ARE HUMAN RIGHTS PART OF CIL? (PART 2) (1/4 points)

Now, consider the following arguments *against* the recognition of the human rights listed in the Universal Declaration of Human Rights as part of international custom:

3. Violations of the UDHR have sometimes elicited protests from States, but hardly ever the adoption of counter-measures.

- Relevant
- Irrelevant ✔

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EXPLANATION

It is generally agreed that State "practice" includes verbal acts such as protests, and not only physical acts : this was confirmed by the 2000 report of the International Law Association on Customary International Law (presented in the form of a Statement of Principles Applicable to the Formation of General Customary International Law (http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376) at the ILA's 2000 London Conference by the Committee on the formation of customary (general) international law, at pp. 14-15); and it is a rule that maintains the equality of States, since not all States may be in a position to adopt physical acts in order to express their discontent concerning violations by other States. Moreover, as regards human rights norms, counter-measures in the form of reciprocal measures (i.e., the non-performance of obligations linked to the obligations that were breached) are prohibited, since human rights treaties aim not to protect the interests of States, but to protect the basic rights of individuals under their jurisdiction. This is why the 1969 Vienna Convention on the Law of Treaties (http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), while allowing in principle a party to a treaty to suspend its operation in whole or in part when another party has committed a material breach of the treaty, adds that this authorization does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties" (Article 60[5]).

4. Violations of the rights contained in the UDHR are frequent. It cannot be said, therefore, that there is a "widespread practice" of compliance, which is sufficiently "representative" across States.

- (•) Relevant ✔
- ( ) Irrelevant

EXPLANATION

It is true that the range of human rights violations that are committed, almost routinely, by States, pleads against recognizing that human rights form part of customary international law. Yet, it is pertinent to note that such violations, when they occur and are made public, are typically denied by the States accused of committing them, or presented by those States as in fact not in violation of international law, for instance, because of exceptional circumstances being present or because restrictions to the rights of the individual being justified by the pursuit of a legitimate objective by means that are proportionate. In other terms, whichever violations do occur do not lead to question the validity of the rule as such. The International Court of Justice considers that, in order to deduce the existence of customary rules, it is "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule" (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (http://www.icj-cij.org/docket/files/70/6503.pdf), Judgment of 27 June 1986 (merits), para. 186). In many cases, the explanations provided by the State to justify its conduct strengthen the rule, confirming that the States considers to be bound. Here too, the distinction between physical acts and verbal acts may be recalled: although physical acts of violation may occur on a relatively frequent basis, this is counter-balanced by the verbal acts accompanying them, that also serve to shape custom. The International Law Association's Statement of Principles Applicable to the Formation of General Customary International Law (http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376) (2000) notes in this regard: "Verbal acts, meaning making statements rather than performing physical acts, are in fact more common forms of State practice than physical conduct. Diplomatic statements (including protests), policy statements, press releases, official manuals (e.g. on military law), instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions these bodies adopt - all of which are frequently cited as examples of State practice - are all forms of speech-act. Physical acts, such as arresting people or seizing property, are in fact rather less common. There is no inherent reason why verbal acts should not count as practice, whilst physical acts (such as arresting individuals or ships) should" (p. 14, commentary to principle 4 (footnote omitted)).

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5. Most of the instances of violation of human rights by States have not led to protests from other States.

- (•) Relevant ✔
- ( ) Irrelevant

EXPLANATION

It is true that the absence of protest by States against a particular conduct may be seen in principle, as evidence that the conduct is not prohibited -- i.e., that there is no rule of customary international law imposing such a prohibition (see for instance, concerning the lack of protest against States extending their criminal law to conduct occurring outside their national territory, Permanent Court of International Justice, The *Case of the S.S. Lotus (France v. Turkey)* (http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf), P.C.I.J. (ser. A) No. 10 (1927)). However, human rights are

specific insofar as they are not established in favor of States: rather than consisting in an exchange of rights and obligations in the interests of States alone, they stipulate rules that shall benefit individuals under the jurisdiction of the States concerned, thus serving a "public order" objective. It is therefore entirely understandable that States will generally be tempted to look the other way when other States violate human rights: even though they could express their discontent or even, where there is a competent jurisdictional forum, file a claim against the State acting in violation of human rights, they generally refrain from doing so, because they are not prejudiced by the failure to comply with the duty to refrain from such violations.

6. The human rights listed in the UDHR have been codified in various treaties at UN level. They cannot therefore also be part of customary international law; since this would deprive the said treaties from any useful purpose.

- ○ Relevant
- ◉ Irrelevant ✔

EXPLANATION

Irrelevant: This argument against the recognition of the UDHR as part of international custom is ill-founded. First, the UN human rights treaties establish monitoring mechanisms, in the form of bodies made of independent experts, receiving reports from States and communications from individuals whose rights have allegedly been violated. (This will be discussed in greater detail in section 8 of the course). Therefore, such treaties have an added value, quite apart from the substantive norms that they codify. Second, it is generally agreed that customary rules of international law can emanate from treaties, where such treaties are are widely ratified or, even if not widely ratified, express rules that are in fact widely accepted. This is the case, for instance, for a number of international agreements that are opend for adherence by all States and codify existing international custom. In fact, where a convention is very widely ratified (including by the States whose interests are particularly affected), this in and by itself may suffice to lead to the emergence of a new general rule of international law (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. 73).

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