1998


Catherine Powell

Fordham University School of Law, cpowell@law.fordham.edu

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SYMPOSIUM IN CELEBRATION OF 
THE FIFTIETH ANNIVERSARY OF 
THE UNIVERSAL DECLARATION 
OF HUMAN RIGHTS

INTRODUCTION: 
LOCATING CULTURE, IDENTITY, AND 
HUMAN RIGHTS

by Catherine Powell*

As we celebrate the Fiftieth Anniversary of the Universal Declaration of Human Rights, the idea of human rights endures. The human rights idea was honored at a conference organized by the Association of the Bar of the City of New York, held at Fordham Law School on December 10–12, 1999, to commemorate the first fifty years of the Universal Declaration of Human Rights. The four pieces that follow were presented at the conference as part of a panel addressing one of the central philosophical concerns regarding the human rights project: its universality. While the panel’s title, “What is a Human Right? Universals and the Challenge of Cultural Relativism,” provided the framework for discussion, all four papers discard cultural relativism as a serious challenge, and instead attempt to locate ways in which the human rights system either accommodates or fails to respond to cultural difference.

In providing an overview to the four papers contained herein, this Introduction investigates notions of culture and relativism by mapping the geography of human rights. In contending that individuals everywhere, regardless of location, are simultaneously bearers of rights and engaged with

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* Associate Clinical Professor of Law, Columbia Law School; Executive Director, Human Rights Institute; B.A., Yale University (1987); M.P.A., Princeton University, Woodrow Wilson School in International and Public Affairs (1991); J.D., Yale Law School (1992). I would like to thank the following people for their generous advice, support, and encouragement: Jose Alvarez, Louis Henkin, Mark Quarterman, and Leti Volpp. I would also like to acknowledge Laura LaVelle for her invaluable research assistance, as well as Amie Riggle and Ted Smoot of the Columbia Human Rights Law Review.
culture, this overview locates culture and identity within the human rights paradigm, rather than in opposition to it. By positing that we are all holders of rights and agents of culture, this overview also challenges the twin assumptions that (1) nation-states which are geographically located in the West are culturally neutral, and (2) Western states are therefore not susceptible to relativist behavior.

I. THE BIRTH OF AN IDEA

Conceived of during World War II and in its aftermath, the contemporary human rights idea insists that all humans everywhere are inherently entitled to basic rights simply by virtue of our humanity. Human rights assert that every human being is entitled to have basic autonomy and freedom respected and basic needs satisfied. A parsing of the human rights idea reveals its organizing principle: the geography of rights corresponds to human beings, not territorial location, status, or culture.

Human rights are conceived of as "human" because they are implied in our humanity; human rights are inalienable. These rights cannot be transferred, waived, forfeited, usurped, or lost through failure to exercise or assert them. Humans are entitled to these rights equally and in equal measure, regardless of location. Human rights are also conceptualized as "rights," not mere aspirations or charity. The idea of rights asserts an entitlement on the part of the rights bearer under an applicable norm, and an obligation on the part of society to incorporate that entitlement into its system of values and laws.

According to this idea, individuals have claims ("rights") upon society and society has corresponding duties to provide domestic laws and institutions to effectuate these rights. The duties which nation-states owe are

4. Henkin, supra note 2, at 1.
both negative and affirmative, as they must respect, protect, and ensure rights. While respecting rights can be achieved through government restraint from violating rights, protecting and ensuring rights requires more: states must affirmatively provide mechanisms to prevent and punish rights violators, as well as to effectuate rights.\(^5\)

While these dimensions of the human rights idea are now widely understood and agreed upon, in this Introduction I examine three commonly held assumptions that undermine the force of the rights idea. The first assumption is that the idea of human rights is an exclusively Western concept. The second and related assumption is that "cultural" objections to human rights are an exclusively non-Western phenomenon. Finally, I challenge the apparent assumption that the only relativism which threatens universality is cultural relativism, in contrast to other relativisms that are reflected in the selective enforcement and invocation of human rights in and by Western and non-Western states alike.

Taken collectively, these assumptions construct Western states as good actors and non-Western states as bad actors vis-à-vis human rights compliance, even while this construction does not necessarily square with the reality on the ground.\(^6\) This state of affairs increases resentment in non-Western states toward Western states, undercutting universal acceptance of the rights idea as it is more difficult for non-Western states to be co-owners of and co-equals in the human rights project. For decades, scholars have discredited the construction of non-Western countries as the culturally primitive "other," which allowed the West to define a contrasting identity as rational and civilized—a device used in the service of colonialism and

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5. While the distinction between civil and political rights on the one hand and economic, social, and cultural rights on the other is often understood as a rearticulation of the negative/affirmative rights dichotomy, several theorists have critiqued this dichotomy. See e.g., Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy 35-40 (1980). After all, effectuating welfare rights (typically considered an affirmative or economic right) requires no greater affirmative government outlays than the right to liberty (typically considered a negative or civil right), which requires supporting the cost of a police force, judicial system, and the right to counsel for indigent defendants.

6. The very terms "Western" and "non-Western" in human rights theory reflect and reinscribe the default assumption that the West is culturally neutral, while the non-Western (the not Western) is a residual category and powerful signifier that captures the "other" (the not culturally neutral). I use the terms "Western" and "non-Western" in this Introduction both to examine and deconstruct the set of assumptions that underlies this dichotomy.
imperialism. Today's selective invocation of "culture" and relativism to describe human rights noncompliance by non-Western countries, while noncompliance by Western countries is rationalized, recreates a West/Rest dichotomy that is preoccupied by an assumed default Western conception of human rights. Ironically, non-Western governments play along with these assumptions, shielding their noncompliance behind charges that human rights is a form of cultural imperialism and enabling Western governments to mask their noncompliance as rational.

