1-1-1997

Considering "Third Generation" International Human Rights Law in the United States

Natsu Taylor Saito

PANEL THREE

BEYOND CIVIL RIGHTS: CONSIDERING "THIRD GENERATION" INTERNATIONAL HUMAN RIGHTS LAW IN THE UNITED STATES

NATSU TAYLOR SAITO*

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* Associate Professor, Georgia State University College of Law. This was initially presented at the Latina/o Law Professors Colloquium of the 1996 Annual Convention of the Hispanic National Bar Association, as part of a panel on Third Generation Human Rights and LatCrit Theory. I am grateful to Elizabeth Iglesias and Francisco Valdes for the opportunity to participate in this program, to Kelly Jordan for his thoughtful comments, to Eric Yamamoto for encouraging me to pursue the topic, and to Soo Jo and Rand Csehy for their research assistance.

I. HUMAN RIGHTS: THE NEXT GENERATION

Human rights are frequently invoked as the basis for decisions about U.S. foreign policy, international relations, and humanitarian intervention.[1] Nonetheless, just what "human rights" means is unclear. Within U.S. legislation and judicial decisions, we see frequent references to civil rights, but rarely to human rights, and international human rights law is seldom considered part of the legal recourse available to individuals or groups in the United States today.

A fundamental principle of international law,[2] articulated by the decisions of the Nuremberg Tribunals, is that there are universal human rights which every person and every government must respect.[3] This principle was endorsed by the United Na-

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1. *See generally* Ann Devroy & Bradley Graham, *U.S. Readies Force for Policing Haiti Following Invasion, Pentagon Adds Seven Cargo Ships for Heavy Equipment Transport*, WASH. POST, Sept. 9, 1994, at A1; Helen Dewar & Ruth Marcus, *Clinton Increases Somalia Deployment, Hundreds More to be Sent than Previously Announced, Byrd Backs Off on Withdrawal*, WASH. POST, Oct. 14, 1993, at A22; Thomas W. Lippman, *U.S. Troop Withdrawal Ends Frustrating Mission to Save Rwandan Lives*, WASH. POST, Oct. 3, 1994, at A11; David Hoffman, *Crisis in the Gulf, Iraq's Invasion of Kuwait*, WASH. POST, Aug. 8, 1990, at A1; Ann Devroy, *Clinton Lobbies for Troops, U.S. Participation Crucial to Peacekeeping Mission President Says*, WASH. POST, Nov. 26, 1995, at A29.

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(1) (1987), provides: "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world." *Id.*

Article 38 of the Statute of the International Court of Justice states that the Court, in making decisions in accordance with international law, shall apply international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law "recognized by civilized nations"; and, as subsidiary sources, judicial decisions and the teachings of "the most highly qualified publicists of the various nations." Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060 T.S. 993.

3. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 10 (1982) ("The [war crimes] tribunals pointed out that international law was not concerned solely with the actions of sovereign states, but 'impose[d] duties and liabilities upon individuals as well as upon states.'")

tions Charter[4] and the Universal Declaration of Human Rights[5] and in the many human rights conventions that have since come into force.[6]

In international law scholarship, human rights are often divided into three classifications or "generations." Civil and political rights are referred to as first generation rights; economic, social, and cultural rights as the second generation; and "group" rights, including the right of peoples to self-determination and the protection of minority groups within nations, as third generation rights.[7] Sometimes referred to as solidarity rights, third generation rights can also describe rights that are asserted on behalf of all people, such as a right to economic, social, and cultural development or to a healthy environment.

This essay proposes the incorporation of international human rights law, particularly that of third generation rights, into the discourse about the rights of those identified as minorities[8] in the United States. Third generation rights focus primarily on the rights of groups, not individuals.[9] In contrast, U.S. law tends

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4. Charter of United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945).

5. Universal Declaration of Human Rights, G.A. Res. 217 IIIA, U.N. GAOR, 3d Sess., U.N. Doc. A/810 at 71 (1948). Approved unanimously by the U.N. General Assembly in 1948, the Universal Declaration elaborates on the requirement of the U.N. Charter that all member states agree to promote and observe "human rights and fundamental freedoms." *Id.* According to Professor Sohn, "[t]he Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states." Sohn, *supra* note 3, at 17.

6. Sohn, *supra* note 3, at 10. ("The General Assembly of the United Nations later affirmed these Nuremberg principles.")

7. The generational terminology was first articulated by French scholar Karel Vasak. *See* KEVIN T. JOHNSON, CHARTING GLOBAL RESPONSIBILITIES: LEGAL PHILOSOPHY AND HUMAN RIGHTS 16 (1994).

8. The term "minorities" is used here to refer to groups identified as distinct because of their ethnic, religious, racial, cultural, linguistic, or other characteristics, that comprise a numerical minority and do not exercise dominant political power within a nation. Unfortunately, in the United States, the term "minority" seems to be increasingly used as a code word for "nonwhite." That is not the meaning I ascribe to it in this essay. The United Nations University has published a WORLD GUIDE OF ETHNIC MINORITIES AND INDIGENOUS PEOPLES (R. Stavenhagen ed., 1988), and the Minority Rights Group has published a series of reports on hundreds of minorities. *See* Gudmundur Alfredsson, *Minority Rights and a New World Order, in* BROADENING THE FRONTIERS OF HUMAN RIGHTS 56 (Donna Gomien ed., 1993). *See also* Roland Oliver, *The Minority Rights Group: What's in a Name?, in* MINORITIES: A QUESTION OF HUMAN RIGHTS? 1 (Ben Whitaker ed., 1984).

9. Third generation or "solidarity" rights are sometimes considered to encompass the rights of all peoples, such as the right to development, or the rights to a healthy environment. I use the term in a somewhat more restricted manner, focusing on the rights of

to define all rights as individual rights. Accepting this limitation on the definition of rights may prevent us from even considering significant solutions to social problems.

