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Culture and International Law: Universalism v. Relativism

Roda Mushkat*

INTRODUCTION

Regardless of whether it has undergone a 'shift of centre,'¹ the universalism versus cultural relativism debate has entered the 21st century largely undiminished.² The proclamation of 2001 as the United Nations Year of "Dialogue among Civilizations," the cultural convulsions triggered by the September 11 event, and the inter-group tensions boiling for some time below the surface have provided further impetus to the persistently lively exchanges on the subject. Given this backdrop, it may be appropriate to revisit, in a multidimensional fashion, the complex issue of the relevance of culture in contemporary international law.

I. FORCES OF DIVERGENCE

Probably one of the most significant challenges to a universalist conception of international law in recent years has been the theory of cultural relativism. In its strongest³ version, "cultural relativism inspires the image of a "cultural chasm" in which

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¹ See Chi-yu Shih, 'Opening the Dichotomy of Universalism and Relativism' (2002) 2 *Human Rights and Human Welfare* 13.

² See, for example, Linda Bell, Andrew J Nathan and Ian Peleg (eds), *Negotiating Culture and Human Rights* (New York: Columbia University Press, 2001).

³ A milder version, for example, would acknowledge the existence of some widely accepted standards which could be used to criticise another's society (as distinct from strong relativism which does not admit that there are objective moral principles and hence the particular circumstances must be the ultimate judge of what is good). For a distinction between levels of relativity in the context of human rights, see Jack Donnelly, 'Cultural Relativism and Human Rights' (1985) 6 *Human Rights Quarterly* 400 (identifying three hierarchical levels of variation, involving cultural relativity in the *substance* of lists of human rights, in the *interpretation* of individual rights, and in the *form* in which particular rights are implemented; Donnelly seems to defend a 'weak' cultural relativist position that permits limited deviations from "universal" human rights standards primarily at the levels of form and interpretation).

irreconcilable cultural differences preclude the pervasive realisation of substantive international law and morality."⁴ As such, it surpasses Samuel Huntington's dramatically posed "clash of civilisations" thesis.⁵ Arguably, if extended to international law, Huntington's thesis might emphasise the impact of cultural diversity on international legal discourse but would not deny the existence of universally applicable principles of international law nor the faith in the universality of particular values.⁶

A. *Dimensions of Cultural Relativism:*
Philosophy, Linguistics, History

Cultural relativism assumes several philosophical dimensions, including "ethical relativism" and "epistemological relativism". "Ethical relativism," in turn, is composed of three dimensions: "descriptive relativism" (asserting that "a diversity of values and ethical principles is espoused by individuals and culture;" Hence, "even if agreement existed on the nature of some appraised act, fundamentally incompatible valuations would arise from the perceptions of that phenomenon"⁷); "metaethical relativism" (asserting that "there can be no absolute moral truth"⁸); and "normative relativism" (stipulating that "something is wrong and blameworthy if some group – variously defined – thinks it is wrong or blameworthy"⁹). "Epistemological relativism" maintains

⁴ See Christopher C Joyner and John C Dettling, 'Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law' (1989-90) 20 *California Western Int'l LJ* 275, 275. The discussion below of cultural relativism draws heavily on this thoughtful and well-supported essay.

⁵ See Samuel Huntington, 'The Clash of Civilisations' (1993) 72 *Foreign Affairs* 3 (hypothesising that future world politics will be shaped by the "West and the Rest" [comprised of Japanese, Confucian, Hindu, Buddhist, Islamic or Orthodox cultures] and hence the key for understanding international relations lies in an analysis of States' position within these interacting civilisations). In Huntington's words at 22: "The great divisions among humankind and the dominating source of conflict will be cultural. Nation States will remain the most powerful actors in world affairs, but principal conflicts of global politics will occur between nations and groups of different civilisations."

⁶ Nigel Purvis, 'In Defence of Universal Law: The Perspective of a Government Practitioner' (1998) *ASIL Proceedings*, 244, 245.

⁷ Joyner & Dettling, *supra*, note 4 at 281.