In fact, early ideas about human rights did not originate exclusively in the West nor were they exclusively identified with any particular form of government, such as liberal democracy. While the modern idea of human rights draws inspiration from John Locke and from revolutionary moments in the American and French experience, these eighteenth-century ideas about individual autonomy were eventually combined with nineteenth- and

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7. See Edward W. Said, Orientalism 3 (1978) (explaining how the creation of "the Orient" in European and American literature, discourse, and imagination has supported Western global conquest and domination); Gayatri C. Spivak, In Other Worlds: Essays in Cultural Politics (1988) (exploring how changes in power alignments are signaled by changes in sign-systems); Leti Volpp, Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism, 96 Colum. L. Rev. 1573, 1602 n.140 (1996) ("Imperialism has been justified by ideology which posits a fundamental distinction between the West and the rest of the world, created through perceived geographical and cultural barriers, as well as by methods used to codify difference among peoples, which chart progress 'from primitive to subject races,' and finally to 'superior or civilized peoples,'" (referring to Edward W. Said, Culture and Imperialism 108-9 (1993))).

8. While noncompliance by Western states is seen as rational rather than cultural, adherence to human rights is assumed to be inherent in Western "culture," thereby creating the West as a culturally neutral baseline from which any deviation is relativistic. This assumption is misguided. See Amartya Sen, Human Rights and Asian Values, The New Republic, July 14 & 21, 1997, at 34 (contesting the "tendency in America and Europe to assume, if only implicitly, the primacy of political freedom and democracy as a fundamental and ancient feature of Western culture").

9. Paul Gordon Lauren, The Evolution of Human Rights: Visions Seen 9-11 (1998) (discussing philosophical traditions in diverse cultures that are consistent with the human rights idea, ranging from Chinese Confucianist-inspired philosophy to Buddhist, Islamic, Hindu, and traditional African societies); see also Sen, supra note 8, at 33 ("Our ideas of political and personal rights have taken their particular form relatively recently, and it is hard to see them as ‘traditional’ commitments of Western cultures. . . . [A]ntecedents can be found plentifully in Asian cultures as well as Western cultures." Id. at 40.).

10. For example, the Universal Declaration borrows language and concepts from the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen. See Henkin, supra note 3, at 1.
twentieth-century ideas about socialism, the welfare state, decolonization, and the proliferation of modern constitutions and bills of rights. This broad conception of the human rights idea found full expression in the Universal Declaration of Human Rights. Adopted in 1948, the Universal Declaration has been accepted by virtually all of today's states.

While Western and non-Western governments alike have embraced the Universal Declaration, both have also failed to respect, implement, and enforce the full range of human rights guaranteed in the International Bill of Rights. As such, although we live in an "Age of Rights" and in an era of spreading democratization and constitutionalism, international scrutiny continues to be necessary where states have failed to guarantee rights. This failure is enabled through selective enforcement, treaty reservations, and the existence of two separate covenants that divide civil and political rights from economic, social, and cultural rights. While the failure of non-Western states to respect human rights is often characterized as being grounded in "cultural" and relativistic objections, by contrast, similar failures of Western states to respect human rights are often described as being based on constitutional, religious, or free market objections. The four articles contained herein do not take on this dilemma directly, perhaps because the


12. As coined by Prof. Louis Henkin in his pioneering book The Age of Rights, supra note 3 (stating that human rights is the idea of our time).

13. This dichotomy is apparent in the ways in which governments themselves assert treaty reservations, in scholarship on human rights and culture, and in much of the popular discourse about rights and culture. See Ann Elizabeth Mayer, Where Does the U.S. Stand on Women's Human Rights? Reflections in a Jaundiced Eye (comparing reservations, understandings, and declarations made by the United States and Islamic countries) (on file with author). For an excellent discussion of how non-Western cultures are often described as barriers to human rights, while Western societies are seen as neutral and therefore lacking cultural barriers to human rights, see Leti Volpp, Multiculturalism v. Feminism, paper presented at Yale Law School, James Thomas Lecture (on file with author) (discussing, for example, how dowry murders in India are "used as a signifier of cultural backwardness," while domestic violence murders in the United States are not; although both phenomena reflect forms of violence against women—"they burn their women there [in India] we shoot our women here [in the United States]"—only Third-World women are described as suffering "death by culture.").
selectivity of human rights enforcement in and by Western countries is frequently masked as rational and therefore does not appear to disrupt the principle of universality. This dilemma is a core concern that this Introduction seeks to address.

II. HUMAN RIGHTS: A UNIVERSAL AND INTERNATIONAL IDEA

The contemporary human rights idea has become both universal and international, as an empirical matter. The idea of human rights is universal, insofar as it is accepted by practically all states, despite political, economic, and cultural variation. In piercing national sovereignty, human rights scrutiny has transformed governments’ treatment of individuals into an appropriate subject of international inquiry. The collapse of the Cold War creates conditions for these trends to continue. However, some governments—both Western and non-Western—use various strategies to try to limit their human rights accountability: raising claims of “sovereignty” to frustrate external monitoring; hiding behind various banners of “relativism” to undermine the idea of universality; and invoking the “free market” as a way to subordinate human rights and democracy to desired economic growth or economic development achieved through political repression.

Take, for example, the U.S. response during the April 1999 session of the U.N. Commission on Human Rights to Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence Against Women, who issued a report documenting sexual abuse of women prisoners by prison guards in the United States and the lack of effective remedies to address this abuse. U.S. officials responded by saying that this is a domestic issue that was more appropriately directed to the Justice Department, rather than to an international forum where the United States had more “important” work to

14. "The universalization of human rights is a political fact.... [E]ven those, notably the European Communist states, which had abstained when the Declaration was approved, have now accepted it formally in the Final Act of the Conference on Security and Cooperation (Helsinki, 1975)." Henkin, supra note 2, at 1.

15. Henkin, supra note 3, at xi.

do, such as focus on China and other "real" human rights abusers.\(^\text{17}\) Additionally, the U.S. position is that it is constrained by federalism with regard to that part of the report concerning state prisons.\(^\text{18}\) Bowing to the "sovereignty" of the states that comprise the nation, the United States frequently invokes federalism as a device to shield its record from international scrutiny. Of course, federalism does not prevent the United States from providing federal civil rights remedies to state prisoners. Nor can the United States take the position that its prisons are any less subject to international standards than are prisons in China, without doing serious damage to the principle of universality.

