International Human Rights, Decolonisation and Globalisation

Becoming human

Shelley Wright

London and New York

Also available as a printed book
see title verso for ISBN details

International Human Rights, Decolonisation and Globalisation

The analysis of human rights to date has lacked a truly deep and complex awareness of the historical context in which they developed. Examining the 'humanness' of rights, this book redresses the balance by demonstrating how the characterisation of this humanity from a Euro-American perspective shapes the content and implementation of international human rights law.

Covering a diverse range of topics, case studies and theories, the author undertakes a critique of the principal assumptions on which the existing international human rights regime has been constructed. She argues that the decolonisation of human rights, and the creation of a global community that is conducive to the well-being of all humans, will require a radical restructuring of our ways of thinking, researching and writing. In contributing to this restructuring she brings together feminist and indigenous approaches, as well as postmodern and post-colonial scholarship, engaging directly with some of the prevailing orthodoxies, such as 'universality', 'the individual', 'self-determination', 'cultural relativism', 'globalisation' and 'civil society'.

The book will be essential reading for professionals, policy makers and academics involved in the study and implementation of human rights within international law.

Shelley Wright is Senior Lecturer in the Faculty of Law, University of Sydney, Australia. She was also the Ariel F. Sallows Professor of Human Rights at the College of Law, University of Saskatchewan, for two years from 1995 to 1996. She has taught at the National University of Singapore, Canterbury University in Christchurch, New Zealand, and has been a Visiting Professor at the University of Victoria, BC, as well as a visitor and guest lecturer at the University of New South Wales, Hong Kong University, UCLA, Columbia University and Oxford University. She is the co-author, with Hilary Charlesworth and Christine Chinkin, of 'Feminist Approaches to International Law' in the *American Journal of International Law* (1991) and has published widely on women's rights, indigenous peoples' intellectual property and cultural rights, feminist theory and international human rights.

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First published 2001
by Routledge
11 New Fetter Lane, London EC4P 4EE

Simultaneously published in the USA and Canada
by Routledge
29 West 35th Street, New York, NY 10001

Routledge is an imprint of the Taylor & Francis Group

This edition published in the Taylor & Francis e-Library, 2003.

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British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Wright, Shelley
International human rights, decolonisation and globalisation: becoming
human
p. cm. Includes bibiographical data, references and index
1. Human rights. 2. Human rights – case studies. 3. Decolonisation – case
studies. 4. Postcolonisation – case studies. 5. Globalisation. I. Title

JC571 .W954 2001
323 – dc21

ISBN 0-203-16725-2 Master e-book ISBN

ISBN 0-203-26208-5 (Adobe eReader Format)
ISBN 0–415–25951–7 (Print Edition)

Dedicated to the memory of my father,
Major Robert E. S. Wright

Contents

Acknowledgements

I have many people to thank. First of all to the College of Law, University of Saskatchewan, where I was the Ariel F. Sallows Professor of Human Rights from January 1995 to December 1996. I would like particularly to thank my colleagues and friends there including Professor Peter MacKinnon, who was then the Dean of the College and with whom I had several spirited discussions on Quebec sovereignty. Also to the members of the ABC Club including guest member Professor Sid Harries. I would also like to thank Professor Don Fleming of the Faculty of Law, University of New Brunswick, for inviting me to give the Inaugural Lodhi Lecture on Human Rights at the Atlantic Human Rights Centre, St Thomas University. The commentaries by Professor Andrea Bear-Nicholas, Professor Patricia Hughes, Ms Susan Li, Professor Melanie Wiber and Professor Thom Workman were invaluable first commentaries on what became the beginnings of this book. I would also like to thank the Native Law Centre, University of Saskatchewan and and Professor Len Findlay of the Humanities Research Unit, University of Saskatchewan, the Faculty of Law and the Centre for Peace and Conflict Studies at the University of Sydney. Also the Faculty of Law and the Center for Asia–Pacific Initiatives at the University of Victoria, British Columbia, for inviting me to come and spend a sabbatical leave in 1999 (and many lunches over several Christmases), and to participate in the Intellectual Property Summer Program. I would especially like to thank Professor Stuart Rees, Ms Lynda-Ann Blanchard, Professor Jeremy Webber, Professor David Cohen, Dr Helen Lansdowne and Professor Robert Howell.

There are also many friends and colleagues to whom I owe a special debt of gratitude. This includes in particular Professor Hilary Charlesworth and Professor Christine Chinkin with whom I began this journey many years ago and without whom it would never have happened. I owe a special debt of gratitude to Mr Sa'ke'j Henderson, Research Director of the Native Law Center, and Professor Marie Battiste of the Faculty of Education, University of Saskatchewan. Their warm welcome, wise advice and kind spirit inform much of my rethinking of indigenous rights. In addition I would like to thank Hilary Astor, Don Bain, Russel Barsh, Dianne Beer, Cathy Bell, Belinda Bennett, Marj Benson, Andrejs and Lorraine Berzins, Dianne Biin, Graeme Coss, James Crawford, Karen Engle, Elizabeth Evatt, Louise Forsyth, Judith Gardam, Rod Germaine, Janice Gray, Makere Harawira, Terri Janke, Karen

Knop, Hester Lessard, Eilis Magner, Pene Mathew, John McLaren, Lou-Ann Neel, Anne Orford, Dianne Otto, Heather Raven, Don Rothwell, Shirley Scott, Barbara Stark, Julie Stubbs, Tang Lay Lee, Teo Soh Lung, Caitlin Trethewy and Stanley and Teng Yeo. Thanks also to Edwina Kobus, Bridget Nguyen-Nyoc and Miki Itakura for valued administrative assistance and to Annabel Watson and Simon Bailey for editing the final manuscript. I owe a special debt of gratitude to Robert Licuria and Tharini Mudaliar who undertook to read, correct, find references and give valuable advice on finishing the manuscript.

I owe a great debt to my students in the several places I have taught, including Singapore, New Zealand, Sydney, Saskatoon and Victoria, BC, for their insights, lively discussion and (sometimes) disagreements. Some of their contributions are particularly referred to in the Bibliography.

Thank you to my family, including Shannon, Gibby, Pat, Caity, John, Marlise, Aidan, Liam and Giovanna. Thanks especially to Rob Wright who read the whole thing through and to my mother Betty with love for the room, board, computer, car, cash and much else.

Parts of this book have appeared previously in the following publications. These have been substantially revised. I have made every effort to track down and obtain copyright approval for reproducing this material. My thanks to the following:

- Professor Len Findlay and Purich Publishing for 'Speaking Truth to Power: Freedom of Expression, Intellectual Property and the Technologies of Communication', in Findlay, L. (ed.) (2001) *Academic Freedom: The History and Future of a Defining Idea*, Saskatoon: Purich Publishing.
- Federation Press for 'Intellectual Property and the "Imaginary Aboriginal" ', in Bird, G., Martin, G. and Neilsen, J. (eds) (1996) *Majah: Indigenous Peoples and the Law*, Sydney: Federation Press, 129.
- Centre for Peace and Conflict Studies for 'Some International Factors Contributing to Violence Against Women', in Lambourne, W. (ed.) (1996) *Speaking Out Against Violence: National and International Perspectives on Violence against Women*, Sydney, CPACS Occasional Paper No. 95/2.
- Canadian Council on International Law for 'Redefining International Legal Norms for the 21st Century: The Incorporation of Different Voices', in (1996) *Globalism and Regionalism: Options for the 21st Century*, Ottawa, CCIL Annual Conference Proceedings, 202.
- University of Saskatchewan Law Review for 'The Individual in International Human Rights: Quebec, Canada and the Nation-State' (1995) *University of Saskatchewan Law Review* 59/2: 437.
- University of British Columbia Law Review for 'Aboriginal Cultural Heritage in Australia' (1995) *University of British Columbia Law Review*, Special Issue: 45.
- Canadian Journal of Women and the Law for 'A Feminist Exploration of the Legal Protection of Art' (1994) *Canadian Journal of Women and the Law* 7: 59.