Admittedly, there are dangers in describing all human affairs—human needs, potential, passion, and suffering—in terms of quantifiable, enforceable, legally definable "rights."[10] All of culture and society cannot be collapsed into law. Identifying "rights" in response to all human needs may cause currently recognized civil and political rights to be taken less seriously, with the result that there is less overall protection for human rights.[11] However, it is important to consider ways in which the defining and recognition of rights affects culture and society.

Although not usually described in these terms, many of the movements to improve people's living and working conditions in the United States can be seen as efforts to obtain what are recognized by numerous international conventions, organizations, scholars, and activists as second and third generation human rights. Housing, welfare, public education, health care, affirmative action, and handicapped access legislation involve second generation human rights. Groups that assert such rights are often, in that process, exercising third generation "solidarity" rights. Recognizing this could allow those groups to benefit from a wealth of international law and the experiences of others who have struggled for similar rights. Such recognition could also

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identified groups within nation-states.

10. Richard Rorty identifies some of the dangers in this approach:

> The language of "rights" is the language of the documents that have sparked the most successful attempts to relieve human suffering in postwar America—the series of Supreme Court decisions that began with *Brown v. Board of Education* and continued through *Roe v. Wade* ... .
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> Yet the trouble with rights talk ... is that it makes political morality not a result of political discourse ... but rather an unconditional moral imperative ... . Instead of saying, for example, that the absence of various legal protections makes the lives of homosexuals unbearably difficult, that it creates unnecessary human suffering for our fellow Americans, we have come to say that these protections must be instituted in order to protect homosexuals' rights.

Richard Rorty, *What's Wrong with "Rights,"* HARPER'S MAG., June 1996, at 15. *See also* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111, 122 (Stephen Shute & Susan Hurley eds., 1993) (advocating an approach that "sets aside Kant's question "What is Man?" and substitutes the question "What sort of world can we prepare for our great-grandchildren?").

11. For a discussion of the risk that the recognition of new rights will undermine existing rights, see Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 607-08 (1984).

clarify connections between what are perceived to be domestic concerns and struggles for human rights in other parts of the world.

Finally, framing the discussion of domestic rights in the broader context of international law may allow us to see groups with apparently disparate interests as being engaged in the same or parallel struggles. Incorporating international human rights principles could provide common ground among minority groups within the United States, among poor and working peoples generally, and those who struggle for similar rights in the United States and in other countries.

II. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

A. Emergence of a Law of Human Rights to Supplement the Law of Nations

International law is generally regarded, at least in the "classical" western tradition, as governing relations between nations. It is the law agreed upon between nations and rests on a foundation of state sovereignty. Within this framework, the rights of individuals are to be protected by their own governments or, through comity or agreement, by the governments of other nations.[12]

Human rights law departs from this framework in two ways. It posits, first, that people have fundamental rights under international law, even as against their own governments; and second, that other nations and international organizations can intervene in what would otherwise be a nation's domestic affairs in order to protect those rights. Professor Louis B. Sohn has described this as a "silent revolution" which "deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subject of international law."[13]

Given impetus by the horrors of World War II, much that is currently recognized as human rights law has developed in the

12. *See generally* Sohn, *supra* note 3 (tracing the history of international law).
13. *Id.* at 1.

past fifty years. There is an emerging consensus about the existence of certain fundamental human rights and a large and growing body of international conventions on specific subjects.[14] Within the arena of international human rights, the United States asserts itself as a leader, but often defines both rights and remedies more narrowly than do other countries.

Concern for human rights was invoked as cause for United States intervention by President Bush in the 1990 Gulf War[15] and by President Clinton when sending U.S. troops to Haiti, Somalia, Bosnia, and Zaire.[16] When the United States takes action in other countries, governmental officials routinely give a number of reasons which often include allegations of human rights violations along with the protection of U.S. national security interests.[17] One result of this generalized use of human rights as a basis for United States intervention is that it is difficult to draw clear causal connections between the rights violation and the action taken to address it. Nonetheless, the justifications given for various interventions and the position of the United States with respect to various international human rights conventions[18] illustrate that the United States generally views civil and political rights as the only "real," or enforceable, human rights.

B. Individual Rights: Civil and Political; Economic, Social, and Cultural

First generation, or civil and political, rights are sometimes characterized as "negative" rights because they generally require governments to refrain from interfering with an individual's right to participate in civil society or the political process. As in-

14. *See, e.g.*, Convention on the Elimination of Racial Discrimination, *opened for signature* Mar. 7, 1966, 600 U.N.T.S. 195 (entered into force for the United States, Nov. 20, 1994); the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 14.

15. *See* Hoffman, *supra* note 1, at A1.

16. *See* Devroy & Graham, *supra* note 1, at A1; Dewar & Marcus, *supra* note 1, at A22; Devroy, *supra* note 1, at A29; Lippman, *supra* note 1, at A11.

17. In these situations it is often difficult to discern just what the U.S. government's position is with respect to which rights are being violated by whom, and what responses or interventions are acceptable under international law. Additional confusion arises because, under international law, it is sometimes acceptable for a state to intervene in the affairs of another state for humanitarian reasons (e.g. to provide relief to victims of a drought) even if there are no *explicit* violations of international human rights law.

18. See text accompanying notes 49-64.

ternational organizations attempted to articulate human rights in the period just after World War II, civil, political, social, economic, and cultural rights were initially proposed as a unified package, spelling out the promises in the 1948 Universal Declaration of Human Rights.[19] These rights were ultimately split into two groups, with the understanding that civil and political rights were to be implemented immediately. Perhaps because there was something close to consensus on civil and political rights,[20] they have been identified as the "first generation" of human rights.