⁸ *Ibid.*

⁹ *Ibid.*, 282 (quoting Brandt, 'Ethical Relativism' in P Edwards, *The Encyclopaedia of Philosophy*, 1967 p. 76). The claims made here under "normative relativism" as related to cultural relativism should be distinguished from the issue of gradation in the normativity of international

that ideas, concepts and categories used to understand reality are relative. Thus, every system of thought rests on *a priori* assumptions about reality that are culturally derived.¹⁰

Cultural relativism also takes on a linguistic dimension. The operative thesis here is that "the structure of a language orients its speakers to certain features of the world and leads them to ignore others, and to picture reality one way rather than another."¹¹

Finally, another particular dimension of cultural relativism is "historical relativism" which denotes that "our understanding of human behaviour and social affairs generally is relative to our cultural perspective...[and that] values themselves are historically relative to the culture from which they came."¹²

B. Cultural Relativism as Obstacle to Universalist Legal Orders

Cultural relativism in its various dimensions has been advanced as a major obstacle to any universalist notions of international legal order (which has a predominantly Western orientation),¹³ most notably in areas where law and morality tend to coincide, such as human rights¹⁴ or the use of force.¹⁵ Specifically, it is

legal norms, triggered by P Weil's much discussed article, 'Towards Relative Normativity in International Law' (1983) 77 *AJIL* 413 (criticising developments in the theory and practice of international law such as the emergence of "soft law.")

¹⁰ See Joyner & Dettling, *supra*, note 4 at 262.

¹¹ *Ibid.*, 283 (quoting E Hatch, *Culture and Morality: the Relativity of Values in Anthropology*, 1983, p. 7).

¹² *Ibid.*, 285.

¹³ For the "most explicit and controversial exposition on the relationship between cultural relativism and international law" (Joyner & Dettling, *ibid.*), see Adda Bozeman, *The Future of Law in a Multicultural World* (Princeton, N.J.: Princeton University Press, 1971).

¹⁴ Incompatibility between human rights and cultural relativism is most commonly exemplified in relation to women's rights. See Karen Engle, 'Culture and Human Rights: The Asian Value Debate in Context' (2000) 32 *Int'l L & Politics* 291, 294 (referring to a survey of literature and legal cases on claims by minority groups in the US and Western Europe to legal protection based on culture, which concluded that "the majority of claims or examples given involve issues related to gender, such as child and forced marriages, divorce, adultery, polygamy, abortion, sexual harassment, domestic violence, clitoridectomy and purdah").

¹⁵ See short discussion in Joyner & Dettling, *ibid.*, 297-9. For a more detailed examination of the different cultural conceptions of war, see Roda Mushkat, 'Is War Ever Justifiable? A Comparative Survey' (1987) 9 *Loyola of Los Angeles Int'l & Comp L J* 227-317 (noting inter alia the peace-war contradictions embedded in Islam, which considers the idea of peace high in the hierarchy of

argued that an international legal order based on universally accepted objective moral and rational standards is unattainable. Several reasons are offered.

Firstly, the anthropological fact of the diversity of cultures, each espousing its own values and ethical principles. Secondly, the assertion that 'enculturation serves as the primary determinant of an individual's ethical views'¹⁶ ("descriptive relativism"); and thirdly, the claim that no absolute values exist and evaluations are relative to the cultural background out of which they arise ("metaethical relativism"). Indeed, as contended by cultural relativists,¹⁷ a rational unanimity of mind is elusive since different cultures operate according to different social and moral logics and produce disparate political and legal logics ("epistemological relativism"). Thus, any notion of achieving transcultural law among nations is precluded.

Moreover, linguistic relativists¹⁸ cast doubt on the possibility of articulating an international "common legal language" – and any inference of cross-cultural legal consensus – in light of the myriad of languages, each endowed with its own particular expressions for interpreting experience. Especially problematic would be the arrival at a universal meaning in an international legal context containing moral and political values (for example, pertaining to human rights).¹⁹ In fact, apart from the difficulty inherent in

Islamic values, yet enjoins Muslims to maintain a state of belligerency with all non-believers, enforcing God's law [the Shari'a] through a "holy war" [jihad]. The inherent conflicts of ethical perspectives on war are clearly reflected in the Doctrine of Just War, where differing (and at times the same) world values have been used both to justify recourse to war and impose restrictions on it. Thus, unilateral armed intervention on behalf of justice is regarded as a conceivable moral option in a world where massive violations of human rights exist. Similar justifications have been raised in the context of enforcement of the right to self-determination. See Roda Mushkat, 'When War May Justifiably be Waged: An Analysis of Historical and Contemporary Legal Perspectives' (1989) 15 *Brooklyn J Int'l L* 223. On the other hand, notions of honour, fairness, ethics, morality and other humanitarian considerations underly the body of the laws of war (*jus in bello*). See Roda Mushkat, 'Jus in Bello Revisited' (1988) 21 *Comp & Int'l L J Southern Africa* 1.