- Professor Christine Chinkin and the Michigan Journal of International Law for 'The Hunger Trap: Women, Food and Self-Determination' (1993) *Michigan Journal of International Law* 14: 262.
- Center for Asia–Pacific Initiatives for 'The Rights of Indigenous Peoples and Ethnic Minorities in Indonesia: East Timor and West Papua in Transition', in Duncan, D. and Lindsey, T. (eds)(1999) *Indonesia After Soeharto: Reformasi and Reaction – International Colloquium Proceedings, 19 March 1999*, Victoria, BC, CAPI, 68.

Unfortunately, I read Hugh Brody's The Other Side of Eden: Hunters, Farmers and the Shaping of the World (Brody 2000) too late to acknowledge his insights in the body of my own text. But I highly recommend it as a perceptive and beautifully written narrative on the themes of Indigenousness, colonialism, gender and the process of becoming human that underlies much of what I have tried to do here.

The information in this book has been updated to 22 June 2001.

Sources for epigraphs

1 A civil religion: Remark attributed to John Humphrey

2 White man's rights: Roosevelt, F. D. Statement to Congress, January 1941, quoted in Burns, J. M. (1970) *Roosevelt 1940-1945: The Soldier of Freedom*, San Diego: Harcourt, Brace, Jovanovich, 34.

3 Witches, slaves and savages: As quoted in Barstow, A. L. (1995) *Witchcraze: A New History of the European Witch Hunts*, London: Pandora, 162.

4 Subjects, soldiers and citizens: From *Gladiator*, produced by Paramount Pictures and Dreamworks, directed by Ridley Scott.

5 Peoples of the book: Austen, J. (1818) *Persuasion*, reprinted 1986, London: Collins, 364.

6 Speaking truth to power: From *Bambi*, produced by Walt Disney Inc., as quoted in Coombe, R. (1991) 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue', *Texas Law Review* 69: 1854.

7 Emerging images: 'My country/Is not a country/It is winter' by Gilles Vigneault (1972) *'Mon Pays'*, recorded on Les Chansonniers du Québec, produced by Radio-Canada International, arr. by G. Rochon, trans. by S. Wright.

8 The death of the hero: Durakovic, F. (1998) 'A War Letter (about the letter from before the war)', in Agosín, M. (ed.) (1999) *A Map of Hope: Women's Writings on Human Rights*, London: Penguin, 27.

9 Ghosts in the machine: Oodgeroo of the Tribe Noonuccal, 'Municipal Gum', from My People, 1990, as quoted in Rees, S. and Wright, S. (eds) (2000) *Human Rights, Corporate Responsibility: A Dialogue Sydney*: Pluto Press, 66.

10 Becoming Human: Akello, G. (1992) 'Encounter', from Busby, M. Daughters of Africa, quoted in Agosín, M. (ed.) (1999) *A Map of Hope: Women's Writings on Human Rights*, London: Penguin, 315.

When I set out on this journey/I thought it would never end
When I started down that road/I could not see the end
And when I took that first step/I fell in so deep, so deep
And all the things that were so hard won/You know I thought I would always keep
Now, what do you think I see?/Standing like a wall in front of me
Defeat, not victory
Defeat, not victory
So, what are you going to do? Die? No!
You going to lay down and die!
No!
I will not admit defeat
I will not admit defeat
I will see
Victory
Pride and deceit have choked my life like weeds
And I lost sight of what I really had/What I really need
And all the things I should have valued/I gave away for a prayer and a song
Now when I reach out for them
They are gone
Now do you know what I see?/Standing in front of me
Like a headstone/A fucking monument to human misery
Defeat, not victory
Defeat, not victory
So, what are you going to do? Die? No!
You going to lay down and die?
No!
I will not admit defeat
I will not admit defeat
I will see
Victory

(Nomeansno, 'Victory' (lyrics by Rob Wright) from Small Parts Isolated and Destroyed (Alternative Tentacles Records, 1990))

1 A civil religion

> There will be peace on earth when everyone's human rights are respected.
>
> (John Humphrey)

As the new century begins international human rights have become a central focus of international relations, law and politics. Article 1 of the Universal Declaration of Human Rights 1948 declares that 'all human beings are born free and equal in dignity and rights' and that we should all 'act towards one another in a spirit of brotherhood'. But what do these words mean? Who are human rights for? What standards whether individual or collective can be accepted as universally applicable to everyone? What does a 'spirit of brotherhood' imply? In other words, what constitutes the 'humanness' of human rights?

> [W]e have come to understand that what we took to be humanly inclusive problematics, concepts, theories, objective methodologies, and transcendental truths are in fact far less than that. Instead, these products of thought bear the mark of their collective and individual creators, and the creators in turn have been distinctively marked as to gender, class, race, and culture. …Western culture's favored beliefs mirror in sometimes clear and sometimes distorting ways, not the world as it is or as we might want it to be, but the social projects of their historically identifiable creators.
>
> (Harding 1986: 15)

One of Western culture's most favoured beliefs is in the existence of inherent and universal human rights. Yet, after more than fifty years of effort by the United Nations and other bodies the world is still far from the full adoption and implementation of universally recognised human rights for all. The Universal Declaration was meant to be a lasting statement of basic human rights. Nevertheless, when it came to implementing these standards into a binding convention two main covenants had to be drafted (the International Covenant on Civil and Political Rights (1966) or 'ICCPR' and the International Covenant on Economic, Social and Cultural Rights (1966) or 'ICESCR'). Many subsequent treaties on human rights indicate that turning universally acceptable standards into enforceable norms is very difficult.

This fragmentation and contention over what human rights might mean is particularly curious with regards to the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979. Women constitute more than 50 per cent of the world's population. If the Universal Declaration, covenants and other conventions are inadequate in dealing with women's rights then whose *human* rights are they? As Hilary Charlesworth has noted, there has been a rather embarrassed silence within the halls of international diplomacy and law-making concerning women's rights (Charlesworth 1998). The fiftieth anniversary of the adoption of the Universal Declaration by the United Nations General Assembly occurred on 10 December 1998. Leading up to the anniversary there was considerable discussion about altering this most basic document better to represent differing cultural perspectives on human rights. Asian countries were particularly insistent while most so-called 'Western' nations responded with horror. But regional documents on human rights indicate the existence of significant differences over what human rights are and what they might mean.