The primary international agreement that specifically addresses first generation rights is the International Covenant on Civil and Political Rights (ICCPR).[21]

> The ICCPR recognizes the rights of every human being to life, liberty and security of person; to privacy; to freedom from torture and cruel, inhuman or degrading treatment or punishment; to immunity from arbitrary arrest; to freedom from slavery; to a fair trial; to recognition as a person before the law; to immunity from retroactive sentences; to freedom of thought, conscience and religion; to freedom of opinion and expression; to liberty of movement and peaceful assembly; and to freedom of association.[22]

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[23] addresses second generation rights by expanding on provisions of the Universal Declaration. It proclaims a right to work; to equal pay and protection against systemic unemployment; to formation of trade unions; to rest and

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19. The United Nations Charter identifies among the purposes of the organization the achieving of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion ... ." U.N. CHARTER, art. 1, para. 3.

20. Sohn, *supra* note 3, at 32.

21. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, Annex to G.A. Res. 2200, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976)[hereinafter ICCPR].

22. Anne Paxton Wagley, *Newly Ratified International Human Rights Treaties and the Fight Against Proposition 187*, 17 CHICANO-LATINO L. REV. 88, 90 (1995) (citing ICCPR, *supra* note 21, pt. II).

23. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, Annex to G.A. Res. 2200, 21st Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1966) (entered into force Jan. 3, 1976)[hereinafter ICESCR].

leisure; to food, clothing, housing, and medical care; to social security, education, and participation in the cultural life of the community; and to the protection of scientific, literary, and artistic production.[24] Second generation rights are also recognized in regional agreements such as the American Convention on Human Rights,[25] the American Declaration of the Rights and Duties of Man,[26] and the Banjul Charter.[27]

The United States has ratified the ICCPR, but not the ICESCR.[28] A common explanation of the current U.S. position of accepting first but not second generation rights as universal is that if a people can choose their own government, they will ensure that it adequately protects their rights. This theory was exemplified by the Reagan administration's emphasis on free elections and helps explain why talk of human rights is so frequently intertwined with talk of "democracy."[29]

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24. Many of these are rooted in President Roosevelt's 1941 proposal for an international instrument dealing with economic and social rights in his "Four Freedoms" speech. He identified these as freedom of speech and expression, freedom of religion, freedom from fear, and freedom from want. *Eighth Annual Message to Congress, Jan. 6, 1941, reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, at 2855 (1966), *cited in* Sohn, *supra* note 3, at 33 n.162.

25. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, 114 U.N.T.S. 123 (entered into force July 18, 1978).

26. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser.L./V/II.23, Doc. 21, Rev. (1979), *adopted by* the Ninth International Conference of American States, Bogota, Columbia, Mar. 30-May 2, 1948, arts. XI-XVI (covering the right to health, education, the cultural life of the community, work, leisure, and social security).

27. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), *available in* 21 I.L.M. 58 (1982). *See id.* arts. 15-18 (including rights to work, to health, to education and culture, and to protection of the family).

28. The ICCPR and the ICESCR were opened for signature in 1966 and signed by President Carter in 1977. The ICCPR was not, however, ratified by the U.S. Senate until 1992, and the ICESCR has yet to be ratified.

Philip Alston has argued that those within the United States who advocate ratification of the ICESCR and support the recognition of second generation human rights should explicitly identify the benefits of ratification and directly address the difficulties of implementation. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990). With the end of the Cold War, there may be new opportunities to engage in this direct approach. *See* Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79 (1992).

29. According to Harold Koh, "Treating human rights and democracy as a unit actually disguises two competing rationales for promoting human rights as part of U.S. foreign policy." Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crises*, 48 SMU L. REV. 189, 194 (1994). *See*

Advocates of second generation rights argue that, by themselves, freedom of speech or the right to vote matter little to people who are starving. Their view is that those who control wealth and power do not want to acknowledge the right to adequate food, shelter, medical care, or jobs because such acknowledgment could entail a redistribution of resources, either within a nation or between nations.

The 1968 Declaration of the Teheran International Conference on Human Rights stated that "[s]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights, is impossible."[30] President Julius Nyerere of Tanzania asked:

> What freedom has our subsistence farmer? ... [h]e scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited.[31]

C. *Group Rights: Solidarity and Self-Determination*

Both first and second generation rights are essentially individual rights, the right of *each* person to freedom of association or due process of law, to food or education, to be free from discrimination based on ethnicity, race, religion, national origin, or gender. Third generation human rights are, broadly speaking, the rights of groups. According to Professor Sohn:

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also Larry Minear, *The Forgotten Human Agenda*, 73 FOREIGN POL'Y 76 (1988-89) (criticizing the Reagan administration's focus on democracy over humanitarian concerns). The association between human rights and "democracy" is also illustrated by the 1983 creation of the National Endowment for Democracy (NED), a private corporation which obtained federal funding to "foster the infrastructure of democracy" in other countries. "The NED intersected with human rights efforts in its insistence that democratic institutions ultimately—and sometimes in the short run—were the most solid bulwarks of human rights." JAMES MACGREGOR BURNS & STEWART BURNS, A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA 433 (1991).

30. 23 U.N. GAOR Supp. (No. 41) at 1, U.N. Doc. A/Conf. 32/41, para. 13 (1968), *cited in* Sohn, *supra* note 3, at 18 n.63.

31. BURNS & BURNS, *supra* note 29, at 411.

> [I]nternational law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.[32]

Article 1, Section 1 of both the ICCPR and the ICESCR read as follows: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[33] The term "peoples" has not been defined in the international agreements or documents where it has been used.[34] It appears to denote groups that are neither individuals nor state entities; but, as James Crawford notes, the definition may have to depend on the context.[35] While there is some disagreement about what rights are specifically included in the third generation, there is agreement on the principle that "[a]ll peoples have the right to self-determination."[36] Self-determination is generally acknowledged to include the right of people to choose their own government as well as the right of a nation to be free from domination by another nation.[37]

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32. Sohn, *supra* note 3, at 48. *See also* Roland Rich, *The Right to Development: A Right of Peoples? in* THE RIGHTS OF PEOPLES 44 (James Crawford ed., 1988) (noting that not only is recognition of a group necessary to allow certain human rights to be protected, but that in certain instances, such as laws against genocide and apartheid, the rights are granted to the group itself).

