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Civil and Political Rights-An Introduction

Berta E. Hernández-Truyol

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PANEL ONE

INTERNATIONAL LAW, HUMAN RIGHTS, AND LATCRIT THEORY: CIVIL AND POLITICAL RIGHTS—AN INTRODUCTION

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I. INTRODUCTION

This short essay is adapted from introductory comments delivered at the Second Annual Law Professors' Colloquium, held

* Professor of Law, St. John's University School of Law. Many thanks to the University of Miami Law School for its kindness and generosity in hosting this Second Annual Law Professors' Colloquium being held in conjunction with the Hispanic National Bar Association's Annual Meeting. Special thanks to Frank Valdes for his indefatigable work and amazing organizational concentration and skill; Lisa Iglesias who, together with Frank, organized this wonderful Colloquium; and to University of Miami School of Law Dean Sam Thompson without whose support this type of event could not take place.

in Miami, Florida in conjunction with the Hispanic Bar Association's Annual Meeting. The Colloquium, "International Law, Human Rights, and LatCrit theory," focused on understanding how, why, and with what theoretical, political, and practical implications, the critical concerns of the LatCrit movement intersect with key issues of international law and human rights.

To explore the relevance of human rights to LatCrit theory, this Colloquium is conveniently organized into three panels representing the three so-called generations of rights: civil and political rights (the first generation); social, economic, and cultural rights (the second generation); and solidarity or collective rights (the third generation). However, at best, it is naive to claim that clear distinctions as to the character and nature of rights exist so as to permit inflexible, clearly delineated, generational classifications. Rather, as human rights instruments recognize, all human rights are indivisible and interdependent¹—notions invaluable to the LatCrit discourse which were recently reiterated in the Vienna Declaration, the consensus document that emerged from the 1993 United Nations World Conference on Human Rights held in Vienna, Austria. The Vienna Declaration plainly states that "[a]ll human rights are universal, indivisible and inter-dependent and interrelated."²

To be sure, the rights of free expression, free association, and free exercise—quintessential examples of the civil and political rights of the first generation—are at best meaningless without the health, education, and social security rights—all of the second generation. Similarly, these health, education, and social security rights are illusory without the peace or environment to facilitate them. Moreover, trade union rights and property rights can be viewed as either (or both) civil and political or social and economic rights.

1. Significantly, based on this notion of indivisibility and interdependence of rights, the United Nations General Assembly called upon the United Nations Commission on Human Rights to adopt a single convention on human rights. G.A. Res. 421 (V), U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (1950). Because of disagreements as to the obligatory nature of social and economic rights between industrialized and developing nations, the one contemplated covenant was fragmented into two documents—one addressing civil and political rights and the other addressing social, economic, and cultural rights.

2. Vienna Declaration and Programme, U.N. GAOR, World Conference on Human Rights, 48th Sess., pt. 1, para. 5, U.N. Doc. A/Conf. 157/23 (1993), *reprinted in* 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration].

Attesting to the indivisibility and interdependence construct, the European system³ considers the right to education and cultural rights as part of the civil and political rights construct, but interestingly, they do not appear in the International Covenant on Civil and Political Rights (ICCPR).⁴ Rather, they appear in the International Covenant on Economic, Social, and Cultural Rights (Economic Covenant).⁵ Moreover, there are myriad significant documents in which the first, second, and third generation rights coexist, such as in the Children's Convention,⁶ the Women's Convention,⁷ the Convention on the Elimination of All Forms of Racial Discrimination,⁸ and the African Charter.⁹ Thus, a human rights construct makes sense only with a holistic reading of rights that truly allows the enjoyment of the aspirational dignity that attaches to our status as human.

Nonetheless, in order to organize presentations, this Colloquium uses the generational structure while concurrently debunking it. Every panel will, in some fashion, address all the "generations" of rights. For example, take immigration status—a much maligned status in the hallowed halls of Congress in the recent past. An appropriate question to ask, one of great importance and relevance to the LatCrit paradigm, is whether, in light of international human rights norms, the United States as a sov-

3. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. See also American Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978), reprinted in 9 I.L.M. 673 (1970) [hereinafter American Convention].

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976, ratified by the United States June 8, 1992) [hereinafter ICCPR].

5. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Economic Convention].

6. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448 (1989) [hereinafter Children's Convention].

7. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14 (entered into force on Sept. 3, 1981) reprinted in 19 I.L.M. 33 (1980) [hereinafter Women's Convention].

8. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Race Convention].

9. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/31 Rev. 5 (1981) (entered into force on Oct. 21, 1986), reprinted in 21 I.L.M. 59 (1981) [hereinafter African Charter].

ereign enjoys the sovereign right to deny health, education, and welfare services/benefits to persons based upon their immigration status? And what insights can LatCrit offer in light of such dilemmas?

This brief introduction to the first panel, which will focus on civil and political rights, has three aims. First, it will introduce the theme of this panel and present some preliminary considerations concerning the so-called first generation of international human rights law. Second, this article will articulate the three questions the panelists were asked to keep in mind in the course of the preparation of their remarks. Finally, this preface will introduce the panelists, preview the rights that they will each address, and suggest some themes that show the inter-connections between and inter-relatedness of the concerns of international human rights law and LatCrit theory.