The African Charter on Human and Peoples' Rights contains civil and political rights similar to those in the European Convention on Human Rights (1950) and the ICCPR. It also contains economic, social and cultural rights as in the European Social Charter, the ICESCR and other conventions. In addition, however, Articles 19 to 24 contain a list of peoples' rights. These include the right to self-determination, the right to dispose freely of a peoples' wealth and natural resources, the right to development, the right to peace and the right to a satisfactory environment. This is the only major human rights treaty that explicitly recognises peoples' rights (other than Common Article 1 of the ICCPR and the ICESCR recognising the right of self-determination), but the reiteration of the other rights is similar to most other regional and global conventions. Although political and civil rights are generally treated separately from economic, social and cultural rights, as in the two main covenants, the African Charter is not alone in grouping them together. But because of the emphasis on group rights peculiar to this Convention the individual human rights that are enumerated cannot in fact be seen in the same light as in, for example, the ICCPR or the European Convention. Individuality, so central to human rights in Western Europe and North America, has a much less central role in the rights of Africans – or at least as they are expressed in the African Charter. In addition this convention sets out a list of duties in Chapter II for each individual covered by the Charter. These include duties towards 'the family and society, the State and other legally recognised communities, and the international community'. The rights and freedoms contained in the African Charter must be exercised 'with due regard to the rights of others, collective security, morality and common interest' (Art. 27). This hybrid formulation illustrates how difficult it is to identify human rights as universally binding in the light of culturally specific or regional needs, whether as an inheritance of a colonial past, or as part of the desire to create a post-colonial present and future.

A major gap in many analyses of human rights is the lack of any deep or complex awareness of the historical context in which they developed. International human rights are intimately connected to a range of issues. The expansion of

Europe, including the economic, political, scientific and technological values that have accompanied it, is a crucial factor, although perhaps in ways less obvious than is usually accepted within international human rights discourse. Religious and ethnic struggles are an important issue. Less generally recognised, however, are the changing nature of the patriarchal family in Europe and elsewhere, the development of printing, the chronology of empire through mainstream history, the connection between citizenship and militarism, and the establishment of human rights within Euro-American literate cultures. Where histories of these structures have been referred to they tend to be dominated by one history – the rise of Europe – whose dominance is taken as axiomatic (Landes 1999).

In one sense a focus on the history of European institutions and traditions *is* an accurate portrayal of the development of such supposedly 'Western' traditions as international law and international human rights. But the dominance of the West is not a matter of economic, technological, scientific, political or legal superiority. The 'lever of riches' (Mokyr 1990) in the West was the colonial conquest of most of the rest of the world. Despite considerable academic debate over the relative costs and benefits of colonisation and imperialism in Europe it is no coincidence that 'the rise of Europe' accompanied its expansion outside the boundaries of western Eurasia (Blaut 1993: 186–206). This expansion involved the dispossession and appropriation of most of the rest of the world. Whatever the particular expenses and burdens this may have imposed on specific European states the overall impact for colonial Europe was access to and acquisition of the world's resources. This resulted in the transformation of European states into centres of world capital, political development and control over legal discourse, including discourses of international law and human rights. This monopoly on the language of power was extended to European colonial settlements established by the English, French, Spanish, Portuguese, Russians, Dutch, Danish, Belgians, Italians, Germans and the United States. Even today only Japan really qualifies as an exception to this centralisation of power. Its economic pre-eminence is both dependent on the European models it adopted with enthusiasm from the mid-nineteenth century onwards, and inherently fragile because of this dependence. International law and human rights are closely connected to this wider colonial history. Part of this connection is reflected in the disturbing lack within human rights discourse of the histories of those people who have been silenced within and because of the Western 'meta-narrative', i.e. women, children, the poor, the colonised, the indigenous, the 'disappeared'. These are the 'people without history' in Eric Wolf's evocative phrase (Wolf 1982). These are the people who, when they are brought within the reach of Western rationalist narratives, are treated as objects, static, unchanging, their 'development' dependent on biology or nature or tradition and, above all, the guiding hand of white European man.

Although I believe it is necessary to place human rights within the very complex context of European colonial history it is not my intention to demean or destroy the deeply transformative effect human rights or a belief in their efficacy can have. Shirley Scott has posited that international law can be seen as ideology (Scott

1994). Human Rights may also be seen as an aspect of the ideology of international law – as ideas that have power and can enable action. But these ideas are also subject to processes of reexamination and reimagination. They are not immutable. The following chapters are meant as an exploration, a kind of archaeological dig through the past and present of human rights within international law. In particular I would like to examine the 'humanness' of rights and how the characterisation of this humanity from a Euro-American perspective affects who gets to be fully human and who doesn't quite make it. My intention is to take a critical perspective. As Charlesworth has said on another occasion:

> While there have been lively debates about the relationship between the generations of rights and the best methods of implementing human rights law, there has been a general reluctance to question the basis or value of the international human rights system itself. Analyses of the foundations and scope of international human rights law frequently lapse into heroic or mystical language; it is almost as if this branch of international law were both too valuable and too fragile to sustain critique.
>
> (Charlesworth 1994: 59)

This book is an attempt at bringing together different perspectives and different voices in order to see how they can contribute to a critical analysis of international human rights. I draw freely on feminist and indigenous approaches as well as some postmodern and post-colonial scholarship. I have made no attempt to survey the literature from any of these sources. A direct engagement with some of the prevailing orthodoxies of human rights such as 'universality', 'the individual', 'self-determination', 'cultural relativism' and 'civil society' is explored. Decolonising human rights, and creating a global community that is conducive to the well-being of all humans and the earth that we share, requires a radical restructuring of our ways of thinking, researching and writing. Linda Tuhiwai Smith describes these processes as 'indigenizing' research (Smith 1999: 146–147), or they might be described as 'feminising' traditional discourses. The point is not to replace one perspective with another but to decentre our focus of attention in the hope that human rights can be expanded and strengthened. It is an uncomfortable but necessary project (see Anaya 1996; Anghie 1999; Barsh 1994; Battiste and Henderson 2000; Cass 1996; Charlesworth and Chinkin 2000; Knop 1993; Orford 1997; Otto 1996a, 1999; Spivak 1995; Stark 2000).

A critical evaluation of the history of international human rights can be very difficult to sustain. A visit to the Holocaust Museum in Washington, DC, provides a vivid example. The depiction of loss represented within the Museum is sometimes overwhelming in its intensity – the names of European villages emptied of their Jewish populations engraved on the glass walls of the walkways from one exhibit to the next; the tower of photographs from the *stetl* in Lithuania out of which no survivors came; Eisenhower's determination to visit the camps so that he could be a witness ensuring that no one could deny this, no one could forget; the Temple of Memory on the ground floor with its candles, the flame of

remembrance, the names of the death camps around the six sides of its warm orange walls, the quiet dome, the cool silence. The display of Nazi photographs of Aryans and non-Aryans – human and sub-human – is particularly chilling and very familiar. Similar photographs were common within anthropological and ethnographic studies of the late nineteenth and early twentieth centuries and the same representations can be seen in books and documentary films on Australian Aboriginal people, the indigenous peoples of the Pacific, American Indians, Africans and non-European populations more generally. Individuals from these groups were measured and photographed and their lives dissected in the name of science and the acquisition of knowledge. On the walls of the Museum the faces of the less human are exhibited and compared with the Nazi ideal like mug-shots or a police line-up with no apparent awareness of their resemblance to anthropological representations common in Western academic and popular documents of the time (Francis 1996; Gibbs Smith, Publisher 1999).