33. ICCPR, *supra* note 21, art. 1, § 1; ICESCR, *supra* note 23, art. 1, § 1.

34. Alfredsson, *supra* note 8, at 71. *See also* Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples), in* THE RIGHTS OF PEOPLES 24-36 (James Crawford ed., 1988) (noting three different ways in which the term "rights of peoples" is used in international law).

35. James Crawford, *The Rights of Peoples: Some Conclusions, in* THE RIGHTS OF PEOPLES 169 (James Crawford ed., 1988).

36. ICCPR, *supra* note 21, art. 1, § 1; ICESCR, *supra* note 23 art. 1, § 1. Although the ICCPR identifies the right of self-determination of minorities, it sidesteps the question of group rights by granting rights to members of minority groups rather than to the groups themselves. ICCPR, *supra* note 21, art. 27. According to Vagts and Wilson, "there are at least two group rights so firmly established as principles of international law—the right of peoples to self-determination and the prohibition against genocide—that it is difficult to deny that groups can have rights in international law." Detlev Vagts & Heather A. Wilson, *The Rights of Peoples*, 83 AM. J. INT'L L. 670, 671 (1989) (book review).

37. Sohn, *supra* note 3, at 48.

The African Charter on Human and Peoples' Rights of 1981, commonly referred to as the Banjul Charter, recognizes in addition the right to development, the right to peace, and the right to a healthy environment.[38] There have also been proposals for a third international human rights covenant featuring "third generation solidarity rights."[39] This covenant would include such rights as the right to benefit from the common heritage of mankind, the right to live in a healthy and ecologically sound environment, and the right to humanitarian assistance, as well as the rights identified in the Universal Declaration and the Banjul Charter.

James Crawford divides the rights of "peoples" into two general categories:

> One immediately apparent category is the group of rights which in some respect deal with the existence and cultural or political continuation of groups. This category would include the right to self-determination, the rights of minorities, and the rights of groups to existence (i.e. as a minimum, not to be subjected to genocide). But ... the phrase "rights of peoples" tends to be used ... to refer to the other and more miscellaneous category of rights, concerned with a variety of issues relating to the economic development and the 'coexistence' of peoples. This second category includes rights in respect of permanent sovereignty over natural resources, rights to development, to the environment and to international peace and security.[40]

Although the United States participated in the drafting of both the ICCPR and the ICESCR, both of which recognize some rights of peoples, it has consistently refused to acknowledge third generation human rights. In 1984 the United States withdrew from the United Nations Economic, Scientific and Cultural Organization (UNESCO), "at least in part because of UNESCO's

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38. African Charter on Human and Peoples' Rights June, 26, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, arts. 19-24 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1982). The right to development—as a right distinct from that of an individual to live in a developed country—has been recognized by a United Nations working group as having both collective and individual dimensions. *See* Report of the Working Group to the Commission on Human Rights, U.N. Doc. E/CN.4/1489, at 5 (1982), *cited in* Sohn, *supra* note 3, at 54 n.273.

39. Alston, *supra* note 11, at 610.

40. Crawford, *supra* note 35, at 57.

support for 'peoples' rights' and the potential conflict between this 'third generation' of human rights and the protection of individual rights."[41] Representatives of the United States have articulated a fear that the recognition of group rights will serve to undermine the rights of individuals.[42] Some fear that this is happening in countries such as Algeria or Afghanistan, where assertions of power by religious groups appears to impose severe restrictions on the rights of individuals.

This view has been countered with the argument that group rights not only complement individual rights, but that oftentimes individual rights cannot be exercised until group rights are protected.[43] This is reflected reflected in Article 27 of the ICCPR, which states that members of ethnic, religious, or linguistic minorities "shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[44]

III. HUMAN RIGHTS LAW IN THE U.S. LEGAL SYSTEM

A. International Human Rights Law in U.S. Courts

According to the Restatement (Third) of the Foreign Relations Law of the United States:

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41. Vagts & Wilson, *supra* note 36, at 670.

42. This problem is illustrated by the situation in *United States v. Antelope*, 430 U.S. 641 (1977), in which federal criminal law, including the felony murder rule, was applied to Native American defendants for a murder on a reservation. Had a non-Native American committed the offense, state law would have applied and the defendants could not have been convicted of murder. Clearly in this situation laws made ostensibly to protect the group harmed the individual rights of members of the protected group.

43. *See* Gillian Triggs, *The Rights of "Peoples" and Individual Rights: Conflict or Harmony?*, *in* THE RIGHTS OF PEOPLES 143-45 (James Crawford ed., 1988).

44. ICCPR, *supra* note 21, art. 27. Thus, for example, the Soviet Union established semi-autonomous regions, recognizing that the stability of the union depended in large part on the belief of its many minorities that their individual rights could not be assured unless their group rights were protected. As the Soviet Union broke up, the same fear was expressed by ethnic Russians living in areas controlled by other groups. *See generally* Henry Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539 (1991).

> International law is law like other law, promoting order, guiding, restraining, regulating behavior. States, the principal addressees of international law, treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation ... . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts.[45]

The U.S. Constitution provides that, along with the Constitution and the laws made pursuant to it, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[46] As the Supreme Court stated in *The Paquete Habana*, "[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[47]

The United States played a leading role in the formation of both the League of Nations, where President Woodrow Wilson advocated strongly for the right of peoples to self-determination, and the United Nations. Serving as the U.S. representative to the United Nations Economic and Social Council and as a member of its Commission on Human Rights, Eleanor Roosevelt worked tirelessly on the drafting and implementation of the Universal Declaration of Human Rights.[48] However, shortly after the 1952 presidential election, the Eisenhower administration "announced that it was washing its hands of the United Nations human rights covenants"[49] and, in the words of David Forsythe, "U.S. human rights policy was collapsed into its anti-Communist policy."[50]

Concern has been expressed that international human rights standards might be imposed on the United States by other nations. In 1951, Senator Bricker, a Republican from Ohio, introduced a constitutional amendment that would have restricted

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45. *See* RESTATEMENT, *supra* note 2, pt. I, ch. 1.