While human rights conditions and compliance vary widely, no government dissents from the ideology of human rights or offers an alternative to it. Even those Asian countries that issued the "Bangkok Declaration" in 1993 acknowledged "the universality, objectivity and non-selectivity of all human rights."\(^\text{19}\) Issued at a regional meeting in preparation for the 1993 Vienna World Conference on Human Rights, the Bangkok Declaration instead contends that the focus on civil and political rights unfairly spotlights "one category of rights," while ignoring other rights, such as the right to development. The Bangkok Declaration posits that this focus fails to respect "the interdependence and indivisibility of economic, social, cultural, civil, and political rights, and the need to give equal emphasis to all categories of human rights."\(^\text{20}\) At the Vienna World Conference, the head of the Chinese delegation reiterated this objection:\(^\text{21}\)

Different historical development stages have different human rights requirements. ... For the vast number of developing countries, to respect and protect human rights is first and foremost to ensure the full realization of the rights to subsistence and development. ... To wantonly accuse another country of abuse of human rights and impose the human rights criteria of one's own country or region on other countries or regions are

\(^{17}\) Telephone interview with Widney Brown, Human Rights Watch (June 8, 1999).

\(^{18}\) Id.


\(^{20}\) Id.

tantamount to an infringement upon the sovereignty of other countries and interference in the latter’s internal affairs. . . .

Underlying this statement was the contention that economic development could only be achieved through authoritarian forms of government and that authoritarianism is inherent in “Asian values.” The claim that civil and political rights reflect “Western values” that are inconsistent with “Asian values” triggered a strong response from Asian non-governmental organizations and intellectuals who criticized the idea that all Asians share a certain monolithic set of values that are distinct from the West. Contending that “there are no quintessential values that separate the Asians as a group from people in the rest of the world,” Amartya Sen, for example, asks rhetorically, “What can we take to be the values of so vast a region, with so much diversity?” Sen notes that “the so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense.” Critiquing the thesis that Western and Asian values present a “clash of civilizations,” Sen suggests that the more relevant clash is one of individual citizens asserting their rights and governments attempting to repress these rights. The West, then, is a convenient foil used to divert attention from the fact that it is individual citizens demanding their human rights. Regardless of whether the demand for human rights accountability comes from an internal or external source, “[t]he people whose rights are being disputed are Asians, and, no matter what the West’s guilt may be . . . the rights of Asians can scarcely be compromised on those grounds.” Sen’s reframing of the Asian values debate provides a useful backdrop for consideration of the ways in which the four articles in this collection attempt to locate (or dislocate) notions of cultural difference and identity within (or from) the human rights framework.

22. Sen, supra note 8, at 34 (suggesting also that the “temptation to see Asia as a single unit” and as reflecting a monolithic set of Asian values reflects alternatively naivete, a “Euro-centric perspective,” and disingenuous tendencies to subvert human rights compliance).

23. Id. at 40; see also W. Theodore de Bary, Asian Values and Human Rights: A Confucian Communitarian Perspective (1998) (demonstrating that Confucian Communitarianism has historically resisted state domination).

24. Sen, supra note 8, at 40 (referring to the phrase coined by Samuel P. Huntington in Clash of Civilizations and the Remaking of World Order (1996), which describes the new world order as one of a “clash of civilizations” between Western and non-Western values).

25. Id. at 40.
III. LOCATING CULTURAL DIFFERENCE WITHIN
THE HUMAN RIGHTS PARADIGM

In his article *How to Argue for a Universal Claim*, Jeremy Waldron contends that certain forms of resistance, including Islamic objections, to universal human rights norms must be seen as presenting competing notions concerning the *content* of rights, rather than seen as forms of resistance to universality *per se*.26 I agree with Waldron's basic premise. The insight behind this premise teaches us that resistance to human rights norms is not necessarily relativist, as such resistance may itself reflect an alternative universalist tendency (informed by claims that may be at odds with those embodied in the human rights idea). While I agree with this insight, I will seek to complicate the direction Waldron's premise takes.

In offering the example of Iranian clerical objections to free speech principles that support pornography on the Internet, Waldron illustrates opposition between two values (*i.e.*, free speech and religious freedom).27 According to Waldron, such an opposition positions "Western" human rights principles of free speech against Muslim religious beliefs.28 However, I am less troubled than Waldron in that I do not view the competing claims that arise in this example (and others he discusses) as necessarily positioning the West against the Muslim world (or other societies). Such a clash of civilizations is not evident in that diversity and overlap exists within and between these spheres.29 The fact that Iranian clerics may oppose free speech

27. Id.
28. Id. at 312 (referring to "our standards" in the West in contrast to "the Muslim response to our toleration of pornography").

Of course, the idea that the West and the Muslim world are two completely separate spheres must itself be further complicated by the fact that—with transnational flows of culture, capital, and labor—the parameters of the West and the Islamic world are often intermingled. Cf. Inderpal Grewal & Caren Kaplan, *Introduction to Scattered Hegemonies: Postmodernity and Transnational Feminist Practices* 10-13 (Inderpal Grewal & Caren Kaplan eds., 1994).
principles justifying a pornography site (or, for that matter, a democracy site) on the Internet does not mean that these religious elites speak for or represent all of Iranian "culture" or Muslim "culture."³⁰ Culture is not monolithic, fixed, or static.³¹ Indeed, culture is a social construct which is constantly contested and redefined through dynamic processes that occur within and between various cultures.³² So while government or religious elites may object on cultural grounds to human rights norms as "Western," individual citizens within these cultures are oftentimes the voices asserting

³⁰ Cf. Azizah al-Hibri, Islam, Law and Custom: Redefining Muslim Women's Rights, 12 Am. U. J. Int'l L. & Policy 1 (1997) (discussing diversity of views, even among devout Muslims, on questions concerning human rights issues, such as women's rights; the author's own Muslim feminist perspective is based on her reading of the Koran, which supports women's equality in many ways, while jurisprudence—which is primarily created through interpretation of Islamic law by male clerical elites—is often patriarchal); see also Sen, supra note 8, at 34 (constructions of "culture" by government elites do not necessarily represent the "vast variations of cultural and historical traditions, despite the fact that the conformism that characterizes [the] political leadership and the official interpretation of Asian values is very powerful").