The genocide that the twentieth century gave us is most appalling when we realise how familiar it is, how common it has become. The word itself is quite recent, invented by Raphael Lemkin during the worst years of the Second World War (Chalk and Jonassohn 1990: 3–10). His new word and ideas about what it meant first gained currency as the Holocaust ended and an attempt at understanding was first attempted. He and a small group of like-minded scholars and activists were largely responsible for the drafting and passage of the Genocide Convention through the United Nations General Assembly on 9 December 1948, just one day prior to the General Assembly's adoption of the Universal Declaration of Human Rights. The definition contained in Article 2 of the Convention, for all its flaws, is now generally accepted as the legal definition of genocide in international law (ICTR, Art. 2; ICTY, Art. 4; Rome Statute, Art. 6; UN Rwanda Inquiry 1999).

But the resonance of the images of dehumanisation that occurred during the Holocaust is also a construction, a careful representation of the past designed to recall and move (see Bauer 2001; Junker 2001). Such representations are both necessary and dangerous – necessary because we forget our past at our peril, dangerous because this history is itself a form of forgetting, a burial. Gypsies, gays and lesbians and the physically and mentally disabled were also targeted for elimination by the Nazi regime. Yet they receive little attention in the Washington Holocaust Museum. One small set of displays tucked into a corner acknowledges their loss. History is never 'just history'. The twentieth century may have given us the word but the practice and policy of genocide is much older. Nor did it end in 1945. We seem to have ended the old century much as we began it: debating humanitarian principles and the nature of international law while preparing for war; using humane impulses and the rhetoric of concern as well as the fervour of nationalism to justify the use of force. To this list we have added denial of our own complicity with violence and exploitation while proclaiming our belief in universal rights for all human beings. We continue to struggle with ideas about the rule of international law while breaching such rules because of the apparent impossibility of resolving our differences in any other way.

Three events in 1999 seemed to encapsulate the difficulties of reconciling history, human rights, violence and the desire to move away from the tragic consequences of the past. On 24 March 1999 NATO began its aerial bombing of Yugoslavia in response to the political stand-off over Kosovo. On that same day the House of Lords announced its second attempt to resolve the problem of General Pinochet's extradition from the United Kingdom to Spain on criminal charges of torture, kidnapping and murder during his term as head of state in Chile (*Ex Parte Pinochet* 1999). As the world's attention was focused on the Balkans and the legal difficulties of a former South American dictator another unfolding chain of events, the process of self-determination in the former Portuguese colony of East Timor, was struggling with the meaning of autonomy and human rights.

Despite months of harassment and violence nearly 80 per cent of East Timorese people voted for independence on 30 August of that same year. Without the harassment and terror the vote may well have been higher. Close to 100 per cent of all voters lined up to cast their ballot on that day. In some polling stations half the registered voters were waiting as the blue UN ballot boxes arrived early on that morning. Reports of UN monitors, journalists, Catholic Church workers and volunteers with non-governmental organisations tallied with the images that appeared on television screens around the world. Women wore their Sunday best and whole families, including small children, came. The elderly, the young, women and men stood in line with their registration papers and identification in hand waiting to cast their vote of condemnation of Indonesia's rule and their hopes for the future. One old man was quoted afterwards: 'Now I have voted, now I can die.' Over and over again the people said they knew they would suffer for this but they had voted for their children. The militia and Indonesian army personnel hovered just out of sight of the cameras. Remembering that close to a quarter of a million East Timorese, around a third of the population, had been killed or had died of starvation and mistreatment during twenty-four years of Indonesian rule made the affirmation of democratic rights all the more poignant and dramatic. The day of 'Popular Consultation' was peaceful, but the preceding weeks and months of violence were a mild foretaste of the havoc, murder, terror and intimidation to be inflicted by the pro-Indonesian militias (armed and directed by the Indonesian military) within hours of the announcement of the final tally. It soon became apparent that another Kosovo-type intervention by 'like-minded countries', in the words of the New Zealand Minister of Foreign Affairs, or a 'coalition of the willing' in the words of the Foreign Minister of Australia, would be necessary to curtail the violence. Two weeks later, after an appalling level of killing, rape and forced removals, the UN finally intervened.

Human rights are often assumed to include only a narrow range of civil and political rights applicable in a relatively confined type of situation. But they have become much more than this. Human rights are an eclectic mixture of civil, political, economic, social, cultural and collective rights engaging us all in an

ongoing debate over priorities, relevance and implementation and, at a deeper level, on the meaning of civil society and a humane world. As we enter a new century of economic globalisation these are the issues that will need to be addressed.

We can all agree that torture is a serious infringement of human rights, and many of us support Amnesty International in its efforts at eradicating this practice. The decision of the House of Lords in upholding at least part of the case against General Pinochet, refusing to allow him to hide behind the shield of state sovereignty, was surely right (*Ex Parte Pinochet* 1999). But what about children sold into sexual slavery, handcuffed to beds or kept in cages and brought out for the benefit of tourists and businessmen who want anonymous sex without the fear of HIV/AIDS? Is this torture? Is the abuse of women, children and even men in the home, or harassment in the workplace, a breach of international human rights? Are the violent dispossession and removal of indigenous peoples and peasants from their land in the name of economic development or national cohesion contrary to international law? If the Albanian Kosovars of Yugoslavia or the East Timorese have a right to be free of violence, 'ethnic cleansing' and abuse, then do not these rights also apply to Aceh and West Papua, Tibet, the Karen peoples of Burma, the Kurds, the Palestinians, the Chechens? Are human rights and decolonisation only applicable to the exotic and the strange? Do the Basque people of Spain and France, the Québecois, the Polynesians of Hawaii, the Spanish-speaking population of Puerto Rico also have rights to self-determination?

Human rights are not only about these more obvious forms of violence. Is hunger an abuse of the human right to an adequate standard of living and if so how can this be implemented? What about the high death rates of children from malnutrition, disease and neglect in many parts of the world? The UN Convention on the Rights of the Child has been ratified by every nation on earth with the exceptions of the United States and Somalia. And yet children suffer and die in the thousands every minute of every day. The holocaust of HIV/AIDS is destroying whole generations of the young and strong in much of Sub-Saharan Africa, the Caribbean, South and Southeast Asia, Latin America and Eastern Europe. The world has been frighteningly slow to respond effectively. This is not only an issue of the right to health but also of the corporate rights of pharmaceutical companies and the power of economic globalisation, the clash with cultural diversity, sexuality, gender, even mass murder (Lewis 2001). What about the renewal of so-called 'fundamentalist' religions demanding specific codes of behaviour for women in particular? Why is the veiling of Islamic women described as a breach of human rights by so many Western commentators, but the reduction of abortion services or the censoring of the 'media' in First World countries in the name of 'family values' and Christianity not? What of the abuses committed by multinational corporations and other private investors in co-operation with governments and international institutions in their search for profit? There is ample evidence that the disparity between the very rich and the very poor is widening, that the

middle is eroding and that poverty is getting worse not better. Is this a question of human rights, or is it merely a matter of the operation of blind market forces moving inexorably towards a world of free trade and unfettered corporate investment?