II. THE FRAMEWORK: INTERNATIONAL HUMAN RIGHTS LAW

International human rights are those rights vital to an individual's existence; they are fundamental, inviolable, interdependent, indivisible, and inalienable rights. Simply put, they are predicates to life as human beings.¹⁰ Human rights are moral, social, religious, and political rights that concern respect and dignity associated with personhood and a human being's identity.¹¹

The origins of the concept of human rights, a relatively recent, modern concept, are based in religion, "natural law, [and] contemporary moral values."¹² The foundation for human rights is the individual's status *qua* individual within the international community and the dignity and justice owed to persons based upon that status.¹³

10. Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom As an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991). See also REBECCA M. WALLACE, INTERNATIONAL LAW 175 (1986) ("Human rights ... are regarded as those fundamental and inalienable rights which are essential for life as a human being.").

11. See generally *supra* note 10.

12. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. b (1987).

13. But see Rhoda E. Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 81, 82 (Abdullahi Ahmed An-Na'Im ed., 1992) (differentiating among human rights, dignity, and justice).

Justice and human dignity are concepts central to any conception of the rights of individuals. For example, the notion of social justice is inherent in the nondiscrimination norms. Similarly, human dignity elevates human rights to a universal level of inviolability in the public and private spheres. Consequently, there can be no challenge to the universal acceptance that, for example, genocide, race discrimination, and terrorism are wrong and universally condemned,¹⁴ regardless of whether the actors are states or private persons and regardless of the victims' nationality.

In the beginning, individual human rights were not part of the international law paradigm. Rather, the concern of international affairs was left exclusively to the state. Such notions notwithstanding, early writers recognized the importance of individuals to the Law of Nations because individuals are "the personal basis of every State" and, consequently, international law must "provide certain rules regarding individuals."¹⁵ Individuals, however, were deemed to be objects, and not subjects, of the Law of Nations.¹⁶

A. *Historical Background of the Development of Civil and Political Rights*

History traces the development of rules to deal with relationships between or among different peoples to the end of the Roman Empire at which time the emergence of independent and separate states required the development of rules that guided sovereigns' interactions with one another.¹⁷ Thereafter, in-

14. This is not to say, however, that universality as opposed to relativity, at least as originally articulated, represent the appropriate analytical paradigm. For a discussion on the universality versus relativity debate, see Berta Esperanza Hernández-Truyol, *Women's Rights As Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 657-67, 657 n.201 (1996).

15. 1 L. OPPENHEIM, INTERNATIONAL LAW 362-69 (2d ed. 1912), reprinted in LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1 (1973).

16. *Id.* § 290.

17. See generally LOUIS HENKIN ET AL., INTERNATIONAL LAW at xxii-xxiii (3d ed. 1993); COVEY T. OLIVER ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1390 (4th ed. 1995). The *jus gentium* system that the Roman Empire had developed to govern the relations between Roman and non-Roman citizens, which (contrasted with the *jus civile*, which applied between or among Roman citizens) was modeled on the Roman system and incorporated principles of equity and natural law. Contemporary scholars analogize the *jus gentium* to the source of international law called "General

creased trade, improvements in navigation, and the discovery of new lands accelerated the development of the new law of nations.¹⁸ The diversity of peoples and ideologies also required orderly processes for state-to-state communications and interchanges.¹⁹

The emergence of human rights law is traced to "premodern natural law doctrines of Greek Stoicism."²⁰ Although later conceptions of natural law included theories of natural rights, early views emphasized duties of "man."²¹ Natural law philosophy also had religious foundations which posited that all human laws derive from, and are subordinate to, the law of God.²² Intrinsic

Principles of Law Recognized by Civilized Nations" contained in Article 38 of the Statute of the Court of International Justice.

18. HENKIN, *supra* note 17, at xxii, xxiii. Another significant historic event in the evolution of international law is the Thirty Years War (1618-1648) in Central Europe which marked the emergence of independent nation-states as the primary actors in the global setting underscoring the need to create norms to govern interactions between and among sovereign equals. James Friedberg, *An Historical and Critical Introduction to Human Rights, in HUMAN RIGHTS in WESTERN CIVILIZATION 1600-PRESENT 2* (John A. Maxwell & James J. Friedberg eds., 2d ed. 1994).

19. Friedberg, *supra* note 18 (quoting Grotius). Indeed, in the seventeenth century Grotius's visionary statement: "Human rights norms must exist today in a diverse world of immensely varied ideologies and beliefs"—effectively predicted the development of a sophisticated human rights system. *Id.* Hugo Grotius, an important international jurist who was guided by natural law, provided a bridge to the positivists' theoretical foundations that followed the natural law epoch. Grotius distinguished between natural law and the customary law of nations based on the conduct and will of nations. As "a rationalist who derives the principles of the law of nature from universal reason rather than from divine authority," HENKIN, *supra* note 17, at xxiv, Grotius' natural law concept was secular and was based on "man's" rationality rather than revelation and deduction of God's will. OLIVER, *supra* note 17, at 1391.