46. U.S. CONST., art. VI, cl. 2.

47. The Paquete Habana, 175 U.S. 677, 700 (1900). *But see* Stanford v. Kentucky, 492 U.S. 361 (1989) (rejecting international norms and upholding the constitutionality of capital punishment for juveniles).

48. BURNS & BURNS, *supra* note 29, at 421-24.

49. *Id.* at 424.

50. *Id.*

the president's treaty-making powers, arguing that ratification of human rights treaties would give other nations undue influence over U.S. domestic policy and could force the end of laws mandating racial segregation.[51] The Eisenhower administration avoided a struggle over the proposed constitutional amendment by promising that no human rights conventions would be submitted for ratification by the Senate.

This moratorium prevailed through the Nixon and Ford administrations. No human rights conventions were, in fact, submitted until the Carter administration, and those which were then submitted contained reservations so significant that some believe they render the conventions meaningless.[52] A common argument is that those rights addressed in the conventions are already protected by U.S. law anyway, thus justifying the reservations that explicitly limit the effect of human rights treaties to current domestic interpretation of protections under the Constitution. For example, ratification of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[53] was conditioned on the Helms Proviso, which states that the United States need not alter its domestic laws in any way to conform to the treaty.[54]

When he came into office President Jimmy Carter announced that the United States "commitment to human rights must be absolute,"[55] and he identified food, shelter, health care, and education as basic human rights.[56] Carter signed both the ICCPR and the ICESCR in 1977, as well as the American Con-

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51. Dorothy Q. Thomas, *Advancing Human Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 19-20 (1996). *See also* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988). This, of course, is a good example of how U.S. law could be influenced in a positive way by international human rights law.

52. *See* Thomas, *supra* note 51, at 20; William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277 (1995).

53. 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).

54. 140 CONG. REC. S7634 (daily ed. June 24, 1994) (statement of Sen. Pell), *cited in* Thomas, *supra* note 51, at 20 n.23. *See also* FRANK NEWMAN & DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 190-91 (1996).

55. BURNS & BURNS, *supra* note 29, at 427 (citing Carter's inaugural address, January 1977).

56. *Id.* at 434 (citing 1977 speech of Secretary of State Cyrus Vance).

vention on Human Rights (ACHR)[57] and the CERD. However, the early promises were outweighed by the political realities. The ICCPR was not ratified by the U.S. Senate until 1992 and the CERD was only ratified in 1994. The ICESCR and ACHR have yet to be ratified.[58]

The Reagan administration came into office attacking the human rights policies of the Carter administration. In the words of James Leach, it argued that "U.S. human rights policy ought to moderate its concern about the behavior of 'traditional' (and friendly) authoritarian regimes and concentrate instead on the abuses of 'revolutionary' (that is to say, Marxist) governments."[59]

Until the Clinton administration, the only major international human rights convention that the United States ratified was the Convention on the Prevention and Punishment of the Crime of Genocide,[60] which was opened for signature in 1948 and entered into force for the United States in 1989. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[61] and the CERD, which was opened for signature in 1966, entered into force for the United States in 1994. The United States has signed but not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women.[62]

Even though the United States has not ratified many of the human rights conventions, and has extensive reservations with respect to those it has ratified, much of the core of international human rights law is applicable to the United States as part of

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57. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, OEA/Ser. L./V/II.23 Doc. Rev. 2, (entered into force July 18, 1978).

58. *See* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS (Hurst Hannum & Dana D. Fischer eds., 1993); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 37-39 (2d ed. 1996).

59. James Leach, *The 97th Congress and Human Rights Law: View Three, in* HUMAN RIGHTS LAW AND THE REAGAN ADMINISTRATION, 1981-1983 (Andrew J. Samet ed., 1984).

60. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

61. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex 39, U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

62. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), *reprinted in* 19 I.L.M. 33.

customary international law.[63] It should be noted that according to the Vienna Convention on Treaties[64]—another convention which the United States has signed but not ratified, but which the State Department has explicitly recognized as articulating customary international law on the subject—a state which has signed a treaty has an obligation to refrain from conduct which undermines the purpose or object of that treaty unless the state has made explicit its intent not to ratify the treaty.

As second and third generation human rights come to be accepted as emerging customary international law, it is interesting to consider the implications of recognizing these human rights within our domestic legal system. The struggles of many groups, including those groups identified as racial or ethnic minorities, can be seen as efforts to obtain second and third generation rights.[65] The following section addresses the possibility of re-envisioning U.S. history and current social conditions in terms of third generation or group rights, and considers some benefits of such an approach.

B. Group Rights in the United States: An Historical Perspective

The history of U.S. law is, in many respects, a history of the struggles of groups to assert or protect their rights, identities, or cultures. In March 1995, as part of the review of its first report

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63. Professor Sohn says of the U.N. Charter, the Universal Declaration of Human Rights, the ICCPR, and the ICESCR:

> Although the existence of the norms embodied in these documents cannot be denied, controversy has been raging for almost forty years about their binding character and practical effect ... . The better view is that these documents have become a part of international customary law and, as such, are binding on all states.

Sohn, *supra* note 3, at 12. *See* Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989).

64. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

65. The position that strong protection of civil and political rights will ensure that basic socio-economic needs are met is undermined by reports of widespread hunger, homelessness, and poor health in the United States. A 1990 report of the Children's Defense Fund noted that "a black child born in inner-city Boston had less chance of living to its first birthday than a child born in Peru, Uruguay, or North Korea"; that every year 10,000 American children died because of poverty; that 100,000 were homeless; that nearly 750,000 were abused or neglected. BURNS & BURNS, *supra* note 29, at 447.

under the ICCPR, the United States came before the Human Rights Committee of the United Nations Economic and Social Council. John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor, stated that "[t]he United States had a history of racism, slavery and racial segregation [that] had among other factors posed obstacles to the full and optimal enjoyment of all Americans of the rights reflected in the Covenant."[66] Assistant Attorney General for Civil Rights Deval Patrick "admitted that discrimination on the basis of race, ethnicity and gender persisted in the United States—not just the effects of past discrimination, but 'current, real life, pernicious discrimination of the here and now.'"[67]

Since the first resistance of Native Americans to colonial rule, the first slave revolts, and the first efforts by Mexicans to prevent annexation of their lands, peoples who are now identified as "racial minorities" in this country have organized and fought for group rights. Some of these have been defined as the struggles of peoples for self-determination, most notably, of course, the efforts of Native Americans to retain some sovereignty over their lands and their people.[68]

Other explicit assertions of what could be termed third generation human rights can be seen in what are often labeled "nationalist" movements. For example, "[t]o advocate self-determination" was one of the eight key points of the Universal Negro Improvement Association founded by Marcus Garvey in the early 1900s.[69]

Malcolm X advocated the need to move from individual rights to group rights, and the need to see the struggle for these rights in an international context. In 1965, just weeks before his death, he said:

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66. Wagley, *supra* note 22, at 102 (citing UNITED NATIONS PRESS RELEASES, UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, HUMAN RIGHTS COMMITTEE, Human Rights Committee Continues Examination of United States Report, HR/CT/404, Mar. 31, 1995; Human Rights Committee Concludes Consideration of Initial Report of United States: Committee Experts Raise Questions On Use of Death Penalty, Rights of Aliens, Among Others, HR/CT/404, Mar. 31, 1995).

67. *Id.* at 102.

68. *See generally* Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

69. AMY JACQUES GARVEY, GARVEY AND GARVEYISM 32 (1970).

> [Our] problem has to be internationalized ... . [W]hen 22 million black Americans see that our problem is the same as the problem of the people who are being oppressed in South Vietnam, and the Congo and Latin America, then the oppressed people of the earth make up the majority that can demand and not as a minority that has to beg.[70]

In recent decades, these struggles have taken many forms, from community and church-based grassroots organizations; to groups such as the National Association for the Advancement of Colored People (NAACP), the Urban League, the League of United Latin American Citizens, or the Japanese-American Citizens League, which tended to support assimilation; to organizations such as the Black Panthers, Brown Berets, and Young Lords which more explicitly advocated the empowerment of groups based on their ethnic or racial affiliations. Regardless of their particular ideological bent, these movements themselves can be seen as assertions of third generation human rights, even as they have organized to demand first and second generation rights. The transition from an unarticulated to a conscious assertion of third generation rights could significantly effect how such movements are organized and perceived.

What we think of as the traditional civil rights movement was precisely that, a struggle for civil and political rights. It was a struggle for the right to vote, for equal access to social and political institutions, and for the right to participate, as individuals, on equal footing with all other individuals in civil society. Martin Luther King, Jr. was in the process of moving from demands for first generation rights to second generation rights when he was killed. As early as 1963 he had stated, "[t]he Negro is not struggling for some abstract, vague rights, but for concrete and prompt improvement in his way of life. What will it profit him to be able to send his children to an integrated school if the family income is insufficient to buy them school clothes?"[71]

By the 1967 convention of the Southern Christian Leadership Conference, King "was searching for an alternative to urban rioting along the lines of organized mass civil disobedience, while

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70. MALCOLM X: THE MAN AND HIS TIMES 257-58 (John Henrik Clarke ed., 1969), *quoted in* Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 18 (1996).

71. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 148 (1963).

fusing demands for economic justice and an end to the Vietnam War with his civil rights agenda."[72] This led to plans for the Poor People's Campaign, with its call for a $30 billion annual appropriation for antipoverty efforts, a full-employment act, guaranteed annual income, and annual funding for at least 500,000 units of low-cost housing.[73] Other movements such as the United Farm Workers' struggle for economic justice, and the pursuit of universal health care and welfare rights were and continue to be struggles for second generation rights.

Minority rights in the United States—first or second generation—are most often framed as the right to participate as *individuals* in the mainstream political, economic, and social institutions *despite* being members of certain groups. Less frequently have there been assertions of the collective rights of minority groups, at least racial or ethnic minorities, to some form of self-determination.[74]

C. *The Potential in Recognizing Third Generation Rights*

As noted above, second generation rights are not generally acknowledged as human rights in the United States. For example, in the introduction to the 1982 Country Reports on Human Rights Practices, the Reagan administration declared that the U.S. government does not accept the idea of economic, social, and cultural rights.[75] Rather, individuals are to be given "equal access" to obtaining economic, social, or cultural resources, but they are not guaranteed to anyone.[76] Even the basics of food,

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72. Michael Ratner & Eleanor Stein, *W. Haywood Burns: To Be of Use*, 106 YALE L.J. 753, 767 (1996) (citation omitted).

73. *Id.* According to Clayborne Carson:

> The "Black Power" rhetoric of the period after Malcolm's death owed much to his influence, but the new African-American racial consciousness also resulted from internal changes in the civil rights protest movement—particularly the increasing involvement of poor and working-class blacks and the growing emphasis on economic and political empowerment.

CLAYBORNE CARSON, MALCOLM X: THE FBI FILE 32 (1991).

74. It is possible that such assertions are less likely due to the individual focus of civil and political rights under the U.S. Constitution. Or, perhaps, such movements have encountered much stronger resistance and have not survived.

