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Help


ARE HUMAN RIGHTS PART OF CIL? (PART 1) (2/2 points)

Human rights instruments such as the 1966 Covenants, the other UN core human rights treaties or regional instruments such as the European Convention on Human Rights or its equivalent in the Inter-American or African systems are treaties concluded between states. Treaties, like contracts, are binding only on the parties that have ratified them, thus accepting a restriction to their sovereignty. However, some rules of international law are binding on states even in the absence of a formal expression of consent. Indeed, in addition to treaties, the primary sources of international law include custom (or "customary international law", which Article 38 para. 1 of the Statute of the International Court of Justice (http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II) defines as "evidence of a general practice accepted as law") and "general principles of law recognized by civilized nations" (to quote again from the rather outdated phrasing of the Statute of the ICJ). International custom is generally defined in doctrine as including two constituent elements, one "objective" element (a practice that is sufficiently widespread and representative), and one "subjective" element (the belief, by the States adopting the practice in question, that such practice is "rendered obligatory by the existence of a rule of law requiring it" (International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (<http://www.icj-cij.org/docket/files/51/5535.pdf>), Judgment of 20 February 1969, para. 77). According to this classic definition, are human rights, as listed in the 1948 Universal Declaration of Human Rights and codified in the main human rights treaties adopted by the General Assembly, part of international custom?

Provide your assessment of the following arguments in favor, and against, an affirmative answer. In this part of the exercise, you are asked whether the following arguments for recognizing the human rights listed in the Universal Declaration of Human Rights (UDHR) as part of international custom are relevant or are, instead, irrelevant. After the second part of the exercise (next unit), ask yourself whether, on balance, you believe that the rights enumerated in the UDHR should be considered as part of customary international law, or not. Or perhaps a distinction should be made between the different rights of the Declaration?

In favor of the recognition of the human rights listed in the Universal Declaration of Human Rights (UDHR) as part of international custom:

1. The UDHR has regularly been mentioned in resolutions adopted in multilateral diplomatic conferences, including at the UN General Assembly, that were adopted with a very large majority, with no or almost no negative votes or abstentions.


- ☒ Relevant 
- ☐ Irrelevant

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In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* (<http://www.icj-cij.org/docket/files/95/7495.pdf>), the International Court of Justice notes that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*" (para. 70). The Court added: "To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule".

2. The UDHR embodies very important values, that are at the heart of the universally accepted norms that form the basis of the international legal order.

- ☒ Relevant 
- ☐ Irrelevant

EXPLANATION

Though this statement may seem tautological or presenting an almost suspicious familiarity with the expression of a nostalgia of natural law, it may in fact be relevant, for the determination of international custom, that the rule is of particular importance to the international community. In one famous example, the United States Supreme Court found that the rule according to which coast fishing vessels were exempt from being captured as prize of war in conflicts had cristallized into a rule of customary international law, based, inter alia, on the consideration that the rule is "founded on considerations of humanity to a poor and industrious order of men", the fishers (*The Paquete Habana Case*, 175 U.S. 677 (1900)). In the well-known *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (<http://www.icj-cij.org/docket/files/70/6503.pdf>), the International Court of Justice also took the view that the principle of the prohibition of the use of force expressed in Article 3, para. 4 of the Charter of the United Nations could be treated as a rule of customary international law, because of its status as a "fundamental or cardinal principle" of such law (Judgment of 27 June 1986 (merits), para. 190).

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