¹⁶ "Enculturation" is defined as the acquisition of cultural ideas, categories of thought, frames of reference and the like. Such enculturation 'screens our perceptions and cognition...[and] becomes our essential guide in the efforts we make to meet reality.' See Joyner & Dettling, *ibid*, 283 (citing M Herkovits, *Cultural Relativism: Perspectives in Cultural Pluralism*, 1972).

¹⁷ See references in Joyner & Dettling, *ibid*, 282-3.

¹⁸ See references *ibid*, 283-5.

¹⁹ See Joyner & Dettling, *ibid*, 283-4 (applying concerns raised by linguistic relativists to international legal discourse).

international legal terms possessing very disparate meanings in various languages, an international legal precept may be completely unintelligible to inhabitants of a culture where no word for a certain legal concept exists because the concept itself is alien to that cultural repertoire.²⁰

Historical relativists also join progenitors of "cultural chasm" in the world's governance, stressing the unique historical experience of each culture which defies assimilation of values and thus hinders the transcultural co-operation that is necessary for the development of international law.

II. FORCES OF CONVERGENCE

Three principal strategies have been employed to rebut claims of cultural relativism and their detrimental effects on international law: (a) exposing the limitation of a cultural analysis; (b) refuting by empirical evidence the existence of cultural diversity (at least with respect to fundamental norms of international law); and (c) demonstrating the 'bridgeability' of alleged chasms.

A. *The Limitations of Cultural Analysis*

Several factors render culture an unreliable indicator in the context of international law. For one, culture is "not monolithic, fixed, or static."²¹ Rather, it is "a social construct which is constantly contested and redefined through dynamic processes that occur within and between various cultures."²² More recent deconstructions of the concept, for example, add "gender" to the commonly regarded organising elements of culture such as race, ethnicity and religion. By way of another illustration, it is clear that there is no monolithic response in the "West" to questions of free speech and pornography, and cultural-based arguments are

²⁰ See *ibid.*, 284.

²¹ See Catherine Powell, 'Introduction: Locating Culture, Identity, and Human Rights' (1999) 30 *Columbia Human Rights LR* 201, 210 (and references therein to various writings on the fluidity and hybridity of culture). See also that statement that "anthropological theory now rejects the concept of culture as integrated, harmonious, consensual and bounded in favour of an understanding of culture as historically produced, globally interconnected, internally contested and marked with ambiguous boundaries of identity and practice." Sally Engle Merry, 'Changing Rights, Changing Culture' in Jane K. Cowan, Marie-Benedicte Dembour, Richard A. Wilson (eds), *Culture and Rights* (Cambridge, UK: Cambridge University Press, 2001), pp 31, 41.

²² Powell, *ibid.*, 210.

advanced in aid of conflicting positions.²³ In a similar vein, the Koran is relied upon by both supporters and objectors of the killing of girls and women suspected of sexual conduct believed to shame the family.²⁴

Nor do constructions of "culture" by political leaders necessarily represent the culture of the entire society.²⁵ In the context of international law, such non-representativeness would mean that "differences between nation-States on various legal topics may be based on different *policies* adopted by elites, instead of a fundamental difference based on deeply held societal values."²⁶ Indeed, given the multifaceted nature of culture – as a "way of life," encompassing language, religion, politics, childbearing practices and attire²⁷ – the concept may be 'misemployed' to cover non-culture based political *interests* or State *policies*. Often quoted in this regard is R P Anand's observation, drawing such a distinction in relation to the "attitudes of the Asian-African States towards certain problems of international law," namely that "[I]t is this conflict of *interests* of the newly independent States and the Western Powers, rather than any differences in their cultures or religions, which has affected the course of international law in the present juncture."²⁸

²³ See *ibid*, 211 (alluding to a commonly used reference to the opposition to pornography by some members of the religious rights and feminist movements juxtaposed with the defence of pornography by others in both camps on grounds of freedom of speech).