I am primarily concerned with the history of international law and human rights and their association with the projects of European colonialism, decolonisation and globalisation. Colonisation began in Europe itself more than a thousand years ago and continued with its expansion throughout the world by the beginning of the twentieth century. This has resulted in a resolutely Eurocentric perspective in most disciplines including international law and human rights. The word 'Eurocentrism' has been defined to mean

> the imaginative and institutional context that informs contemporary scholarship, opinion, and law. As a theory, it postulates the superiority of Europeans over non-Europeans. …On a global scale, this results in a world with a single center – Europe – and a surrounding periphery. Europe, at the center (Inside), is historical, invents and progresses, and non-Europe, at the periphery (Outside), is ahistorical, stagnant, and unchanging.
>
> (Battiste and Henderson 2000: 21)

'Eurocentrism' is not limited to Western Europe but also includes former white settler colonies in North America and elsewhere, principally the United States but also including the rest of North and South America, Australia, New Zealand and southern Africa. For this reason I prefer to use the phrase 'Euro-American' unless the context warrants otherwise. But it is meant to be synonymous with this geographically expanded definition of 'Eurocentrism'.

The relationship between supposedly 'universal' values embedded in international human rights law and the complications and challenges posed by cultural difference is also discussed. As Antony Anghie has pointed out, the 'universality of international law is a relatively recent development'. It could not be said to have been really established until 'the imperial expansion that took place towards the end of the "long nineteenth century"' (Anghie 1999: 1). Questions of universality cannot therefore be properly addressed without facing squarely the history of European colonialism. Surprisingly, relatively little attention has been paid to the relationship between colonialism or imperialism and international law, including human rights, until very recently (Berman 1999). Anghie postulates this as a problem of sovereignty. As European states became increasingly rigid embodiments of sovereignty they contrasted themselves with sites of 'non-sovereignty' in the rest of the world. Once the colonial project was largely complete (by 1900) the entire world, with a few exceptions, was subject to Euro-American authority. Most of the world's population therefore could be seen as 'non-sovereign' and unproblematic in terms of legal theory if not in terms of political reality (Anghie 1999: 3). My own view is that this historical blindness is much more complex and has much more significant social, cultural and even

psychological reasons lying behind it. As Anghie also notes, sociological perspectives preceded questions of sovereignty for European colonisers. The resulting failure to accommodate difference without conquest or violence has profoundly shaped our world.

'Sovereignty' is, according to Martti Koskenniemi, an extremely ambiguous term. He divides sovereignty into 'external sovereignty' or 'independence' and 'internal sovereignty' or 'self-determination'. By the end of the nineteenth century states came to represent the principle of independence in international law, meaning the power to exercise the functions of a state to the exclusion of all other states within defined territorial boundaries (Koskenniemi 1989). It was not, however, until after 1960 that this principle of sovereignty was applied to most of the world's peoples through their exercise of a right of self-determination in achieving external sovereignty, or independence, as nation-states. This process of decolonisation or nation building was presumptively built on the post-war international legal order's return to a natural law theory of rights pertaining to individuals, not just to states. New nation-states formally adopted principles of human rights directly from international law (principally from the Universal Declaration of Human Rights) into new constitutions and regional human rights arrangements in Europe, the Americas, Africa and even Asia. Since then human rights appear to have become the new civil orthodoxy of morality in international politics and law (Ignatieff 2001).

But this process of nation building essentially grafted the older positivist notion of state sovereignty onto a plethora of new states most of which are culturally non-European. Even where Europeanisation was deeply entrenched most states have begun to depart from their colonial pasts as decades or even centuries of European colonialism begin to disintegrate and native or homegrown social and cultural traditions resurface or are newly invented in the quest for an anti-colonial or 'post-colonial' national identity. Human rights, supposedly 'universal' in application, have suffered through lack of implementation and enforcement, neglect or, more controversially, through a lack of cultural 'fit' (or so it is sometimes argued) between mainly civil and political rights and the demands of new national orders. Nation-states continue to grapple with the complexities of modern political structures that are often antithetical to pre-existing cultural or social patterns and political arrangements. In addition the weight of Euro-American economic superiority, most recently 'universalised' through the process of globalisation, has increasingly buried new nation-states under mountains of debt, poverty, disease and dysfunction. Both new and old patterns of social structure frequently collapse through civil and interstate war, famine, environmental devastation, expropriation of land, and rapid urbanisation.

Human rights are fundamentally about challenges to the notion of state sovereignty. The late twentieth-century expansion of economic trade and financial arrangements across international boundaries is also a significant challenge to state sovereignty. The trajectory of law and international relations in the twenty-first century must deal with these two major forces and how they can be reconciled (or not) with the sovereignty of the state. Although economic globalisation is

frequently seen as the more significant of these challenges, political and legal globalisation through international law, labour law, human rights and environmental regulation is rapidly developing as the twin force for change. Disruptive riots in Seattle, Melbourne and Quebec City have highlighted this uneasy relationship. In fact economic decisions are primarily political and legal in nature and major international economic players (including states) are becoming increasingly aware of this, partly through the noisy insistence of the millennial street fighters. Human rights and environmental regulation within international law are developing as the constitutional framework for global governance by which economic liberalisation might be tamed. States, especially new nation-states, are caught in the middle. The theoretical construct of the state in international law is struggling to adapt to these twin challenges.

The impact of these revolutionary processes on indigenous peoples, women, children and other disadvantaged groups has often been devastating. This book focuses on indigenous peoples and women in an attempt to deconstruct and perhaps reconstruct the meaning of 'humanness' as it applies to human rights within international law. I would suggest that decolonisation is an immensely more complex process than international law has hitherto acknowledged. It involves seriously questioning the meaning of universality and its association with European humanism and the Enlightenment as partners and beneficiaries of the colonial mission overseas. As decolonisation continues to undermine the long history of European colonialism different cultural patterns will continue to emerge making the applicability of international law and human rights more and more complex. To dismiss this trend as a misconceived and fuzzy idea called 'cultural relativism' or, more bleakly, as a descent into chaos is to miss the great challenge that the new cultural renaissance of the twenty-first century presents. The changing nature of state sovereignty, a global marketplace, human rights (including labour standards), the environment and the effect of burgeoning and often aggressively defended cultural difference are the five interrelated pillars of historical change through which we are currently moving.

The first five chapters of this book attempt to paint a picture of the history of international human rights with a relatively broad brush. Chapter 2 traces the history of the Universal Declaration and human rights in the immediate aftermath of the Second World War. It also looks further back to theories of the Enlightenment in establishing the parameters of how human rights have developed. Kantian and Jeffersonian contradictions are specifically referred to. Chapter 3 attempts to make this history more complex by asking whether colonialism was in fact a one-way street and the gift of Enlightenment and human rights to the world entirely a matter of Euro-American diffusion. It is proposed that a much more complex process took place in which indigenous peoples and women played a prominent, though often hidden, role. Nevertheless, the weight of European colonialism buried this more complex history under the notion of the universality of international law and human rights. Ideas about 'humanness' that developed in European debates on the meaning of civil society borrowed from indigenous sources while genocide, slavery and misogyny flourished.