20. Burns H. Weston, *Human Rights, in ENCYCLOPEDIA BRITANNICA, reprinted in INTERNATIONAL LAW ANTHOLOGY 21, 22* (Anthony D'Amato ed., 1994) (stating that "the school of philosophy ... which held that a universal working force pervades all creation and that human conduct therefore should be judged according to, and brought into harmony with, the law of nature.").

21. See generally MYRES MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 68-71, 73-75* (1980), excerpted in FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS 167-68* (2d ed. 1990). The underpinnings of natural law are assumptions that there are laws existing in nature—both theological and metaphysical—that confer rights upon individuals as human beings. The two sources for these rights are either in divine will or metaphysical absolutes, and they are deemed to constitute a higher law than is identified with all of humankind and requires protections of individual rights. An underlying assumption of natural law is that there is a common human nature that presupposes the equality of all human beings.

22. HENKIN, *supra* note 17, at xxiv. Thomas Aquinas, for example, viewed the law of nature as "a body of permanent principles grounded in the Divine Order, and partly revealed in the Scripture." In his thirteenth century writings, Aquinas even noted the notion that one sovereign could interfere in the internal affairs of another when one mis-

cally contradictory to any notion of human rights was the recognition of the legitimacy of slavery and serfdom—concepts anathema to the notion of human rights, liberty, freedom, equality, and dignity that are at the heart of human rights as viewed today.²³

From the early days, the view of these rights of “man” as inalienable was reflected in the language in which they were couched. For example, Locke argued that “certain rights self-evidently pertain to individuals as human beings ... that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property”²⁴ and that individuals in civil society only ceded to states the right to enforce these natural rights, not the rights themselves. If the state does not safeguard the rights, it will give “rise to a right to responsible, popular revolution.”²⁵

The shift from natural law to positivism signified that the focus of states’ conduct would be on what states did in practice rather than what occurred based upon forces existing in nature.²⁶ The value of the positivists’ contributions to the development of human rights law lies in their recognition of the importance of organizing rules by established processes of the states. Its weakness, however, lies in the fact that the values promoted as human rights become wholly dependent upon the perspective of the governing elite.²⁷ Thus, under a positivist model, human dignity is what a state makes it.

The reality is that the evolution of rights recognized both positive and natural law. Certainly, there was acceptance of a state’s sovereignty over its own subjects; however, the suprasovereign nature of the inviolability of a human being was also rec-

treats its subjects. Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT’L L. 547, 570-74 (1987) (quoting Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203, 214 (1974)). This religious view of the natural law was carried forward by Spanish theologians Francisco de Vitoria and Francisco Suárez, both of whom recognized that beyond individual states there existed a community of states that was governed in their interactions with each other by international rules that were found “by rational derivation from basic moral principles of divine origin.” OLIVER, *supra* note 17, at 1390-91. See also HENKIN, *supra* note 17, at xxiv.

23. Weston, *supra* note 20, at 22.

24. *Id.*

25. *Id.*

26. HENKIN, *supra* note 17, at xxv. The popularity of positivism corresponds to the rise of the nation-state and the view of the state as independent and sovereign. *Id.*

27. See generally MCDUGAL, *supra* note 21.

ognized. As one writer plainly stated, "[if] a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connection is not cut off in such case."²⁸

The contemporary conceptualization of human rights, such as the rights to life, liberty, and equality, remained unarticulated until the last decades of the eighteenth century when they emerged contemporaneously with the institutionalization of democratic forms of government.²⁹ This was a time when political and social uprisings sought to identify and particularize those impermissible governmental intrusions into individuals' rights. Such movement is symbolized and embodied in the American Declaration of Independence³⁰ and the French Declaration of Les Droits de l'Homme.³¹ These rights, however,

28. Bazyler, *supra* note 22 (quoting Hugo Grotius, *De Jure Belli Esti Pacis* 438 (William Whewell trans., Cambridge Univ. Press 1853) (1625)). See also Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués a la Conduite et aux Affaires des Nations et de Sovereigns* (1758), reprinted in Covey T. Oliver, et al. *Cases and Materials on the International Legal System* 742 (4th ed. 1995). De Vattel articulates in section 71 some of the early notions of human rights law:

Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.

Id. § 71. Section 72 states:

[b]ut, on the other hand, the nation or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend that state itself: and this, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries, but also because nations ought mutually to respect each other, to abstain from all offense from all injury, from all wrong, in a word, from every thing that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation either in its body or its members, he does no less injury to that nation than if he injured it himself. In short, the safety of the state, and that of human society, requires this attention from every sovereign. If you let loose the reigns to your subjects against foreign nations, these will behave in the same manner to you; and instead of that friendly intercourse which nature has established between all men, we shall see nothing but one vast and dreadful scene of plunder between nation and nation.

Id. § 72.