³² See Rosaldo, supra note 31; Clifford, The Predicament of Culture, supra note 31; Uma Narayan, Dislocating Cultures: Identities, Traditions, and Third-World Feminism 20-21 (1997). To the extent that a hegemonic culture exists in a particular society, this "hegemony consists of '1. the spontaneous consent given by the great masses of the population [and] 2. the apparatus of state coercive power which legally enforces discipline on those groups who do not consent either actively or passively.'" Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1360 (1988) (quoting Antonio Gramsci, Selections From the Prison Notebooks (Q. Hoare & G. Smith trans., 1971)).
these very norms. The "Muslim response" to human rights must therefore be deconstructed, as there is unlikely to be a monolithic response.

Waldron implicitly recognizes that the reverse is true: that in the West there is no monolithic response to questions of free speech and pornography. He notes that some members of the religious right and feminist movements oppose pornography, while others in both camps defend it on the grounds of freedom of speech. In fact, both Christian and feminist objections against pornography in the West may be characterized as being cultural in the same way Islamic objections in non-Western societies are characterized. Again, such objections do not necessarily represent the culture of the entire society, even if they are made by religious or political leaders within the society. Competing universalist claims, then, may be just as likely to arise

33. See Hope Lewis and Isabelle Gunning, Essay: Cleaning Our Own House: "Exotic" and Familial Human Rights Violations, 4 Buff. H.Rts. L. R. 123, 127, n.12 (1998) (discussing indigenous African women's organizations that are working to oppose female genital cutting—another practice Waldron implies is only opposed by Westerners based on "our Western views about women and sexuality." Waldron, at 310 (emphasis in original)).

34. See al-Hibri, supra note 30; Douglas Jehl, Arab Honors Price: A Woman's Blood, N.Y. Times, June 20, 1999, at A1 (citing disagreement within Muslim societies between those who contend Islam permits family members to kill girls and women suspected of infidelity, premarital sex, or other allegations of sexual conduct believed to shame the family, and those who contend that such killings have no basis in the Koran and violate the human rights of women). Consider also the use of human rights discourse by Muslims going back to as early as 1990 in response to human rights violations carried out by Serbs against Muslims in Kosovo. See, e.g., Albanians in Yugoslavia Strike Over Human Rights, L.A. Times, Sept. 4, 1990, at A18 ("Tens of thousands of ethnic Albanians staged a one-day general strike in the Yugoslav province of Kosovo on Monday to protest against human rights violations by the republic of Serbia.").

35. See Narayan, supra note 32, at 34-35 (in discussing how discourse around "Christian values" and "family values" have become constitutive of "American culture," Narayan notes, "[A]s the visible presence of many Christian groups on the right wing of the American political spectrum makes amply clear, religious fundamentalist politics are not a phenomenon unique to Third-World contexts."). While "culture" is often defined as being organized around race, ethnicity, and religion, cultural feminists believe that "women are shaped by their culture in certain ways" that make women different from men. Linda J. Lacey, Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence, 35 B.C. L. Rev. 1, 3, n.21 (1993). Cultural feminists have also, in turn, influenced American culture. For example, Carol Gilligan's book, In a Different Voice: Psychological Theory and Women's Development (1982) probably laid the groundwork for later trends in popular culture, such as "girl power."

36. This is particularly true where leaders are not democratically elected. In a democratic society, particular policy positions could be seen as more directly reflecting "culture." However, even in a democracy, elected leaders do not necessarily represent the
in the context of an intra-communal debate (i.e., within a particular society) as in an inter-communal debate (i.e., between two societies). This is particularly true when opposition to a universalist claim (i.e., free speech principles justifying pornography on the Internet) is deployed as a pretext for suppression of other rights (i.e., political dissent of government policies).

Waldron's positioning of free speech and religious freedom as two competing universalist claims raises a second and related concern, which is addressed by other articles in this volume: how can the human rights idea be universal if it fails to take into account religious objections? Waldron contends that certain critics of the "human rights orthodoxy" may believe that their objections "cannot be understood except from a religious perspective, and that human rights theories have impoverished themselves by ruling out such perspectives a priori." However, the human rights framework does not rule out religious perspectives a priori. Article 18 of the Universal Declaration states, "Everyone has the right to freedom of thought, conscience and religion." Indeed, religious freedom is a universal norm, and the fact that different people embrace different religious traditions does not make the right to religious freedom any less universal. From a human rights standpoint, religious freedom and free speech are both universal rights, a fact that does not necessarily make the challenge of sorting out competing demands easier. The real issue is what does religious freedom demand, require, and permit?

37. See Michel Rosenfeld, Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities, infra at 249, 272, n.59 (discussing distinction between intra-communal and inter-communal relations). Accord Jeremy Waldron, What is Cosmopolitan?, J. Pol. Phil. (forthcoming, 1999) (describing complex relationships that are created by the fact that humans must live with each other side by side).

38. See, e.g., Eric Goldstein, Cyber-Censorship (and Evasion) in the Middle East, Middle East Insight, Mar.-Apr. 1999, at 53 ("[G]overnments paternalistically invoke affronts to conservative Muslim sensibilities—notably pornography—when justifying their restrictive or go-slow approaches to the Internet. Almost without exception, their restrictions also target political or human rights criticism.").