Chapter 4 then turns to look specifically at the construction of the individual in social theories of the eighteenth and nineteenth centuries and the nature of subjectivity as it is incorporated into human rights. The impact of militarism and the creation of gendered categories of individuality or the 'citizen' are raised and related to the difficult subject of sovereignty. Chapter 5 refers to a different kind of history, i.e. the definition of history as written or literate. The problems of literacy as a human right and the impact of writing and printing on the nature of human subjectivity and the development of human rights are discussed.

The final five chapters build on this historical and theoretical material by looking at specific rights or problems in human rights. Chapter 6 discusses freedom of expression within the context of the development of intellectual property laws, especially copyright, and the discussion of literacy in Chapter 5. Chapter 7 focuses on self-determination, particularly from an indigenous perspective, and the importance of language and culture in the creation and fulfilment of collective or 'peoples' ' rights. Chapter 8 discusses in detail the problem of violence and its inadequate treatment in international human rights law, referring back to the nature of subjectivity and the category of the 'citizen' discussed in Chapter 4. Chapter 9 contrasts civil and political rights and self-determination with socio-economic rights, especially the rights to food, freedom from hunger and access to adequate medical treatment in relation to the HIV/AIDS pandemic. Again the role of women and indigenous peoples is emphasised. Questions as to the implementation or enforcement of human rights are raised within the wider context of economic globalisation. Chapter 10 concludes by proposing five challenges facing international human rights and possible ways forward in reconstructing human rights for a new era of globalisation and cultural revival.

To question the fundamental premises of human rights looks like a dangerous thing to do given the precarious nature of human freedom, security and solidarity around the world. But without questioning our basic assumptions about human rights we leave ourselves vulnerable to inaccurate assumptions about the nature of human identity, cultural diversity and the hangover of colonial thinking posing as universality. As we stumble into a new century the rights discourse seems to have been momentarily captured by Western commentators who maintain that human rights are coterminous with corporate capitalism and individual initiative. Anything else is dismissed as a form of 'political correctness' antithetical to 'real' human rights. Individualism is seen as axiomatic to human rights, essential to the competitive nature of 'Man', and any reference to collective or co-operative values is dismissed as a laughable or even dangerous degeneration into romanticism, socialism or cultural relativism. In some senses this conservative view of human rights has become the new ideology of the post-Cold-War world.

We still seem to be caught in the illogic of our own passionate attachment to divergent ideas about nationalism, universality, humanitarian concern and the rights of both individuals and peoples. During the past hundred years or longer the call for equal rights by women, former slaves, indigenous peoples, the poor, the disabled, gays and lesbians, and even children has become a powerful force for

political debate and legal change. Too often, however, human rights discourse is constrained by boundaries which make the rights of the vast majority of human beings seem marginal, 'alternative' or irrelevant. International human rights can be a necessary tool in bringing all human beings into the centre of discussion over the division of resources and power in this world, or they can be used as a rhetorical device for sidelining most humans into a kind of international darkness.

As war began in March 1999 with nightly bombing in Kosovo and Serbia (brought to us in intimate and uninformative detail by the technological miracle of the televised military briefing) the massive war in Central Africa was almost completely ignored. On that memorable northern spring day of 24 March 1999 another announcement of another atrocity on the borders of Uganda appeared in small print on the back pages of the American national press. Member-states of NATO and their allies (such as Australia) prepared to take in thousands of Kosovar Albanian refugees. At the same time hundreds of thousands of Africans displaced by war, famine and terror in Sierra Leone, Sudan, Somalia, Ethiopia, Eritrea, Rwanda, Burundi, Angola, both Congos and many surrounding states were left to their misery in almost complete obscurity. People struggling for self-determination and human rights in Asia, the Pacific, Africa and the Americas are still routinely dismissed and ignored. In former President Clinton's words, we cannot leave any people behind based on the belief that this is 'just how they are'. At the end of the twentieth century East Timor, after centuries of colonial rule by Portugal and decades of violent oppression by Indonesia, seemed on the point of tremendous hope and potential horror – again – while the world focused its attention on another tragedy in southern Europe. Then, early in the new century, one old man did finally catch his flight from London to Santiago.

Human rights have become a kind of civil religion to many, especially in the West. Conor Cruise O'Brien borrows the phrase from Rousseau as meaning 'the religious dimension of the polity', or the 'cult of liberty' best represented by the American experience of civil rights and freedoms. O'Brien suggests that the phrase can be generalised to mean a belief in human rights going beyond law or political freedoms (O'Brien 1998: 301–325). International human rights have developed into a powerful ideological device both for and against the peaceful resolution of disputes and the equitable division of political and economic power. They are also a foundational principle of legal order in the world competing directly with older patterns of *realpolitik*, economic development and state sovereignty. Human rights cannot be dismissed simply as the colonialist imposition of Western values or the cynical manipulation of an outdated 'meta-narrative' of Enlightenment. Nor should they be relegated to the level of propaganda in the modern temple of law and political grandstanding posing as principle. Despite British Prime Minister Tony Blair's assertion that the action against Yugoslavia over Kosovo could be described as 'compassionate bombing', rights cannot be established or maintained through force. Only the long hard work of sustained self-examination, negotiation, reciprocal respect, responsibility, imaginative law reform and the input of significant political and economic resources can achieve some measure of peace, stability, equity and freedom in this deeply damaged world.

2 White man's rights

> We look forward to a world founded upon four essential human freedoms: Freedom of speech and expression; Freedom of every person to worship God in his own way; Freedom from want; Freedom from fear.
>
> (Franklin D. Roosevelt)[1]

The Universal Declaration of Human Rights

Where do human rights come from? A full history of the debates, deals, failures and triumphs of human rights within the bureaucratic maze of the United Nations would be a fascinating one but it is beyond the boundaries of this book (see Green 1956; Henkin 1978; Humphrey 1984; Morsink 1999; United Nations 1995; Waltz 2001). The foundation for the human rights principles contained in the Universal Declaration of Human Rights is the American Bill of Rights and the French Declaration of the Rights of Man and the Citizen, but this is far from being the full story. Although the search for origins is probably futile some understanding of the different threads that have gone into the making of human rights might help to ground the current debates over their relevance and implementation.

The idea of an international 'Bill of Rights' goes back to the 1920s or earlier (Dowrick 1979: 5; Waltz 2001: 50–51). The introduction of human rights into international law was an important feature of the post-war years, although this may be more a product of hindsight than a genuine reflection of the priorities of the time. Franklin D. Roosevelt's 'Four Freedoms' speech in his State of the Union address in 1941 is often credited with laying the foundation for the incorporation of human rights in the post-war international order (Burns 1970: 33–35; Waltz 2001: 45). Human rights first became a significant part of international law under the Charter of the United Nations 1945 and the Universal Declaration of Human Rights 1948. The Declaration is a resolution passed by the United Nations General Assembly, not a binding treaty. But, as Louis Henkin has noted, even in 1948 some saw it as elaborating on references to human rights contained in the Charter itself (1978: 96–97). Since then it has almost certainly crystallised into customary international law (Brownlie 1992: 21). Some provisions may even have achieved the status of *jus cogens* or 'peremptory norms' of international law taking priority over all other customary law and even treaty obligations (Vienna Convention 1969, Art. 53; see also Charlesworth and Chinkin 1993).