75. Christopher J. Dodd, *The 97th Congress and Human Rights Law: View One*, *in* HUMAN RIGHTS LAW AND THE REAGAN ADMINISTRATION, 1981-1983, at 57, 60 (Andrew J. Samet ed., 1984).

76. Senator Dodd characterized the Reagan administration's position on economic

housing, and medical care are no longer guaranteed to children. Increasingly, these resources are to be allocated not to all who live in the United States, but exclusively to U.S. citizens. In other words, second generation rights are envisioned as political rights, rather than human rights.

The struggles to obtain both first and second generation rights in the United States have required organization by the groups affected, and this has required a sense of identification with those groups. The ensuing backlash has attacked both the formation of these organized movements and the substance of their demands. To make the first generation rights that they secured at such great cost meaningful and to turn the tide that is eroding existing second generation rights, minority groups may need to assert third generation rights within American society. A founding principle of the United States is the protection of individual rights and liberties from the tyranny of the group. Perhaps as a result, the presumption that all rights are individual rights, and that all remedies are individual remedies, is deeply entrenched in mainstream American thought. International human rights law and the analyses that are being developed on the rights of peoples within nations could be useful to groups within the United States who wish to expand this framework.[77]

The idea of using international human rights standards to bring about change within this country is not a new one. U.S. civil rights organizations were among the first

> national groups in the world to petition the United Nations for relief from abusive conduct by a member state. In 1947, the National Association for the Advancement of Colored People (NAACP) filed a petition before the United Nations denouncing race discrimination in the United States. The Civil Rights Congress filed a second petition in 1951, charging the United States with genocide under the 1948 Convention on the Prevention and Punishment of Crimes of Genocide.[78]

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and social rights as one in which, rather than rights, these are "*objectives* to be implemented *gradually* in accordance with the available resources of a given country." *Id.* at 64 (emphasis added).

77. *See* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990) (proposing that international human rights standards be incorporated as binding domestic law).

78. Thomas, *supra* note 51, at 17 (citing Mary L. Dudziak, *Desegregation as a Cold*

More recently, indigenous peoples in the United States have been incorporating international human rights law into their struggles.

> For America's indigenous peoples, rights are no longer framed entirely by the provisions of the Constitution and legislative enactments. Indigenous peoples' demands are increasingly asserted within dual frameworks. One framework is narrow. It consists of rights claims recognized by the American legal system (e.g., due process violations or breaches of trust), even though the rights, as framed, may not accurately embody the cultural, spiritual, and political experience of the group involved. A second framework is expansive. It consists of claims of transnational moral authority cast in the language of international human rights (e.g., right to self-determination).[79]

As domestic remedies become increasingly constricted,[80] international law may offer additional relief, and conversely, it is possible that domestic remedies will be expanded by the incorporation of international human rights law. Successfully asserting the emerging international law of third generation human rights as part of the legal recourse available in the United States could establish common ground among various groups in the United States and help clarify some of the connections between domestic issues and international struggles.

In the face of persistent racial divisions[81] and the widening gap between the rich and the poor,[82] in an era when it is becoming more difficult to ensure food, shelter, and basic medical care for all, it may be helpful to reconsider the framework of rights in the United States. The view that the government is only responsible for ensuring the civil and political rights of its citizens,

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War Imperative, 41 STAN. L. REV. 61, 94-98 (1988)).

79. Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 3-4 (1994).

80. *See* Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1468-71 (1996).

81. *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1995)

82. The years of the Reagan and Bush Administration saw the incomes of the richest five percent of the population grow nearly sixty percent while the incomes of the bottom sixty percent of the population decreased roughly fifteen percent. During this period, the poverty rate grew to more than thirteen percent of the population, yet the richest one percent experienced an increase in their incomes of more than one hundred percent. *See* JOHNSON, *supra* note 7, at 19-20 (citing THOMAS WHITE, BUSINESS ETHICS: A PHILOSOPHICAL READER (1993)).

and that these rights can only be exercised by individuals, is one choice—but there are others.

Lawyers and legal scholars can contribute to efforts to expand the scope of human rights in the United States, not only by pursuing such rights and recourse as are identified by the domestic legal system,[83] but by broadening the parameters of that system itself. Dorothy Thomas states that, "[l]ong isolated from, and at times dismissive of the rights movement abroad, U.S. groups could benefit from the insights and solidarity of their international colleagues. The experiences of activists elsewhere can contribute to the conceptualization and implementation of domestic advocacy strategies."[84]

Commenting on the struggles over ratification of the ICESCR, Philip Alston notes that "the U.S. debate needs to be much more internally focused ... . [R]atification should not be seen primarily as a foreign policy issue but, rather, as one of domestic policy."[85] Similarly, perhaps debates about third generation human rights should be taken seriously as issues of domestic policy.

D. Expanding the Discourse

This essay contends that an understanding of the international human rights framework could help secure basic rights for racial and ethnic minorities, poor people, and other groups within the United States and that it would be ill-advised to see these struggles as isolated from those of people in all parts of the world to obtain first, second, or third generation rights. The economic resources available in the United States depend on global economic, political, and military relationships, and U.S. government policy toward internal minorities has often been influenced by international affairs. As the Justice Department noted in its amicus brief in *Brown v. Board of Education*, "[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the

83. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1993) (describing domestic remedies for violations at international law).

84. Thomas, *supra* note 51, at 22. *See also* Wagley, *supra* note 22.

85. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 393 (1990), *quoted in* Thomas, *supra* note 51, at 21.

most civilized and most secure form of government yet devised by man."[86]

Groups struggling for rights and resources within the United States have a choice of how to view their efforts. One option is to see the interests of peoples in the United States as being aligned with those of peoples around the world. Such a position could lead to support of stronger first, second, and third generation human rights in all contexts. Another option is to see people in the United States, even those who are poor or discriminated against in some way, as benefiting, if only marginally, from the relatively higher standard of living available in the United States. This view leads to efforts to preserve that benefit, even if it is obtained through the enforcement of an inequitable distribution of global resources.