39. Waldron, supra note 26, at 312.

40. See Universal Declaration, supra note 1, art. 18; see also ICCPR, supra note 1, arts. 18 & 27.

41. Rosenfeld, supra note 37, at 252.
Tracy Higgins' article in this collection drives this point home.42 In a discussion of the ways in which religious and cultural practices are justified through the invocation of human rights protections concerning religious freedom, cultural integrity, and autonomy, Higgins notes that these challenges are difficult precisely because "the defenders of such cultural practices tend to invoke justifications human rights advocates are obliged to respect."43 Higgins suggests that while these conflicts of rights are difficult to balance, at least such competing claims are within the same rights based paradigm.44 "Although certain groups will continue to stand outside the existing framework and challenge its terms, it is acceptance of the language of rights, not recognition of cultural difference that is the relevant marker."45

In a similar vein, Higgins points out that feminist critiques of human rights are also internal to our "human rights framework."46 For example, feminists have criticized human rights as being defined largely in male terms, and centered in notions of liberal or formal equality. Feminists have furthered challenged the traditional focus on negative rights against the state as understating the need for state intervention to limit abuses of private power, such as domestic violence.47 While these arguments have radical potential in that they mark the limits of the human rights paradigm, they also

42. See Tracy Higgins, Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights, infra at 225.
43. Id. at 245 (citing polygamy, female genital cutting, and strict rules of purdah as examples). For a proposed balancing test designed to negotiate women's rights and religious freedom when such rights conflict, see Donna Sullivan, Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution, 24 N.Y.U. J. Int'l L. & Policy 795 (1992).
44. Higgins, supra note 42, at 246-7; see also id. at 244-5 (discussion of conflict of rights in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), in which the Court barred an Indian Civil Rights Act suit, where a woman challenged the double standard whereby if a mother was a member of the tribe, but the father was not, their children would be excluded from membership, whereas the children of a male member of the tribe could obtain tribal membership, despite the mother's membership status).
45. Id. at 248.
46. Id. at 241.
seek to recast rights to more fully address women’s needs.\textsuperscript{48} Higgins notes that “[t]he response to this critique, therefore, involves an expansion of our notion of personhood to embrace more fully the experiences of women, particularly with respect to the impact of private power and violence.”\textsuperscript{49} In fact, the Universal Declaration appears to envision protections beyond the actions of states,\textsuperscript{50} and, as alluded to earlier, the human rights idea requires states to affirmatively provide mechanisms to prevent and punish rights violators, even when these violations occur in the private sphere.\textsuperscript{51} Because feminist critiques can be read as challenges that are internal to the human rights paradigm, Higgins contends that these critiques should not be seen as threats to the human rights idea, but rather as “opportunities to see it in a new light.”\textsuperscript{52} Therefore, identity-based critiques of human rights, whether based on religion, culture, or feminism, do not ultimately undermine the concept of universality when such critiques are made within the context of rights discourse.\textsuperscript{53}

A further insight Higgins offers is that associational interests do not necessarily stand outside the framework of human rights. While the human rights paradigm is based on liberal conceptions emphasizing individual autonomy, rights also “imply a respect that places one in the referential range of self and others, that elevate one’s status from human body to social being.”\textsuperscript{54} Indeed, the Universal Declaration includes certain rights, such as linguistic or cultural rights, which can be exercised meaningfully only in a group, and still other rights, nominally understood as individual, which

\textsuperscript{48} Higgins \textit{supra} note 42, at 241; \textit{see also} Crenshaw, \textit{supra} note 32, at 1386 (positing an alternative vision to that offered by Critical Legal Studies, Crenshaw states that the challenge for a subordinated group in using rights rhetoric is in creating “a counter-hegemony by maneuvering within and expanding the dominant ideology to embrace the potential for change.”).

\textsuperscript{49} Higgins, \textit{supra} note 42, at 242.

\textsuperscript{50} \textit{Id.} at 242-3 (discussing application of the Universal Declaration to private employers and other non-state actors).

\textsuperscript{51} \textit{See, e.g.,} ICCPR, \textit{supra} note 1, art. 2(3) (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights ... are violated shall have an effective remedy”); \textit{Velasquez Rodriguez}, 28 I.L.M. 291, 324-26 (1989) (finding that Honduras had an obligation to prevent, investigate, and punish violations, even where it was not clear that the violators were state actors).

\textsuperscript{52} Higgins, \textit{supra} note 42, at 242.

\textsuperscript{53} \textit{Id.} at 240-3.

contemplate collective exercise, such as freedom of the press and association and the right to jury trial. However, Hurst Hannum contends that recognition of group rights has actually been quite limited, until recently. As an example of this limitation, Hannum cites Article 27 of the ICCPR, which provides that "persons belonging to [ethnic, religious, and linguistic minorities] shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or use their own language." Hannum notes, "This minimalist and individually oriented text (note that 'persons belonging to' protected minorities are the possessors of rights) reflected the prevalent view of the 1950s and 1960s that issues of ethnicity, religion, and language would gradually diminish in importance as marginal or less developed population groups were integrated or assimilated into a democratic, non-discriminatory society." Until recent instruments concerning the rights of indigenous people and minorities were adopted, "the only widely accepted group right was the right of self-determination, but self-determination in the era of decolonization was based primarily on territory, not human beings."

In his article in this collection, Michel Rosenfeld examines the controversy over competing rights, particularly as such conflicts emerge between individual and group rights. Rosenfeld notes that this conflict typically arises when, for example, an individual woman asserts her right to gender equality in the context of a minority community that asserts a competing right which may be characterized as a group right (i.e., concerning cultural and religious affiliation). The conflict is particularly acute where the community perceives assertion of these group rights as vital to the community's survival, whereas the individual's right to gender

55. See Ethnicity and Group Rights 4 (Ian Shapiro & Will Kymlicka, eds., 1997); Thomas Franck, Legal Culture and Culture Culture, lecture to be published in the proceedings of the 93rd Annual Meeting of the American Society of International Law (July 26, 1999) (discussing group rights dimensions of freedom of association).
57. Id. at 5.
58. Id. at 6.
59. Rosenfeld, supra note 37, at 268-70.
60. Id. at 264-5, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (unsuccessful sex equality challenge to tribe's prerogative to define tribal membership in discriminatory way).
equality is seen as undermining community survival or "polluting" the community with external values.Ḥ

Rosenfeld offers "comprehensive pluralism" as a vehicle through which individual and group rights can be mediated and weighed. "[W]ile the comparisons in question may not be that precise and while they may not furnish a clear cut result in every case, they are nonetheless quite comparable to many of the kinds of analyses that are routinely used in constitutional adjudication."ḤIndeed, the Universal Declaration seems to have envisioned such mediation between individual and group rights, as the rights therein range from those conceived as individual to those which are more associational by definition.