The vote for the Declaration was forty-eight countries for, none against, two absentees (Honduras and Yemen) and eight abstentions (Brownlie 1992: 21). Honduras later stated that if its representative had been in the General Assembly at the time the vote was taken Honduras would certainly have voted in favour of the Declaration (Green 1956: 29). The list of those who abstained is revealing. Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, the Soviet Union, Yugoslavia, Saudi Arabia and the Union of South Africa all found it impossible to vote either for or against the Declaration (Brownlie 1992: 21). Byelorussian SSR and the Ukrainian SSR are now the independent states of Belarus and Ukraine. At the time they were both part of the Soviet Union but still had separate votes in the General Assembly (Burns 1970: 567–568). It is interesting to note that these countries, although they disagreed profoundly with some provisions of the Declaration, did not want to vote against it. This was considered significant at the time as an indication that even those who disagreed with some provisions were not prepared to reject it in principle (Green 1956: 29).

Not only Eastern bloc countries had their doubts. Canada also nearly abstained in the final vote even though Professor John Humphrey of McGill University had participated in writing the first draft of the Declaration and strongly supported its passage (Waltz 2001: 58). In a preliminary vote in the Third Committee of the General Assembly on Social, Cultural and Humanitarian Questions Canada *did* abstain, shocking nearly everyone (Humphrey 1984: 71). Canada finally voted in favour of the Declaration in the plenary session of the General Assembly on 10 December 1948, thus avoiding the permanent embarrassment of having abstained in the company of the communist Eastern bloc and apartheid South Africa. But the Canadian government, offering a rather weak *ex post facto* explanation, remained sceptical (Humphrey 1984: 73).

States that took a positive role in the drafting of the Declaration included Australia, Chile, (pre-communist) China, Cuba, France, India, Iran, Lebanon, Panama, the Philippines, the United Kingdom, the United States and Uruguay (Green 1956: 24–29; Waltz 2001: 55–56). Afghanistan, Burma, Ceylon (now Sri Lanka), Ethiopia, Iraq, Haiti, Liberia, Pakistan, Syria, most of Latin America and all the Allied powers were members of the UN General Assembly at the time and voted in favour of the Declaration. South Africa did not vote for the Declaration in view of its developing policies on apartheid that would eventually lead to its expulsion from the United Nations, the Commonwealth and most other international groups. Its stated reasons were that the provisions were too broad and would give rise to legal liability in international law. This may well lie behind Canada's near-abstention. As Humphrey points out, the South Africans were right about the document creating legal obligations (1984: 72–73).

The wide representation of nations voting for the Declaration portrays perhaps a surprising unanimity among a range of different political and cultural traditions. Ensuring that the Declaration was sensitive to 'differing religious traditions, political philosophies, legal systems and economic, social, and cultural patterns' that were represented among the fifty-eight members of the UN at that time was a primary goal of the drafters (Green 1956: 26–37). These included eminent international

figures such as Eleanor Roosevelt and leading international scholars and diplomats such as René Cassin of France, P. C. Chang of China, Hernan Santa Cruz of Chile, Charles Malik of Lebanon, Omar Loufti of Egypt, Hansa Mehta of India, Carlos P. Romulo of the Philippines and Alex P. Pavlov of the Soviet Union (Buckingham 1999: 28; Waltz 2001: 57–61). The hope was to reach as wide a consensus as possible and this seems to have been achieved with the exception of the Eastern bloc. It should not go unnoticed, however, that most of the principal drafters were male. It was mainly a few determined women in delegations from the developing world and smaller nations, such as Hansa Mehta of India or Jessie Street of Australia, who pursued issues of sex discrimination within the UN at this time (Waltz 2001: 63–64).

The Declaration went through extensive discussions and revisions *before* reaching a vote in the General Assembly plenary session on 10 December (under the warmly supportive chairmanship of Australia's H. V. Evatt). From the first drafting or 'nuclear' committee of the newly formed UN Human Rights Commission, to the full Commission (both under the guidance of Eleanor Roosevelt), and finally to the Third Committee of the General Assembly the debate included all member-states of the UN (Waltz 2001). The debate in the Third Committee lasted nearly three months. Every article was thoroughly discussed (Humphrey 1984: 23–72).

The claim by some cultural relativists that this document represents a Western imperialist imposition of standards on non-Western cultures is weakened by the widespread support for the Declaration in the General Assembly in 1948 (Maritain 1949; Waltz 2001: 46). It is true that most of Africa and much of Asia and the Pacific were still under colonial rule at this time so could not be represented in the drafting or passage of the Declaration. Nevertheless there was, significantly, broad support among a range of different cultural and political traditions including Islamic, Asian, Latin American and African. The discussions were by no means dominated by the Western powers although they obviously played an important role (Waltz 2001: 47–48).

> In an incident recounted by both Eleanor Roosevelt and John Humphrey, Chang took an early opportunity to establish that the Universal Declaration could not be a simple reflection of Western philosophy – and to that end, he advised UN staff to embark on a study of Confucian thought. Chang was remembered and appreciated for two kinds of contributions. On one hand, he regularly caught the attention of other delegates by referring to Chinese practice or quoting a pertinent Chinese proverb. Official records reflect some of these contributions, and in some instances they appear to have had the effect of helping delegates appreciate an alternative perspective and move beyond an impasse. Third Committee records note his advice to sweep the snow in front of one's own doors and overlook the frost on others' rooftiles.
>
> (Waltz 2001: 59)

Representatives from Latin America, the Soviet Union and the Middle East ensured that the Declaration contained economic, social and cultural rights

going beyond an Enlightenment view of human rights as civil and political rights only (Waltz 2001: 63). Humphrey himself had put such rights into his original draft. Both Eleanor Roosevelt and the British delegation supported them. The most controversial issues revolved around whether to include some reference to the Deity in the Declaration, and over the substance of Article 18 on religious freedom. In the end no reference to either 'God or nature' was made in the Declaration. The Article 18 reference to the right to change one's religion was hotly contested by representatives from Saudi Arabia, Lebanon, Afghanistan, Iraq, Pakistan and Syria.

> [I]n the Third Committee [Arabia's representative] Jamil Baroody had said that the provision in Article 18, which recognizes the right of everyone to change his religion or belief, was contrary to the rule of the Koran, an interpretation which was challenged in plenary by Sir Mohammed Zafrullah Khan, a Pakistani Moslem.
>
> (Humphrey 1984: 72)

At the plenary session, however, only Saudi Arabia among majority Muslim nations abstained.

The Declaration and the development of binding human rights law were seen by some as a possible means of maintaining global peace and security as well as creating a more just and equitable world order. The backdrop against which the UN Charter and Declaration were drafted was, however, one of deepening schisms among the Allied powers themselves. By 1948, when the Declaration was passed, the Cold War had already begun. The expansion of nuclear weapons symbolised by the acquisition of the 'Bomb' by the Soviets increased this sense of threat.

