim if they belong to a state other than the territorial one). The Commission
would have the advantage of acting promptly and discharging its task expedi-
tiously. In addition, it might be more acceptable to states if its findings were
devoid of any legally binding force. Such findings could even be handed over
confidentially to the relevant state, while the individual complainants might be
given only a summary account of the findings. Under such a scheme, it would
however, be wise to allow for the Commission’s right to disclose its findings
whenever the state in question contumaciously failed to comply with the conclu-
sions articulated in the Commission’s report. If this Commission were absolutely
impartial and independent as well as very authoritative, its findings would carry
much weight.

\textit{(ii) Bolstering international accountability mechanisms}

There is no doubt that bringing the authors of serious and large-scale violations of
human rights to justice constitutes one of the most efficacious means of reacting
to such violations. Plainly, to hold perpetrators personally accountable strikes at
the root source of grave misdeeds and prevents culpable individuals from hiding
behind the state. \textit{Individual criminal liability} is more effective than \textit{state responsibil-
ity} for the purpose of both preventing future violations and alleviating the suffering
of the victims or their next of kin. However, criminal justice is far from a panacea.
Indeed, the deterrent effect it aims to produce is less apparent than the other two
effects attaching to international conviction and sentence: stigmatization of the
criminal conduct and retribution.

In spite of these limitations, criminal accountability processes remain a valid
tool for addressing the whole range of gross violations of human rights norms of \textit{jus
cogens}, in particular those violations which, being uniquely odious in character and
collective in nature, amount to such international crimes as torture, crimes against
humanity, genocide, war crimes, or terrorism.

What should be done to enhance the existing accountability procedures and
bolster their effectiveness? I would suggest a number of different avenues: (i) to
make the \textit{International Criminal Court} more effective so as better to use its uni-
versal potential; (ii) strongly to urge the exercise by national courts of \textit{universal
criminal jurisdiction} over such international crimes and (iii) to insist on the notion
3. What should be done to move towards a global community of human rights? 143

that no amnesty for gross violations of human rights amounting to international crimes is permissible under current international law.

(iii) Activating international civil society

To push states and other international subjects to respect human rights and, generally speaking, behave in consonance with the universal values enshrined in the norms of *jus cogens*, one cannot rely too much on states. They are too concerned with pursuing economic, commercial, political, or military interests to prioritize safeguarding fundamental values or to take principled positions. We must therefore turn to international civil society.

In earlier times this society substantially coincided with public opinion. Indeed, in 1931 a distinguished British international lawyer, J.I., Brierly, stressed the importance of public opinion as a sanction, noting that in the international society public opinion is intrinsically a weaker force than opinion in the domestic sphere, yet it is in a sense more effective as a sanction of law. For whereas an individual law-breaker may often hope to escape detection, a state knows that a breach of international law rarely fails to be notorious; and whereas again there are individuals so constituted that they are indifferent to the mere disapproval, unattended by pains and penalties, every state is extraordinarily sensitive to the mere suspicion of illegal action.6

Today international civil society must guide public opinion more actively. At present public opinion is too frequently distracted by the media, and the media bombardment is also intensive but shallow, for it jumps each day to a new subject. We have thus been made accustomed to tragedies occurring every day in some part of the world, with the risk of becoming indifferent or even cynical.

We must therefore turn to that international civil society, which is chiefly incarnated in the most independent, impartial, and proactive non-governmental organizations. By gathering and disseminating information, by drawing publicity to issues, and by acting as the moral voice of the international community, international civil society might play a significant role in prodding states and other international subjects as well as national courts increasingly to proclaim and comply with fundamental values upheld in *jus cogens* rules.

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