Analysis of the conflicts that emerge when cultural objections are asserted vis à vis individual rights often center on minority communities or non-Western societies. However, Western and non-Western states alike object to individual rights through reservations, understandings, and declarations to treaties. The United States, for example, having signed (but not yet ratified) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has proposed certain reservations. One such reservation states that "the United States does not accept any obligation under this Convention to enact legislation establishing the doctrine of comparable worth as that term is understood in U.S. practice."ḤBecause the doctrine of comparable worth would require changes in occupational structures and recalibration of the value of "women's work," this doctrine is perceived as a threat to market-based theories of supply and demand. However, given that other exceptions are made to pure market-oriented approaches (i.e., agricultural subsidies), the United States' proposed

61. Of course, such competing claims are not necessarily limited to questions concerning women's equality. See, e.g., Rosenfeld, supra note 37, at 263-4 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972), in which Amish parents successfully sought an exemption from the state's compulsory education requirement for children over the age of fourteen. Rosenfeld, supra note 37, at 263. In agreeing that an exemption was constitutionally warranted so that the Amish parents could socialize their children consistent with their religious values, Justice Stewart, in a concurrence, expressed concern that there was no inquiry into whether the individual adolescent to be taken out of school agrees with his or her parent's decision to do so. Id., citing Yoder, 406 U.S. at 237 (Stewart, J., concurring)).

62. Id. at 275-6 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969), Roe v. Wade, 410 U.S. 113 (1973)).

reservation to CEDAW's protections requiring equal remuneration is an example of relativism, and perhaps even cultural relativism.\(^6\)

On the whole, the international community has negotiated universality and cultural difference through reservations to treaties. Reservations have served as an escape hatch for Western and non-Western countries alike. Consistent with what I have argued earlier regarding constructions of culture by political leaders, it is worth noting here that when a cultural objection forms the basis of a treaty reservation, it is a construction of culture invoked by a government—a notion of culture that may or may not be shared by citizens in the society. As exceptions to the application of human rights norms, reservations undermine the idea of universality, even while they preserve the ability of states to, at least superficially, gain respectability as human rights observers.\(^5\)

Reservations and treaty noncompliance affect three groups in particular: women, religious groups, and minorities. Among U.N. human rights treaties, CEDAW "has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty."\(^6\) Moreover, one need only consider the genocide and other human rights abuses that have occurred in the Balkans and Rwanda to appreciate the fact that large scale human rights violations continue to be organized around religious and/or ethnic difference. Furthermore, reservations submitted by the United States cabin its treaty obligations by defining international obligations to be no greater than what U.S. law already provides, with profound implications for civil rights enforcement. The movement should be to discourage and reverse the trend in making such reservations. Pressure should be asserted in the opposite direction.

\(^6\) C.f. Deborah L. Rhode, Justice and Gender 309 (1989) (beyond celebrating values traditionally associated with women, relational cultural feminism "has insisted that these values be valued and has demanded changes in occupational structures, public policies, and male attitudes.").

\(^5\) Of course, states may object to a reservation of another state. Also, reservations "incompatible with the object and purpose" of the Covenant are impermissible. Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331, 340.

IV. INTERNATIONAL HUMANITARIAN LAW:
AFFIRMING THE HUMANITY OF ALL,
REGARDLESS OF IDENTITY OR LOCATION

As the close of the twentieth century draws near, we reflect on an era of two world wars; genocide and gross human rights abuses in conflict situations; military dictatorships and apartheid. Increasingly, conflicts occur within nation-states, rather than between them. These internal conflicts are frequently organized around religious and ethnic difference, with individuals targeted because of their identity (i.e., because of their membership in particular religious, ethnic, racial, linguistic, or indigenous groups). Human rights treaties embody nondiscrimination principles that largely reject consideration of such distinctions. At the same time, international criminal justice prosecutions are organized around difference insofar as the definition of certain crimes, such as genocide, recognizes persecution based on group identity. In her article in this collection, Ruti Teitel critiques this approach, charging that it reaffirms difference. Teitel asks to what extent international criminal justice prosecutions "simply represent past wrongdoing; or to what extent is it intended to be transformative of that past wrongdoing?" On the one hand, Teitel expresses concern about the "risk" of reaffirming "identity politics" by representing wrongdoing through the prosecution of crimes defined by the identity of the individuals they target. On the other hand,

67. See, e.g., Universal Declaration, supra note 1, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind. . ."). But see ICCPR, supra note 1, art. 27 (recognizing that persons belonging to religious, linguistic and ethnic minorities have a right to enjoy their culture in community with other members of their group); International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(4), Jan. 4, 1969, 660 U.N.T.S. 195 (recognizing that temporary affirmative action measures shall not be deemed discriminatory); Convention on the Elimination of All Forms of Discrimination against Women, art. 4, Mar. 1, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (same).
69. Ruti Teitel, The Universal and the Particular in International Criminal Justice, infra at 285.
70. Id. at 298.
71. Id. at 299-302; see also id. at 298 ("In this regard, contemporary human rights proceedings risk emphasizing ethno-conscious elements of persecution that, to some extent, would affirm, and perhaps even in some small way reenact, past persecution.").
Teitel recognizes the value of identity-based approaches by noting that provisions of the International Criminal Court statute which allow prosecution of rape as a war crime, crime against humanity, and potentially as an act of genocide reaffirm "that women are part of 'humanity.'" Indeed, preserving collective memory and compensating victims—both goals which war crimes prosecutions seek to address—necessarily involves affirming that members of the specific targeted groups (i.e., women, Jews, Tutsis, Kosovar Muslims) are part of humanity. Reaffirming humanity (i.e., that we are all members of the human race), in this sense, necessarily involves affirmation, respect, and tolerance of religious, cultural, linguistic, and other differences.