29. GERHARD VON GLAHN, *LAW AMONG NATIONS* 185 (4th ed. 1981).

30. The inalienability and inviolability of rights that Locke addressed and the natural law roots of these rights is also reflected in the language of the American Declaration of Independence, which proclaims the *self-evident* truth "that all *men* are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

31. The French Declaration of the Rights of Man and Citizen of August 16, 1789

emerged at a time when all women and all slaves were mere chattel—conditions anathema to the very rights being articulated, developed, and embraced.

Early examples of express protection of individuals, predating even the democratic movements, include the seventeenth century negotiations by Catholic princes to ensure appropriate treatment of Catholics by Protestant princes and vice versa.³² These agreements were precursors of the late nineteenth and early twentieth century treaties concluded by states which protected the rights of certain classes, mostly minority groups (i.e., persons of a different race, religion, or language from the majority group) within a state³³ and which abolished slavery.³⁴ These

also reveals its natural law roots. That document provides that "men are born and remain free and equal in rights... the aim of every political association is the preservation of the natural and imprescriptible rights of man ... [which are] Liberty, Property, Safety and Resistance to oppression." THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (Fr. 1789). Liberty is defined to include the right to free speech, freedom of association, religious freedom, and freedom from arbitrary arrest and confinement. *Id.*

32. HENKIN, *supra* note 17, at 596-97.

33. VON GLAHN, *supra* note 29, at 185-86. See also HENKIN, *supra* note 17, at 597. A major step in the protection of individuals' rights is evident in the peace treaties of 1919 which provided guarantees of fair treatment to the inhabitants of mandated territories and certain racial minorities in eastern and central Europe. Another landmark is the establishment of the International Labor Organization (ILO), the purpose of which was (and continues to be) the improvement of working conditions throughout the world. The origins of these actions can be traced to the period after the First World War when changes in sovereign boundaries required the expansion of rights to minorities because of the rise of nationalistic sentiments which created a real danger of oppression against racial, ethnic, linguistic, and religious minorities. Consequently, the allied and associated powers, such as Czechoslovakia, Austria, Greece, Bulgaria, Hungary, Poland, Turkey, Rumania, and Yugoslavia, concluded a number of treaties whereby those states promised to treat minority groups justly and equally. At a later time, Albania, Estonia, Iraq, Latvia, and Lithuania gave similar guarantees as conditions of their admission to the League of Nations. See generally MARJORIE M. WHITEMAN, 1 INTERNATIONAL LAW DIGEST 52 (June 1963).

34. Conventional views date the recognition of freedom from slavery as a customary international norm to 1915. This norm was re-affirmed in international conventions such as the 1926 Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927); 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957). For subsequent treaties further prohibiting the traffic of women and children, see International Convention for the Suppression of the Traffic in Women and Children, 9 L.N.T.S. 416 (1923); 1947 Protocol, 53 U.N.T.S. 13 (1947). By 1955, it had been affirmed in the General Act of the Berlin Conference on Central Africa that "trading in slaves is forbidden in conformity with the principles of international law." RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS 1 (2d ed. 1991). Thirty-four years later, the Brussels Conference condemned slave trade and also agreed on measures for the suppression of such practices, which included "granting of reciprocal rights of search, and the capture and trial of slave ships." *Id.*

early manifestations of the importance of protecting minority groups even within a sovereign provide historical momentum, utility, and support to a LatCrit proposal that rights of Latinas/os in this country, citizens, and noncitizens alike, merit and warrant protection from state intrusion.

Those treaty obligations notwithstanding, in the early development of human rights law, states mainly observed their commitments in the breach. States considered such provisions as intrusions into their national sovereignty³⁵—the same arguments presently echoed in the current nativistic legislative and congressional trends to curtail non-citizens' access to basic services such as health, education, social security, and welfare. But even then, in light of breaches of minority treaty provisions and prevailing statist principles, an early writer listed the following "rights of mankind" as guaranteed to all individuals in their state of nationality as well as by foreign sovereigns pursuant to the Law of Nations: "right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration and the like."³⁶

The truly revolutionary events in human rights development followed the Second World War after which emerged the unique acceptance of individuals *in se*, and not only states (even if on behalf of, or having an impact on, individuals), as primary actors in the global sphere, rendering individuals both objects and subjects of law and its enforcement.³⁷ As a noted scholar has re-

35. This attitude of states resulted in the Permanent Court of International Justice's (PCIJ) reiteration that discrimination against minorities within a state constituted a violation of obligations under the treaties. See Advisory Opinion No. 6, *German Settlers*, 1923 P.C.I.J. (Ser. B) No. 6 (Sept. 10); Advisory Opinion No. 44, *Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J., (Ser. A/B) No. 44 (Feb. 4); Advisory Opinion No. 64, *Minority Schools in Albania*, 1935 P.C.I.J. (Ser. A/B) No. 64 (Apr. 6).

36. OPPENHEIM, *supra* note 15, § 292 reprinted in LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 4 (1973). After providing such a catalogue of rights, Oppenheim fretted that those rights could not be guaranteed by the Law of Nations because individuals cannot be subjects of law that is limited to relations between states. Yet, he also recognized the suprasovereign nature of "human" rights in the statement that:

there is no doubt that, should a state venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such state to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation.