²⁴ Powell cites the 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. Reference is made to Azizah al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights (1997) 12 *Am U J Int'l L & Policy* 1.

²⁵ As noted by Powell, *supra* note 20 at 211, 36n., this is true even in societies where leaders are democratically elected, as voters may elect leaders for reasons other than their stand on a particular 'cultural' issue.

²⁶ Alison Dundes Renteln, 'Cultural Bias in International Law' (1998) *ASIL Proceedings*, 232 at 234 (emphasis added). Renteln points out a related problem of determining which statements by governmental officials are actually based on cultural consideration or political expediency.

²⁷ See *ibid*, 233 (and references therein). See also reference by Renteln to the attempt to delineate all elements of culture in George P Murdock, et al, *Outline of Cultural Materials*, Vol I (New Haven: Human Relations Area Files, 1965).

²⁸ R P Anand, 'Attitudes of the Asian-African States Towards Certain Problems of International Law' in Frederick E Snyder and Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law* (Dordrecht: Martinus Nijhoff, 1987) at 17.

B. Absence of Empirical Evidence of a "Clash of Civilisations"

However, a response which relies on the conceptual difficulties surrounding cultural analysis to discredit 'cultural relativism' has been criticised as reflecting the "internationalist's general discomfort with culture."²⁹ Such a response was also said to be based on "the "presumption of universality" which entails an unwillingness to evaluate empirical evidence that would demonstrate the presence or absence of cultural influences."³⁰ The latter criticism is nonetheless countered by claims that (notwithstanding relevant attempts) little empirical evidence is available to support cultural divergence of the magnitude alleged, at least in respect of fundamental norms of international law. In contrast, actual State conduct provides "ample evidence to the existence of a wide moral consensus among civilisations."³¹

Probably the most systematic assessment is offered by Joyner & Dettling. Relying on a survey of State practice, as reflected in participation in treaty regimes in key areas such as human rights and the use of force. Joyner & Dettling portray the "pervasive international agreement on the nature and importance of human rights, irrespective of States cultural backgrounds and disparate value systems."³² In a similar vein, the record of non-Western

²⁹ David Kennedy, 'New Approaches to Comparative Law: Comparativeness and International Governance' (1997) *Utah Law Review* 546, 552 (asserting that "[f]or the internationalist, law and culture inhabit different frames. Like politics or religion, culture and cultural difference precede the move to law, exist external to it as a constant challenge or threat, or live below it, beneath the veil of the sovereign State. For the internationalist culture is a natural, local, antiquate and largely national thing.")

³⁰ Renteln, *supra*, note 25 at 235 (referring to her major work on *International Human Rights: Universalism Versus Relativism*, 1990). Elsewhere, Renteln developed her thesis that the "reality of universality depends on marshalling cross-culture data" and that it behoves the international lawyer to discover whether and where different cultural systems overlap in the form of common moral denominators that reflect shared moral principles or "cross cultural universals." See Joyner & Dettling (note 4 above), 297-7 for citations and rephrasing of Renteln's writings.

³¹ See Purvis, *supra*, note 6 at 246. The author (who is a Special Assistance and Policy Adviser to the Under-secretary for Global Affairs, US Department of State) does not furnish however any documentation in support of this assertion.

³² Joyner & Dettling, *supra*, note 4 at 307. Writing around 1990, the authors document the record of States' ratifications of core international human rights treaties, as well as of treaties relating to specific kinds of human rights violations, to show, for example, that: the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights have a membership of more than 85 States, including at least 58 developing States;

State practice in the international law pertaining to armed conflict³³ has led Joyner & Dettling to conclude that “irrespective of the varied content of cultures, or their different historical backgrounds, or metaethical variations in values, or interpretive nuances in linguistic distinctions, or cultural heritage, the plain fact is that non-Western developing States are responsibly participating in the formulation and conduct of international law curtailing the use of force in their international relations.”³⁴ Thus, for example,

‘[I]n the area of human rights and humanitarian law, all States repeatedly reaffirm the universality, non-selectivity and interdependence of internationally recognised human rights. All States repeatedly reaffirm – in unilateral and regional political statements, as well as in international bodies – the binding nature of international obligations prohibiting certain bad acts...States, moreover, give tacit consent to the universality of a broad array of international norms. No State claims that human rights are a purely domestic matter and that no human rights are universal. Similarly, no State defends the right to engage in any specific bad acts [identified as above]...such as slavery. No State willingly admits systematic violations of any internationally recognised human right, regardless of whether the State recognises the right...[M]any States have codified international norms into their domestic laws, including those norms they argue do not apply to them.’³⁵