These are choices that need to be discussed further. Opening up the subject of group rights, and the related questions of redistributing resources, is always controversial. It triggers fears of "Balkanization," fears that acknowledging group rights, or perhaps even talking about them, will be divisive. To discuss these issues, difficult questions must be addressed. What is a "group," and which groups should be recognized as having rights? Would recognition of religious groups violate the separation of church and state? Would recognition of racially identified groups lead to entrenchment of what are increasingly recognized as invalid classifications? Should white survivalists or others who deny the legitimacy of the federal government have group rights protected by that government?

These issues do not go away simply because they are not discussed. Although protection of individual rights is firmly grounded in the U.S. political structure, the rights and opportunities available to individuals have been closely related to their group affiliations. Much of our history is the history of groups—the treatment of and response by native peoples, racial and ethnic minorities, organized labor, and religious groups, to name a few. Generally speaking, the political and legal response to discrimination based on group affiliation has been to guarantee rights to individuals, regardless of their group affiliation.

86. Thomas, *supra* note 51, at 18 n.11 (citing Brown v. Board of Educ., 347 U.S. 483 (1954), Brief for the United States as Amicus Curiae at 6).

There are problems, however, with trying to resolve all social issues individualistically. One difficulty is that the sum of individual interests may not be equal to the whole of the group interest. A classic example of this is the "problem of the commons." Without collective decisionmaking and control over a common resource, the individual incentive may be to use as much as possible, thereby depleting the resource in a way that is in no one's long term interest.

Atomizing the group can leave everyone worse off in other ways. In the 1880s, the U.S. government attempted to divide up Native American lands that were being held in trust and to allot them to individual Native Americans, who were then promised U.S. citizenship.[87] In essence, this was a attempt to turn the group rights of Native Americans into individual rights—an experiment which resulted in the loss of land, natural resources, communities, and access to culture and history. Similar issues were raised in the debates sparked by the Black Manifesto and other calls for reparations for African-Americans in the 1960s and 1970s.[88] The likelihood that individualized reparations would do little, if anything, to address institutionalized racism raises again the need to assess group rights.[89]

There is a fear, expressed most often with respect to racial tensions, that the divisions within the United States will tear the society apart. Some believe that these divisions are best addressed by dismantling, or at least ignoring, the groups themselves.[90] However, as long as people see themselves as having common interests, or as having their rights denied because of their group affiliations, they will struggle together to assert those interests or rights. The government can respond by repressing those movements, or by recognizing them and providing some assurance that the rights of groups will be protected.

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87. *See generally* Allotment Act, ch. 119, Stat. 388 (1987) (codified as amended at 25 U.S.C. §§ 331-358 (1988)); Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963 (1996).

88. *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 71-86 (1973).

89. Another problem with individualized rights and remedies is that, in a majoritarian political system the rights of minorities, can be systematically suppressed by the majority. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

90. *See generally* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1992); J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993 (1995).

While some assert that the problems of "Balkanization" come from the recognition of group rights, it may be that they arise when the rights of those groups, and the individuals who compose them, are endangered.

Other nations have addressed these issues in many different ways. There is much to be learned from the treatment of native peoples and French-Canadians in Canada, from the Soviet Union's establishment of semi-autonomous regions, and from the experiences of postcolonial African nations in balancing national interests with ethnic, religious, or linguistic affinities.[91] Understanding how third generation rights have come to be asserted in these contexts can enrich perspectives and discussions about rights within the United States. As Dorothy Thomas states, "stronger links to the international community may encourage greater national solidarity. By placing domestic struggles in an international context, U.S. rights activists may have an opportunity to ease the racial and class tensions that can often frustrate cooperation at local and national levels."[92]

IV. CONCLUSION

Despite the tremendous influence that the United States has on the rest of the world, and despite the fact that images from around the globe are constantly available on television and in other media, most of the thinking in the United States remains sharply divided into "American" and "foreign." A common perception is that while other countries may have human rights problems, the United States has civil rights concerns; concerns which can generally be resolved by better enforcement of existing domestic law.

Even those who struggle for second and third generation human rights in the United States—for universal health care, a cleaner environment, or the recognition of the rights of indigenous peoples—often see their efforts as being in a different realm from the issues "ethnic cleansing" in the former Yugoslavia or political prisoners in the Sudan or child labor in Pakistan. The idea that international human rights law not only applies to the United States, but that it can extend the protections and options

91. Thomas, *supra* note 51, at 22.
92. *See generally* Steiner, *supra* note 44, at 22.

currently available is rarely discussed.

This essay has sketched the outlines of international human rights law and identified aspects of "second" and "third" generation human rights law relevant to efforts to improve life for all people in the United States. The U.S. government has been reluctant to acknowledge that international law could provide protections beyond those available under U.S. law, and hesitant to recognize anything beyond civil rights. Nonetheless, in the terms of international human rights law, many battles have been fought for economic, social, and cultural rights (i.e. second generation rights) and in that process, many groups have exercised (and sometimes articulated) third generation human rights.[93]

Some see recognition of group rights as creating divisions. However, it may be that social divisions are best addressed by protecting group rights, and that some individual rights cannot be effectively exercised without such protection. These possibilities should be discussed. It is time to look beyond civil rights. We need to expand the discourse to include explicit debates about social, economic, and cultural rights and the rights of groups in U.S. law, debates which are foreclosed by accepting the notion that human rights are limited to civil and political rights.

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93. Mark Tushnet points out that:

> [D]istinctions among rights have always been unstable in fact, though participants in any particular legal culture tend to believe that their culture's definitions of the categories are embedded in the nature of society. Today the differences are taken to be that social rights are more contingent than civil rights and that only civil rights are appropriate subjects for judicial enforcement. I argue ... that these differences are no less contingent than the ones Reconstruction legal culture found to be natural.

Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1210-11 (1992).