Id.

37. See generally 1 WHITEMAN, *supra* note 33, at 51 (quoting CHARLES DE VISSCHER,

ported:

Before the Second World War, scholars and diplomats assumed that international law allowed each equal sovereign an equal right to be monstrous to his subjects. Summary execution, torture, conviction without due process (or any process, for that matter) were legally significant events only if the victim of such official eccentricities were the citizen of another state. In that case, international law treated him as the bearer not of personal rights but of rights belonging to his government, and ultimately to the state for which it temporarily spoke.³⁸

This modern view of human rights, placing the individual at the center, emerged in 1945 in the wake of the Nuremberg and Tokyo trials and the vivid awareness of the Nazi human rights atrocities.³⁹ Nuremberg clearly established that rules of international law applied to individuals. In a now famous and oft-quoted phrase, the Tribunal provided that "[c]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁴⁰

With the signing of the United Nations Charter in 1945, international law structurally protected individuals *qua* individuals against all forms of injustice regardless of whether the abuse or injustice was committed by a foreign sovereign or the individuals' own state of nationality.⁴¹ As such, these rights are permanent and universal and are ingrained as a purpose of the United Nations Charter to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without

THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 125, n.8 (P. E. Corbett trans., 1957).

38. TOM FARER, HUMAN RIGHTS BEFORE THE SECOND WORLD WAR IN INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: TEN YEARS OF ACTIVITIES 1971-1981, at v-vi (1982), reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS 33-35 (2d ed. 1991).

39. See Hernández, *supra* note 10, at 320-325; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9-10 (1982).

40. Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

41. See generally MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 75-76 (5th ed. 1984). Prior to that, as the peace treaties and the treaties with respect to slavery and the slave trade show, the concentration was on remedying specific abuses or protecting particular groups.

distinction as to race, sex, language or religions"⁴² Significantly, the universality of rights is founded in Western philosophy and thus open to attack for lacking Southern, Eastern, or African linkages.

This philosophical schism gave rise to another noteworthy post-World War II event which is relevant to an international law and LatCrit analysis of rights: the polarization of the economic development of states.⁴³ Programs of aid that were envisioned without an understanding of the varying cultures and problems in various countries failed and led to schisms in theory and practice. Such gaps are evident today in efforts ranging from the Maquiladora projects to the United States' so-called immigration reform.

More recently, post-Cold War discord and its attendant results of increased nationalism, ethnic strife, civil wars, and human rights abuses for which the community of nations was not prepared, have presented a grave challenge to the continued development of human rights law. These concerns are also evident today in the United States, not only in its national, but its international policies as well.

Another document that creates human rights obligations that are pertinent to this Colloquium is the Universal Declaration of Human Rights (Universal Declaration).⁴⁴ The Universal

42. U.N. CHARTER art. 1, para. 3. See also other U.N. Charter provisions that confirm it as a watershed moment in the internationalization of human rights. The preamble provides that the members "reaffirm [their] 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 [as well as the institution's goal] to promote social progress and better standards of life in larger freedom." *Id.* Preamble. In addition, Article 55 mandates that the United Nations promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55. To achieve this end, the state members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement" of such purposes. *Id.* art. 56.

43. The second panel of this Colloquium on social, economic and cultural rights, as well as the third panel on solidarity rights, will address this theme more directly.

44. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/180 (1948)[hereinafter Universal Declaration]. Although there is ongoing debate on the legal status of the Universal Declaration, many scholars consider it to be legally binding as a general principle of international law while others consider it to have the status of *ius cogens*—a peremptory norm. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE xxiv (1994). Moreover, notwithstanding that at its adoption the U.S. representative stated that the Declaration "is not and does not purport to be a statement of law or of legal obligation," (19 Dep't of State Bulletin 751 (1948)). Subsequent developments in both domestic and international law confirm the

Declaration is significant and noteworthy because it is a comprehensive document that addresses, not only civil and political rights, but also economic, social, and cultural rights—a testament to the indivisibility and interdependence of rights.⁴⁵ Included in the Universal Declaration's protections of civil and political rights are the prohibition of slavery, inhuman treatment, arbitrary arrest, and arbitrary interference with privacy, as well as a broad, nondiscrimination provision that mandates equality on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. In addition, the Universal Declaration provides for rights to a fair trial, to freedom of movement and residence, to political asylum, to have and change nationality, to marry, to own property, to freedom of belief and worship, to freedom of opinion and expression, to freedom of peaceful assembly and association, to free elections, and to equal opportunities for access to public positions. As to social, economic, and cultural rights, the Universal Declaration recognizes the rights to social security, full employment, fair working conditions, an adequate standard of living, education, and participation in the cultural life of the community.⁴⁶

B. *Civil and Political Rights*

On December 16, 1966, the General Assembly adopted and opened for signature, ratification, and accession the ICCPR, the Optional Protocol to the ICCPR, and the Economic Covenant.⁴⁷ The ICCPR is most pertinent to this panel because it, together with the Universal Declaration, is the document that articulates the civil and political rights of individuals. For example, the ICCPR's prohibition against the suspension of certain rights by the state, even in the event of public emergencies that threaten the life of the nation, reflects the notion of the inalienability of

Declaration's status as a statement of customary international law. See LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 518-19, 522 (1973).