Equally assertive is Jack Donnelly, who professes that “virtually all States today have embraced – in speech if not in deed – the human rights standards enunciated in the Universal

the Optional Protocol to the Covenant on Civil and Political Rights counts amongst its parties at least 29 non-Western developing countries (at 305); the 1948 Genocide Convention was ratified by more than 95 States, amongst them 70 non-Western Developing Countries [NWDC]; the 1966 International Convention on the Elimination of All Forms of Racial Discrimination has more than 125 States-parties, at least 95 NWDC; the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid has 88 States-parties, 79 NWDC; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women has 96 States-parties, at least 67 NWDC; and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment has 40 States-parties including 20 NWDC (at 305-6).

³³ As detailed by the authors, *ibid.*, 309-310.

³⁴ *Ibid.*, 310.

³⁵ Purvis, *supra*, note 6 at 246. For more recent examples of the “universalization” of human rights, see Adamantia Pollis and Peter Schwab (eds), *Human Rights: New Perspectives, New Realities* (Boulder, Co: Lynne Rienner, 2000), p 26 (referring to developments such as the international criminal tribunals in the Hague and Arusha and the attempts to try Pinochet in Chile, Spain and the UK as reflecting an “emerging consensus of international responsibility and accountability for the most heinous crimes against humanity”).

Declaration of Human Rights and the International Human Rights Covenants.”³⁶ In a somewhat more restrained manner, Antonio Cassese too holds that “an agreement in principle has developed at least regards an essential core of human values among almost all States in the world. [Moreover,] it is foreseeable that this agreement in principle will gradually come to embrace an increasingly wide range of rights.”³⁷

Finally, often alluded to as a vindication of the universality of human rights is the ‘consensus-text’ of the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights on 24 June, 1993.³⁸ Paragraph 1 of the Declaration “reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.” Attention is drawn in particular to the last sentence of the paragraph which provides that “[t]he universal nature of these rights and freedoms is beyond question.” It is moreover observed that the Vienna Declaration “contains very little countervailing evidence in the sense of stipulations that could be interpreted as legitimising forms of cultural relativism... [and that] the little countervailing evidence that is available is couched in rather weak wording.”³⁹

Yet, even ‘universalists’ or ‘moderate universalists’ acknowledge the limitations of reliance on so-called ‘consensus texts.’⁴⁰ Purvis admits that texts negotiated by consensus – as

³⁶ See Donnelly, *supra*, note 3 at 414. As noted previously, however, Donnelly adopts a weak cultural relativism, maintaining that the strong presumption of universality may be overcome by particular cultural arguments, at 417.

³⁷ Antonio Cassese, *Human Rights in A Changing World* (Cambridge: Polity Press, 1990), pp 64-5.

³⁸ UN Doc A/Conf.157/24.

³⁹ Fried van Hoof, ‘Asian Challenges to the Concept of Universality: Afterthoughts on the Vienna Conference on Human Rights’ in Peter R Baehr *et al* (eds), *Human Rights: Chinese and Dutch Perspectives* (Martinus Nijhoff, 1996), 1, 3. The author cites as an example paragraph I.5 which, after setting forth universality, reiterates the “duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms,” albeit under the condition that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.”

⁴⁰ Although creating an impression of wide agreement, the use of the term may simply indicate that a decision had been reached by a ‘consensus-procedure’ – i.e., without a vote – which generally means that no participant opposed the

international instruments that deal with normative issues usually are – “can ratchet down their scope and effectiveness to the level desired by the least interested State.”⁴¹ International human rights texts in particular attest to the premium given to consensus in international decision-making. Such texts are frequently replete with, what diplomats call, “constructive ambiguity,” namely, “overt efforts to paper over profound moral disagreements.”⁴² In fact, as contended by van Hoof, a “look behind the Vienna consensus” that is, an examination which is not confined to the largest common denominator text but takes into account the various positions adopted by individual States or groups of States reveals “deep cleavages between (traditional) Western conceptions on the one hand and the (new) Asian approach...on the other hand. [These cleavages] would seem to go to the very heart of the idea of human rights.”⁴³