Perhaps a more troubling contradiction in this era of internal conflict is the redlining of rights that has been revealed in comparing the United States' foreign policy response to human rights abuses in Kosovo in 1999 to its response to the genocide in Rwanda in 1994. It would be overly simplistic to contend that the differential response is based solely on race, and I do not use the term "redlining" in this sense. The differential response is more complicated than can be explained by noting that the United States chose to respond to one crisis and not the other because Kosovo is in a predominantly white neighborhood (i.e., Europe) and Rwanda is in a predominantly black one (i.e., Africa). The failure to respond to the crisis in Rwanda can in part be explained by American paralysis following graphic television images of the corpse of an American soldier dragged through the streets of Somalia following intervention there. Rwanda also suffered from broader paralysis by the international community and by the United Nations, following its failed mission in Somalia. In 1994, neither the United States

72. Id. at 16.
73. Jose Alvarez, Crimes of State/Crimes of Hate (forthcoming 1999) (arguing that international prosecutions have not achieved stated goals effectively).
74. My comments here have benefitted from conversations with Kendall Thomas, who is involved in more sustained research in this area. Besides Rwanda, the international community has also failed to intervene in any meaningful way in conflicts in the Sudan, Angola, the Congo, Sierra Leone, and along the Ethiopia-Eritrean border.
75. The United Nations' limited involvement in Rwanda was in part shaped by the United States, which, as a permanent member of the Security Council, stalled the United Nations from taking action. Philip Gourevitch, We Wish To Inform You That Tomorrow We Will Be Killed With Our Families 150-54 (1998); see also Wole Soyinka, Hearts of Darkness, N.Y. Times, Oct. 4, 1998 (Book Review. Sec.), at 11 (reviewing Gourevitch's book. "[T]he United Nations cannot claim not to have been informed") (emphasis added). U.N. Secretary General Kofi Annan has recently ordered an investigation into the United
nor the Security Council (where, at the time, Rwanda occupied a temporary seat) were initially willing to acknowledge that a genocide was in fact occurring in Rwanda, thereby circumventing the “obligations which arise in connection with the use of the term.”

While Somalia helps explain the failure to intervene in Rwanda, perhaps a more critical factor that explains differential treatment of Kosovo and Rwanda is Europe’s perceived strategic importance to the world’s only superpower, the United States. In his speech justifying the NATO air strikes against Serbian forces, President Clinton stressed the need to protect American interests perceived as linked to European interests, as well as the importance of intervention to prevent a wider war (a risk which also existed in Rwanda). Acknowledging that shared cultural heritage also played a role in the decision to intervene in the Balkans, NATO Secretary-General Javier Solana spoke of NATO’s response to Kosovo with reference to the alliance’s founding principles, “to safeguard the freedom, common heritage and civilization of their people.” In sum, the United States is bound to Europe by strategic interests, a common heritage, and a shared history of military and geopolitical concerns.

The United States’ alliance with Europe and the decision to intervene on the basis of this alliance may make sense as a foreign policy nation’s failure to effectively respond to the genocide in Rwanda.

76. Gourevitch, supra note 75, at 153 (quoting State Department spokeswoman, Christine Shelley, who, at that point was reluctant to admit that a genocide was occurring, insisting instead on the Clinton Administration’s position that “acts of genocide may have occurred,” but that she was not in a position to say how many acts of genocide it takes to make a genocide).

77. “If we have learned anything from the century drawing to a close, it is that if America is going to be prosperous and secure we need a Europe that is prosperous, secure, undivided and free.” President Clinton, In the President’s Words: “We Act to Prevent a Wider War,” N.Y. Times, Mar. 25, 1999, at A15 (reprint of speech given the previous evening).

78. The fact that two world wars were fought primarily in Europe this century is not an insignificant factor justifying the international community’s concern with the Balkans, although the spread of conflict from Rwanda to the Congo has engulfed numerous African nations in war, raising similar concerns of a wider war.

79. The New NATO, The Guardian, Apr. 22, 1999, at 20 (quoting Javiar Solana) (emphasis added); see also Lynne Duke, In Africa, Frustration and Envy Over the West’s Rapid Response, Wash. Post, May 7, 1999, at A31 (Peter Takirambudde, Director of Human Rights Watch/Africa Division, notes that “the repetitive lack of reaction to African crisis compared to the rapid response to Kosovo does often encourage people to think that probably there’s a cultural dimension to this”).
matter if such matters are not determined solely on the basis of human rights. While I am not arguing here that foreign policy should be based solely on human rights considerations, I am asserting that the selectivity with which the United States mobilizes human rights concern is relativistic in light of its differential response to Kosovo and Rwanda. The principle of universality is undermined when the invocation of strategic interests and "common heritage" serve as a gateway for determining when and where the human rights concern is mobilized as part of a humanitarian response to large-scale violations of rights. Human beings are entitled to human rights regardless of the location or culture of the humans whose rights are in question.

Of course, humanitarian responses take many forms beyond military intervention, and the use of force is a blunt instrument for achieving humanitarian objectives.80 My comments here should not be read as an endorsement of U.S. policy to use force to protect human rights atrocities from occurring everywhere in the world, nor should my remarks be interpreted as advocating for the United States to play the role of the world's policeman. On the contrary, selectivity of human rights enforcement occurs precisely because it is often filtered through strategic and other concerns of the United States, which uses force unilaterally or with narrow coalitions.81 The tendency of the United States "to go to war with narrow coalitions—from the US/British airstrikes in Iraq to the NATO-led attacks on Serbia and Kosovo, which are being pursued without a UN mandate—has undermined the basis for the kind of collective diplomacy that is urgently needed to resolve regional conflicts."82 I agree with William Hartung, who argues for an internationalist preventive strategy.83

80. Disparities between the Balkans and Africa also exist in the provision of non-military humanitarian assistance, such as refugee aid. T. Christian Miller & Ann M. Simmons, Relief Camps for Africans, Kosovars World Apart, L.A. Times, May 21, 1999.


82. William D. Hartung, Preventive Diplomacy, The Nation, May 10, 1999, at 12 ("Not only is bombing the wrong tactic for achieving humanitarian ends but NATO is the wrong institution for the task at hand." Id. at 11.).