45. For a discussion of the different types of rights, see Berta E. Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE* (Kelly Askin & Dorean Koenig eds., forthcoming 1997).

46. See Universal Declaration, *supra* note 44 *passim*. See also SOHN & BUERGENTHAL, *supra* note 44, at 516; AKEHURST, *supra* note 41, at 76-77.

47. See ICCPR, *supra* note 4.

rights. Such rights include the right to life; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from slavery and servitude; nonapplicability of retroactive laws; right to recognition as a person before the law; and the right to freedom of thought, conscience, and religion.⁴⁸

Civil and political rights comprise the so-called first generation. Ironically, and aptly, called "the rights of Man," these rights were in their apogee starting in the eighteenth century when, among others, women had no rights. These rights are traced to the "bourgeois" revolutions, particularly the French and American Revolutions in the last quarter of the eighteenth century that gave rise to the Declarations which are viewed as the foundation of this group of rights.⁴⁹

Civil and political rights originally were conceived as negative rights, which meant freedom from governmental interference in the various realms. Rights that fall into this negative construct include the freedom of opinion, conscience, religion, expression, the press, assembly, movement, from arbitrary detention or arrest, interference with correspondence, and the right to property.⁵⁰ However, such a conception of negative rights is exceedingly and misleadingly limiting as civil and political rights also include some rights that can be categorized as positive because they require some action by the state, such as the right to

48. *Id.* arts. 6, 7, 8(1)-(2), 15, 16, and 18. Aside from the U.N. Charter, the Universal Declaration, the ICCPR, and the Economic Covenant, a rich body of human rights treaties, including regional human rights systems, exists. Other significant treaties include the Women's Convention, *supra* note 7; Race Convention, *supra* note 8; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, U.N. Doc. A/Res/39/46 (1984) (entered into force June 26, 1987), *reprinted in* 23 I.L.M. 1027 (1984); Children's Convention, *supra* note 6.

49. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 437 (1981) (stating that "the commonly recognized starting point for the emergence of international human rights as we know them today is the movement for the 'rights of man' in eighteenth century Europe."). Significantly, notwithstanding these origins, Marks notes that he does not suggest "that the concept of human rights is exclusively or even essentially Western. All cultures and civilizations in one way or another have defined rights and duties of man in society on the basis of certain elementary notions of equality, justice, dignity, and worth of the individual (or of the group)." *Id.* at 437 (citing UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, BIRTHRIGHT OF MAN (1969); HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS (1949)).

50. *Id.* at 438. It appears that the right to property properly belongs as a civil and political right; however, it can easily be viewed as an economic right. Interestingly, it is often placed under the civil and political rights because property was central to the interest fought for in the French and American Revolutions.

participate in free elections and the right to a fair trial. The nondiscrimination provision in the ICCPR, the UN Charter, and the Universal Declarations—prohibiting discrimination on the basis of race, gender, language, religion, culture, family, ethnicity, national origin, and social origin—make clear that all persons enjoy these rights.

Notwithstanding the universality of civil and political rights, the development of these rights has been nationalized, politicized, and gendered. The notion of human rights that emerged, rather than being universal, was normative; the norm was the white, Anglo, Western, European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male. The Western domination in the development and articulation of law has resulted in challenges to its validity, authenticity, and universality with the conception of universality frequently meeting with resistance from representatives of different cultures and ideologies.⁵¹ Civil and political rights are meaningless to a population that cannot exercise them. Rights of this first generation have been criticized as being “meant for the majority of the working class and peoples of conquered lands, the right to be exploited and colonized. They were regarded as ‘formal’ freedoms that neglected the material realities of social conditions.”⁵²

Today, world events following the fall of the Berlin Wall, the break-up of the Soviet Union, the virtual end of communism, and the destabilizing global consequences of these occurrences, including regional strife, ethnic and religious wars, genocide and ethnic cleansing, and a turn towards nativism, nationalism, and isolationism in politics, governance, and trade, indicate that global society is in a second revolutionary stage, even from a traditionalist human rights perspective. This last decade of the twentieth century thus becomes but a beginning of a new era for human rights law. In such a context, this Colloquium can and will articulate the great expectations for years to follow—a vision of a great future for all persons in the world; where women and men of all races, religions, ethnicities, sexualities, abilities, classes, colors, and cultures can elect and be elected representatives of society; where cultures and people are protected, valued,

51. Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge* 21, 23, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Asbjørn Eide et al. eds., 1995).

52. Marks, *supra* note 49, at 438.

and heard; where poverty, malnutrition, and premature deaths are eliminated; where not only boys, but also girls are healthy, well-fed, cared-for, valued, and educated; and where Latinas/os (and all "others") form an integral part of the social construct and are significant participants in any existing social contract.