At the same time, a ‘consensus text’ may be the outcome of culturally-inspired forces. The *Convention on the Rights of the Child*⁴⁴, for instance, is cited as reflecting pressures exerted by Islamic and Third World States, which have resulted in significant alterations of initial drafts.⁴⁵ This, in turn, is said to illustrate the impact in general that religious or cultural differences may have on international law-making and norm-setting.⁴⁶ Such an impact, furthermore, extends to the post-drafting stage – through the mechanism of reservations⁴⁷ -- influencing the elaboration, interpretation, and the enforcement⁴⁸ of treaties.

content strongly enough to insist upon the right to vote against the text. See N Lateef, ‘Parliamentary Diplomacy and the North-South Dialogue’ (1981) 11 *Georgia J Int'l & Comp L* 1, cited in van Hoof, *ibid*, 4.

⁴¹ Purvis, *supra*, note 4 at 245.

⁴² *Ibid*.

⁴³ Van Hoof, *supra*, note 38 at 9.

⁴⁴ GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989).

⁴⁵ See Renteln (note 25 above) 238-9 (citing a study by Lawrence LeBlanc on ‘Developing Countries and the UN Convention on the Rights of the Child’).

⁴⁶ *Ibid*.

⁴⁷ *Ibid* (citing reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, as well as to the Convention on the Rights of the Child, which reject the bindingness of provisions that “conflict with Islamic Law”).

⁴⁸ See Powell, *supra*, note 20 at 218-224 (discussing the selectivity of human rights enforcement, with particular reference to differential responses to Kosovo and Rwanda).

It is clear in any event that formal agreement by States to human rights documents does not mean that the legal principles and rules of conduct contained therein will necessarily be respected and obeyed by governments. Indeed, ample evidence is available to support a contrary proposition. By the same token, failure to comply with international human rights norms – and for that matter, the inadequacy and ineffectiveness of international law in general – need not be attributed to cultural factors or cultural relativism.⁴⁹

As maintained by Mullerson,⁵⁰ while the implementation of human rights varies greatly from society to society, cultural traditions constitute only one factor affecting compliance. Nor is it a very dominant or powerful factor. Rather, in Mullerson's view, "receptiveness of different societies to international human rights standards is less conditioned by the cultural peculiarities of a given society than by the level of its social, economic and political development."⁵¹ Frequently, too, a "thirst for power" is behind the suppression of rights and freedoms in many countries by unscrupulous leaders, using ethnic or religious considerations as a cover or mechanism to facilitate the achievement of political aims and consolidation of their power.⁵²

This is not to deny, however, that "there are cultural differences and historical or religious traditions which may make the implementation of at least some human rights problematic in certain countries;"⁵³ or that "difficulties rooted in the cultural or religious traditions of some societies inhibit the full and

⁴⁹ See Joyner & Dettling, *supra*, note 4 at 307 (suggesting that such failures "should be blamed on the clash of national interests and conflicting foreign policy objectives of sovereign States, particularly when governments are unwilling to subordinate their national interests to the higher common interests of a peaceful world order").

⁵⁰ See Rein Mullerson, Ch 3 ("The Role of Cultural Factors, Societal Development and Power Interests in the Human Rights Discourse") in *Human Rights Diplomacy* (London / New York: Routledge, 1997),

⁵¹ *Ibid*, at 96.

⁵² *Ibid*, at 98-100. The author cites as examples inter alia Milosevich of Serbia. Tudjman of Croatia and Kravchuk of Ukraine who used the ethnic/nationalistic ideology to further their power; the genocidal ideology nurtured and unleashed in Rwanda by Hutu-led authorities to consolidate their power; President Ja'fur Numeri of Sudan who turned to Islam to consolidate his increasingly unpopular regime; Saddam Hussein of Iraq (an "eminently secular leader" who suppressed independent clergy inside Iraq) appealing to the solidarity of the Muslim world after the US-led coalition had come to the assistance of Kuwait.

⁵³ *Ibid*, at 78.

immediate implementation of international human rights standards.”⁵⁴ Mullerson thus joins the third category of ‘counter-relativists’ – namely, those who acknowledge the reality of cultural diversity, and the relevance of culture to international legal discourse, but do not regard differences of values and traditions as posing an unbridgeable chasm or insurmountable challenge to the viability and future of international law.