83. Id. at 12.
Looking ahead beyond Kosovo and Rwanda, this preventive approach requires investment in multilateral agencies that could diffuse ethnic conflicts before they escalate into war through resort to a range of tools that could be employed prior to resort to force. Moreover, the United States must be willing to give diplomacy a chance by doing the kind of diplomatic spadework that is required to bring countries like Russia along, rather than treating them as second-rate powers, which motivates them “to act against US interests to assert [their] independence on the world stage and to assuage nationalist resentments at home.” If use of force becomes necessary to stop genocidal attacks on defenseless communities, it should be deployed lawfully, in consultation with the United Nations and relevant regional bodies. Furthermore, a preventative strategy will be assisted both by efforts to stop the spread of deadly weaponry (such as arms sales to dictators, landmines, and nuclear weapons) and by the establishment of the International Criminal Court, whose authority to prosecute those accused of genocide, crimes against humanity, and war crimes should provide a deterrent effect. Finally, the best option for coping with ethnic conflict and civil strife is to develop a standing U.N. peacekeeping force and “clearer ground rules for delegating peacekeeping and conflict prevention to broad-based regional organizations like the Organization of African Unity and the Organization for Security and Cooperation in Europe (OSCE), a fifty-five member body that includes Russia.”

Collectively, these initiatives would provide “tools for dealing with future conflicts like those in Rwanda and Kosovo besides sitting on our hands in the face of ethnic slaughter or dropping bombs on the parties to a civil war.” Having the United States in the role of the world’s policeman will inevitably result in selective responses to human rights crises. Therefore, a reformed United Nations and other more inclusive regional institutions are

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84. Id. Such an investment would be a fraction of the costs of going to war. (“[T]he United States could pay its outstanding UN dues for the price of just one B-2 bomber” Id.).
85. Id.
86. Id.
87. Id.
88. Id. at 12. As for the concern that the United Nations does not act rapidly enough or lacks the political will to act forcefully in a crisis, one proposal is to give the U.N. Secretary General authority to deploy a limited number of peacekeeping units immediately, with the requirement that the Security Council would have to vote on the continuation of the operation within a short period of time following the initial deployment. See id.
89. Id. at 15.
more appropriate sites for the determination of international humanitarian responses.

V. HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS: 
THE UNITED STATES AS WORLD LEADER?

This Introduction began by challenging the commonly held assumption that human rights is an exclusively Western idea and that objections to it are predominantly non-Western and therefore "cultural." The United States provides an example of a Western state that has both rejected the universal application of human rights in its foreign policy decisions regarding humanitarian intervention, and has failed to apply the principle of universality at home. While the United States has ratified the ICCPR and other conventions (on genocide, torture, and racial discrimination), it has yet to ratify two major treaties—the International Covenant on Economic, Cultural, and Social Rights (ICECSR) and CEDAW (although President Carter signed both treaties and submitted them to Congress). Even those treaties that have been ratified (and are therefore constitutionally recognized as the supreme law of the land) are far from being fully realized in the United States. Racial inequality, police misconduct, poor prison conditions, and restrictions on immigrants' rights continue to stain the national record. Economic rights have collapsed and poverty continues to be a chronic problem, particularly for women, children, and racial and ethnic minorities.

Retrenchment of rights extends to the U.S. Supreme Court's refusal to apply human rights—even transnational rights found in binding treaties—both extraterritorially and domestically to non citizens. The Supreme Court has said that the Fourth Amendment's unreasonable search and seizure provision does not apply to a search by U.S. federal drug agents in the home of a Mexican national in Mexico.90 The Court has also refused to apply Article 33 of the Refugee Convention to restrain U.S. Coast Guard cutters from involuntarily repatriating Haitian refugees without screening their asylum claims.91 More recently, the Court has failed to stay the execution of a Paraguayan inmate who was on death row in the United States

90. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); see also United States v. Alvarez-Machain, 504 U.S. 655 (1992) (finding no violation of the Extradition Treaty between the United States and Mexico, the Supreme Court held that a federal district court had jurisdiction to try a Mexican national who had been forcibly kidnapped and brought to the United States).

and who was denied access to a consular official as required by the Vienna Convention on Consular Relations. These cases (and the precedent they establish internationally through state practice) impair human rights enforcement globally.

This lack of leadership on the human rights front is not limited to the Supreme Court. The Executive Branch has been a leading opponent of an independent International Criminal Court. The White House has also opposed efforts to strengthen protections that prevent the participation of children in armed conflict, despite the devastating impact war has on children. Moreover, Washington has not supported the Oslo accord banning the production, use and export of antipersonnel landmines. The legislative branch has also taken a restrictive approach to human rights, refusing, for example, to consent to ratification of CEDAW or the ICESCR or to enact implementing legislation for treaties that may be nonself-executing.

The universality of human rights is threatened by a superpower that treats human rights as a paradigm that applies "over there" but not "here." Human rights is indeed the idea of our time. For this idea to endure well into the next century and beyond, all governments must respect, protect, and ensure human rights everywhere.

92. Breard v. Greene, 118 S.Ct. 1352 (1998). But see Breard, 118 S.Ct. at 1357 (Breyer, J., dissenting) (citing amicus brief submitted by the United States, which acknowledges that the Vienna Convention had been violated, Justice Breyer held open the possibility that this argument had merit and stated that he would have stayed the execution and considered the petition for certiorari accordingly). The Vienna Convention requires that a person arrested in a foreign country be quickly notified of his right to communicate with his home country's consular officials. Vienna Convention on Consular Relations, art. 42, Apr. 24, 1963, 596 U.N.T.S. 261.

93. Indeed, Madeline Albright expressed concern that Breard's execution would have negative implications for U.S. citizens arrested overseas. By contrast, the Justice Department's position was that there should be no interference in Virginia's executing Mr. Breard, despite any violation of the Vienna Convention. David Stout, Clemency Denied, Paraguayan Is Executed, N.Y. Times, Apr. 14, 1998, at A18.

94. The Clinton Administration's opposition is primarily based on the Pentagon's objections to raising the age of military recruitment to eighteen years old. Telephone Interview with Jo Becker, Human Rights Watch (June 22, 1999).