III. THE QUESTIONS: CIVIL AND POLITICAL RIGHTS

The Civil and Political Rights panel will explore whether LatCrit theory can further the theoretical and practical work of promoting civil and political rights in both the domestic and international arenas, particularly in light of the United States Supreme Court's recent constitutional jurisprudence effecting a dramatic contraction of certain individual rights in this country. The following questions were offered to the speakers to present a framework within which to explore this theme.

1. Does a LatCrit theoretical perspective on identity politics, the multiplicity and intersectionality of Latina/o identities and cultural values as well as the convergences and divergences in our histories and discourses of assimilation, independence and revolution offer new perspectives on the traditional themes and concerns that have organized the legal and political struggle to promote the recognition and enforcement of human rights, broadly conceived?

Significant themes raised by this inquiry include the theoretical and historic origins of the particular generation, here the first generation, of human rights. LatCrit can be instrumental in suggesting and proposing ways to conceptualize differences and commonalties in designing an agenda to promote the recognition and enforcement of human rights in domestic and international fora. For example, international human rights instruments expressly recognize the indivisibility, interdependence, and inviolability of rights. This paradigm is well-suited to LatCrit analysis as it supports the multidimensional nature of Latinas/os' identities. Thus, international human rights norms' protection against discrimination on the basis of race, sex, color, culture, and language serves Latinas/os well because their identities are the combination of many of the protected characteris-

tics, not the fragmentation of them as U.S. law would have it.⁵³

2. Does LatCrit theory offer new perspectives on the recent trend toward regional economic integration and the likely impact of such developments on the human rights of Latinas/os within the United States, at the borders, and within the Latin American states considering regional integration?

This query insinuates that international human rights law provides a fulcrum from which to take a global perspective that encourages diversity of analysis rather than a parochial and nationalistic perspective that eschews others and insists on a pre-ordained hierarchical normativity. What would happen, for example, if one were to focus on the border crossing issues from a Mexican worker's perspective instead of taking an irate *Estado Unidense* outlook? Rather than hear the cacophonous sounds of nativistic voices from this side of the border, which attempt to convince others that the so-called "illegal aliens" are stealing American jobs (jobs which in reality involve performing tasks no "American" worker wants to carry out), one might simply hear the voices of concerned mothers and fathers whose family values render them willing to risk their lives for the sake of making a living at a job that will enable them to feed, clothe, and educate their children—a task not possible in their country and a risk easily understood when one compares the U.S. \$4.00 *per day* wages earned in their countries working for U.S. companies to the U.S. \$4.00 *per hour* wages earned by simply crossing the border.

3. Does LatCrit theory have anything to say about the key debates over (a) the status of national sovereignty in interna-

53. See, e.g., *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (the court held that a black woman claiming discrimination based upon a company policy that prohibited her wearing braided hair could not conflate her identities (i.e., her blackness and her womanness to enhance her case in court), and the court, noting that corn-rowed hair was made popular by Bo Derek, found the policy was not discriminatory against women or blacks). See also, Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995) (discussing the Rogers case); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995) (addressing the intersection of race, sex and class); Berta E. Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 *HARV. LATINO L. REV.* (forthcoming 1996) (applying the indivisibility and interdependence construct to Latinas/os' identities).

tional law, (b) the proper scope and limits of state intervention in civil society, and (c) the status of international human rights in regional agreements such as free trade agreements or procedural norms for the enforcement of international human rights?

LatCrit, and in particular the Latinas/os and Asian-American colleagues and coworkers, as well as other hyphenated "Americans," may have an especially valuable contribution to make because of our conflated North/South and East/West identities. To us, with our trans/international roots, origins, and families, and our multilingualism, national sovereignty takes a different form. We can all ask which part of a national identity or which of our nations a particular concern/policy triggers, since our claim to citizenship is not homo-national. With such multiplicity claims, again the indivisibility and interdependence paradigm of international human rights norms is both constructive and instructive. For one, national origin and its indicia such as language are expressly protected classifications in the international sphere. For another, the very notion of sovereignty and citizenship gets confused when in border raids in the United States, both Mexican nationals and U.S. nationals of Mexican ancestry get rounded up and herded out—simply because of their physical traits—regardless of nationhood.⁵⁴

In addition, the notion of the individual in the global text is a concept broader than citizenship with protections of individuals based on their personhood,⁵⁵ not their citizenship. Significantly, all states, not just the state of nationality, owe all peoples, not just their citizens, these international protections. Finally, the lesson from Nuremberg and its progeny is that state sovereignty cedes to human rights protections. Consequently, international human rights norms set the proper baseline scope and limits of state intervention in civil society as well as the threshold observance of such rights in any regional or international agreement.

54. See Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245 (1996-97).

55. For a discussion on the international legal protections of persons, rather than the narrower class of citizens, see Berta E. Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 263-64 (Juan Perea ed., 1997).

IV. HUMAN RIGHTS AND LATCRIT THEORY—THE FIRST GENERATION

The indisputably suprasovereign nature of fundamental human rights offers LatCrit theory fertile ground on which to develop conceptions of law that will be of significance to the *comunidad latina* as well as to all other communities in our midst. For example, with sovereignty ceding to basic human rights principles, it follows logically that human rights norms can trump local law which derogates from such principles.