C. The ‘Bridgeability’ of Cultural Chasms

Embracing the ‘bridgeability’ tack, Mullerson submits that

Universal human rights standards are not rigid rules whose interpretation and application cannot be adapted to different cultural traditions. Although this is not always possible, there are many cases in which apparent contradictions can be reconciled. International human rights standards are rarely as detailed as domestic laws on the subject. Often they are framework norms which leave room for States to adjust their implementation to the peculiarities of their domestic legal systems. There is often room for what, in the context of the European rights system, is called the “margin of appreciation”.⁵⁵

States, as noted earlier, are also able to negotiate cultural differences through reservations to treaties, which allow culturally-based objections to affect application and implementation.⁵⁶ Such objections, it is argued – and for that matter any “identity-based critique, whether based on religion, culture or feminism” – “do not ultimately undermine the concept of universality,” given that they are made “within the context of rights discourse.”⁵⁷

⁵⁴ *Loc.cit.*

⁵⁵ See *ibid.*, at 80. The author proceeds to provide various examples of ‘margin of appreciation applications,’ including the permissible derogations under the International Covenant on Civil and Political Rights on grounds of public health and morals, national security, and the protection of rights and freedoms of others. See *ibid.*, at 80-81.

⁵⁶ See however the observation that ‘when a cultural objection forms the basis of a treat reservation, it is a construction of culture invoked by a government – a notion of culture that may or may not be shared by the citizens in that society.’ Powell, *supra*, note 20 at 217.

⁵⁷ See Powell, *ibid.*, 214 (alluding to Tracy Higgins’ views as expressed in ‘Regarding Rights, An Essay Honouring the Fiftieth Anniversary of the Universal Declaration of Human Rights’ (1999) 30 *Columbia Human Rights LR* 225, 240-3). Powell herself, however, contends that reservations *do* undermine the idea of universality. It should nonetheless be noted that States may object to a reservation made by another State and that reservations, under the Law of Treaties Convention (article 19), which are “incompatible

In a similar vein, it is maintained that 'local variations and exceptions' or 'differences in form' do not detract from the universality of rights. This is in practice the case among many Western democracies, which share similar interpretations and substantial meanings of rights but differ on the forms rights should take.⁵⁸ As contended by Donnelly (in an earlier work), even in the midst of considerable *substantive* diversity, there may be an 'essential universality' if one looks at complete lists, rather than at particular rights.⁵⁹

Furthermore, not only is universality unaffected by divergence in the *practice* of human rights but it is also consistent with a "plurality of [theoretical] perspectives" and "multicultural characterisation of human rights."⁶⁰ Indeed, it has been asserted that "the cause of human rights can be better advanced if one accepts the operative presupposition that there are different conceptions of rights and dignity which inevitably conflict."⁶¹ An acknowledgement of competing ideals in this manner would arguably be conducive to dialogical relations and cultural interaction geared to moral synthesis and cross-cultural consensus. Proponents of such an approach,⁶² therefore, urge international lawyers and foreign policy-makers to eschew *a priori* standards and "naturalistic abstractions" and adopt an investigative attitude in an attempt to locating "common moral denominators" and identify "core rights which are truly universal."⁶³

It is moreover presumed that an empirical study of this nature would disclose the existence of a broad common ground and

with the object and purpose of a treaty" are impermissible. Culture, in this respect, may actually serve an important function as a 'check on the potential excesses of universalism.' See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) at 110.

⁵⁸ See Joyner & Dettling, *supra*, note 4 at 293-4 (citing Donnelly, *ibid*).

⁵⁹ See Donnelly, *supra*, note 3 at 409.

⁶⁰ See Joyner & Dettling, *supra*, note 4 at 294-5.

⁶¹ *Ibid*, 296 (referring to A Pollis and P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives*, 1980).

⁶² See in particular, Renteln, *International Human Rights: Universalism Versus Relativism*, *supra*, note 29.

⁶³ See, *eg.*, van Hoof, *supra*, note 36 at 11-15 (proposing a list consisting of six categories of 'core rights'). The author notes a similar desire for identification of core rights in the so-called 'empirical approach' advocated by Singapore's Foreign Minister in an address to the 1993 Vienna Conference on Human Rights ("...more effort should be devoted to clinically identifying the specific rights that we can all agree on now, and which others must await further discussion before we reach consensus"), *ibid*, 10.

convergence of values, generated and fortified by the powerful integrative forces of globalisation. As professed by Alex Y Seita, "[g]lobalisation is causing, and being reinforced by, a world-wide convergence of economic and political values that portend a possible, though distant, future world in which human beings will look upon themselves as part of a single human civilisation comprised of a single human race."⁶⁴ More specifically, "globalisation has contributed to the convergence of basic values among nations towards the liberal democratic values of market economies, democratic governments, and human rights."⁶⁵ Such convergence of values could have a pivotal long-term effect, namely the possibility that a majority of human beings will begin to believe that they are truly part of a single global society – the human race.⁶⁶ Likewise, globalisation has facilitated cross-cultural pollination – whereby ideas, values and technology have penetrated many cultures – resulting in blurred cultural boundaries and an emerging global culture.⁶⁷

At the same time, while the inter-penetration of different cultures may have increased homogeneity, it has also led, as a 'counter-reaction,' to an 'even stronger search for cultural identity and resistance to what is perceived as alien cultural challenges.'⁶⁸ This reactionary movement has been claimed to be part of the process of 'globalisation-from-below'⁶⁹ which is 'inherently pluralistic' (as distinct from 'globalisation-from-above' which is 'essentially homogenising and hegemonic in its tendencies'⁷⁰ Yet, such challenges – which mirror the 'tension between [the] accelerating globalisation and the inability of both public institutions and the collective behaviour of human beings to come

⁶⁴ Alex Y Seita, 'Globalisation and the Convergence of Values' (1997) 30 *Cornell Int'l L J* 429.

⁶⁵ *Ibid.*, 491.

⁶⁶ *Ibid.*, 463.

⁶⁷ See Joyner & Dettling, *supra* note 4 at 300 (referencing R Vincent, *Human Rights and International Relations*, (1986) at 54).

⁶⁸ Mullerson, *supra*, note 48 at 90.

⁶⁹ See Nikhil Aziz, 'The Human Rights Debate in an Era of Globalisation, Hegemony of Discourse' in Peter van Ness (ed), *Debating Human Rights: Critical Essays for the US and Asia* (London/New York: Routledge, 1999) at 32 (adopting Richard Falk's distinction to depict the process of globalisation, as represented in the form of "a variety of transnational social movements which have wide-ranging concerns grounded in the notion of human community that is itself based on unity in diversity").

⁷⁰ See *ibid.*, at 34 (describing the dialectical relationship between 'globalisation-from-above' and 'globalisation-from-below in the interaction between political, economic and cultural globalisation).

to terms with it'⁷¹ – do not signify an irreconcilable 'clash of civilisations,' nor an irreparable damage to the internationalisation of legal norms.

In fact, the more heterogeneous the world becomes, the more importance appears to be attached to the formulation of common goals and criteria for the balancing of interests. This is reflected in the tendency to view certain international issues as matters of concern to the international community as a whole; the recognition of some fundamental duties as constituting obligations *erga omnes*; the concept of *jus cogens*; and the "phenomenon of soft law."⁷² It is precisely in such a context that international law is held to be "indispensable" as a "conduit through which States can express differences and similarities of interests plainly in fairly exact, universal language," as well as "a bridge that both transcends and nurtures cultural differences."⁷³

This is not to diminish however the relevance of cultural relativism considerations. As Joyner & Dettling admit, "it is imperative to realise that forging future international law in an increasingly interdependent world must unavoidably turn to the ideas, consciousness and mores of different cultures."⁷⁴ Similarly cultural factors may serve to explain and justify dissimilarities in the implementation of universal norms. Care must be taken nevertheless to distinguish between genuine claims for differentiation in treatment and excuses or justifications used to cover the real interests of political leaders.⁷⁵

⁷¹ E Hobsbawm, *Age of Extremes* (London: Michael Joseph, 1994) at 15.

⁷² See Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) *EJIL* 305, 339 (highlighting the 'invaluable function' performed by soft law in the face of conflicting interests and divergent goals, stemming from different cultures – of enabling worldwide agreement on the content of hard law by limiting the scope of acceptable subjective auto-determination).

⁷³ Joyce & Dettling, *supra*, note 4 at 314.

⁷⁴ *Ibid*, 311.

⁷⁵ See Mullerson, *supra*, note 50.

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