Considering current issues of interest and activism, the immigration rights discourse provides a significant forum in which to apply the theory to practice. It is beyond question that a state has the sovereign right to enact immigration laws; however, human rights norms dictate that such a sovereign right is not unfettered. While immigration norms can be, and are, promulgated, such norms cannot derogate from fundamental human rights principles. If a state, hiding behind the sovereignty shield attempts to treat similarly situated folks differently based upon grounds proscribed by human rights norms, such as the broad nondiscrimination mandates that include language, national origin, and conditions of birth, international principles simply prohibit the state's conduct. These same nondiscrimination principles could be put to good use against the welfare law, beyond the immigration provisions.

Last, but certainly not least, is the introduction of these exciting panelists who will, by their conversations, focus on some of the international human rights to which this introduction has alerted the readers. Elvia Arriola from the University of Texas is one of the leaders of "queer" theory, who has been doing some fantastic LatCrit work. Her presentation focuses on Immigration and Naturalization Service raids and the rights which are placed in jeopardy by such raids. As far as human rights go, this presentation raises issues of race, color, culture, and citizenship; the rights to life, liberty, security of the person, and human dignity; and the right to freedom of movement

The following presenter is Kevin Johnson who teaches at UC Davis and has studied, represented persons in cases dealing with, and has extensively written on immigration issues, particularly as they affect the Latina/o community. His panel discussion, entitled "*Aliens and the U.S. Immigration Laws: The*

Social and Legal Construction of Nonpersons scrutinizes how the construction of the alien has allowed these noncitizens to be afforded limited rights, to be mistreated, and to be abused—a timely topic in light of the recently signed pieces of legislation on welfare and immigration. Again, this theme raises the issues of global rights of others, in this instance, foreign others, outside the jurisdiction of their nationality.

Last is Enid Trucios-Haynes who teaches at the University of Louisville and has practiced, taught, and is writing up a storm in the area of immigration. She focuses on “Transnational Identities and the Implication for Global Advocacy Strategies and State Sovereignty.” This presentation underscores the tension between, on the one hand, the individual rights of those who, because of immigration, language, ancestry, or family have identities with transnational reach rather than a single national identity, and, on the other hand, the sovereign states for which nationality is a crucial identifying factor for granting rights and taking responsibilities vis à vis the individual.

All of these presentations weave a unified challenge to Lat-Crit theorists: the identification of that fine balance of what is a legitimate exercise of power by the state and what is the pretextual overbearance of state power to others/outsideers, particularly Latinas/os who often may be citizens by birth, but foreigned out of full citizenship by name, language, color, accent or appearance. How can we reconcile the deportation of citizens because they look like their brothers and sisters from south of the *frontera* with their birthright to be present and enjoy life in *their* country and dignity to which all persons are entitled, free from governmental obstruction and intrusion? How can we use the diversity of Latina/o panethnicity to make international human rights a reality in the life of the immigrant rather than aspirational paper rights that leave the immigrant at the margins of the discourse? How can we use that panethnic diverse experience to reconstruct the meaning of alien, after its deconstruction shows its pretextual, thinly veiled patina aimed at contracting basic human rights to disempower foreigners by rendering them aliens, something less than human? How can we use the experiences grounded in our multidimensionality, often including a transnational identity(ies) factor, to make the indivisibility and interdependence of that diversity central to the rights discourse?

LatCrit offers the multifaceted experiences of numerous persons who travel many worlds because of their Latina/o-ness. This experience and the successes we can share because of our non-mainstream culture, color, ethnicity, and multilingualism while traveling within our *estadounidense* home is a real life complement to the theoretical human rights framework. The international paradigm recognizing, indeed mandating, the recognition of a holistic rights construct—the indivisibility, inviolability, and interdependence of rights—is a reflection of the lives of Latinas/os whose multiple identities and multilingualism enable our world-travelling.

And so what does LatCrit have to offer? It can serve to urge, promote, and insist upon a local to universal theoretical construct that eschews the single-trait, myopic approach of our system of laws in favor of a holistic one that promotes the indivisibility and interdependence of our identities. Rather than focus on our differences, let our multilingualism be at the center of the creation of a cohesive theory that insists upon our protections notwithstanding our differences. And, this is of paramount importance to Latinas/os, as well as Asians and others: our panethnicity should be a source of strength rather than a pretext for surrender. We are the diverse peoples—we are tall and short; blond and brunette; blue-eyed and brown-eyed; we are India/o, mestiza/o, blanca/o, morena/o, trigueña/o; men and women; lesbian, gay, and straight; Catholic, Protestant, Santera, and Jew; all levels of ability and education; all classes and religions; from all parts of the world, including all parts of the *estados unidos*, yes, *nuestros* United States as well. It is time to eschew the notions that our hyphenated entities are less than nonhyphenated ones. LatCrit and international human rights norms are indispensable to the articulation of a cohesive, holistic paradigm that effectively can develop, expand and transform the content and meaning of a rights construct.