> [T]he starry eyed delegates and self-congratulating diplomats present at the Palais Chaillot, in the shadow of the Eiffel Tower, at the birth of the first New World Order in December 1948 failed to notice that the Berlin airlift had just begun, made necessary by Stalin's petulant decision to seal the city against road and rail transport. …The Soviet ambassador to the UN gave a tight, abstemious smile as he explained the Soviet abstention to the newsmen: the Declaration, he said, was 'just a collection of pious phrases'.
>
> (Robertson 1999: 30–31)

It is too easy to romanticise the efforts of the drafters of the Charter and the Declaration. There is no doubt that the horrors of world war were very much on their minds in attempting to establish a peaceful and humanitarian global regime. The prominence of human rights within the UN was not, however, the original purpose of the organisation. The 'Great Powers' were intent on creating another version of the League of Nations, but one with a little more muscle. It was only after 'last-minute pressure exerted on the US delegation by a group of American non-governmental organizations (notably, the American Jewish Congress and the National Association for the Advancement of Colored People)' that human rights

were elevated into a primary purpose of the UN (Robertson 1999: 23). The role of NGOs generally was crucial to the drafting of the Declaration (Korey 2001; Waltz 2001: 48). But, as Mark Mazower has reminded us, anti-Semitism did not disappear in Europe or elsewhere after the Holocaust was revealed to the world by Allied soldiers in 1945. Indeed it appears to have intensified as Jewish survivors tried to re-establish their lives either in their old homes (which had frequently been taken over by others), or as immigrants overseas; or as they tried to reclaim their property, a process which is still continuing (Mazower 1999: Chapter 6). Racism of another kind has remained a problem in Europe and elsewhere despite gains made from the early 1960s onwards. Sexual discrimination against women is still inadequately dealt with despite the demands of women's rights activists and feminists that gender discrimination is as serious as racism in most societies (Charlesworth *et al.* 1991). This form of human rights abuse did not receive any significant attention until the 1970s. This was so even though the elevation of a sub-commission on women's rights (set up under the UN Commission of Human Rights in 1946) into a full-blown Commission on the Status of Women was, at the time, a considerable achievement (Stamatopoulou 1995: 40–41). Other major human rights abuses such as genocide, torture, even slavery continued throughout the second half of the twentieth century and remain unresolved problems in international and national affairs (Mazower 1999: 210).

The Holocaust

In writing a book about international human rights, and especially one that purports to offer some sort of historical explanation for their manifestation and expression, it is impossible to avoid a discussion of the Holocaust. Yet, like Inga Clendinnen in her superb portrayal *Reading the Holocaust*, I still come away baffled and silent (Clendinnen 1998).

In the first two years in which a colleague and I offered International Human Rights as an undergraduate unit of study at the University of Sydney in Australia we invited a Jewish survivor of the death camps to come and speak to our students. The first year he came he described his own experience as a young man. He had fled Austria when it became clear that the Nazis were about to take over, sought refuge in Switzerland (which was denied) and ended up in France where he managed to evade detection for a number of years. Eventually he was sent off by railway to various different camps including Auschwitz. He described the killing work, the brutality of the guards, the cold, the lack of food and how desirable it was to get the last bit of soup because it was more nutritious. He said he only slowly realised that he and the others were not meant to survive – that their prisons were in fact death camps. He described his striped uniform and shaved head and how ordinary people in the streets would literally not see the work gangs of concentration camp inmates when they passed. At the end of his talk he gave us just one horrifying detail meant to shock – his description of a pile of bodies heaped up in a corner of a yard that had not been disposed of before the Allied troops came and liberated the survivors.

I do not know whether our guest ever really came to terms with what had happened to him or, like Primo Levi's suicide seems to indicate, had merely learned how to speak of it in quiet language that hid ongoing anguish (Anissimov 1999). He told us that he had not started to speak about his experiences until fairly late in life. This seems to have been a common part of the biography of many survivors. Talking to groups, especially groups of university and high school students, was, he said, one way for him to fulfil his obligations to those who had not survived, which included most of his family. He emphasised that the experience in the camps was deliberately designed to dehumanise the victims. His own view was that it had in fact dehumanised those who were committing the crimes. He expressed pity for the guards who had become brutes, no longer human.

The documentation on the Holocaust is overwhelmingly thorough and detailed. The record is very clear that Jews were targeted for elimination. But so also were gypsies or Roma people. Many others were of course also caught up in this system: civilians from all nations conquered by Germany, especially Poland; communists; gays and lesbians; the mentally and physically disabled; political agitators; pacifists; anyone deemed deviant by the German state. Even Allied servicemen were sent to the camps contrary to existing laws on the treatment of prisoners of war (Hague Convention 1907). By 1942 when the 'Final Solution' was begun in earnest 2 million Russian prisoners of war had already been shot or had died of exposure and starvation (Clendinnen 1998: 9).

Although we tend to think of Hitler and Nazi Germany as a horrifying aberration in European history, I believe this is a mistake (Rosenbaum 1998). The recurrence of fascination with this topic in academic, literary and popular culture (including the continuing debate over whether the Holocaust 'really' happened) indicates that we are still trying to come to terms with what the Holocaust means (Langer 1995). By the early twentieth century Western Europeans had convinced themselves that they did indeed represent the pinnacle of human achievement; that Europe really was the centre of the earth; that the peak of civilisation really did exist in Europe alone. The 'white man's burden' was the extension of this civilisation to the rest of the world. People genuinely believed this. Not just blatant racists, or xenophobes, or imperialist oppressors, but ordinary men and women had been convinced of the truth of this racially based propaganda. These included my own forebears and many others from all classes and nationalities of Europe and where European settlement has multiplied, as in the United States, Canada, Australia, New Zealand and southern Africa. Indeed many Europeans and people of European descent still believe this. It has become so ingrained that most of us are not even aware of our own Eurocentrism (Blaut 1993).

The Holocaust was a horrifying event that cut a deep wound down the middle of twentieth-century Europe. That wound is not, however, as some have maintained, a great chasm dividing us irrevocably from our brutal past. It is a very thin line. We have crossed it many times. If one is in search of memorials to the killing fields of the past and the present one should not limit one's

travels to Auschwitz. Indigenous peoples in the Americas, Australia and elsewhere around the globe have their own memories of horror to deal with as do the citizens of Armenia, Cambodia, East Timor, China, Russia, much of Africa (Chalk and Jonassohn 1990). A treeless valley in South Dakota, a sluggish stream in central New South Wales, a river bank in Rwanda, a small forest village in Vietnam – each are quiet memorials to an unspeakable past. Indeed it is hard to find a place on this earth which has not witnessed mass murder. Human rights were designed as an attempt to halt the killing. They have grown well beyond this aim. At the same time the international human rights movement appears to have failed to fulfil even this most basic goal, as witnessed by the dead of Rwanda in 1994 (Gourevitch 1999). Arguments that somehow these other examples of mass murder and terror are not 'holocausts' seem to those who still suffer from them to be a heartless quibble over terminology, or an attempt at another kind of 'holocaust denial' (Chang 1997; Rosenbaum 1998; Thornton 1987).

The Holocaust was, among many other things, a terrible awakening. But it has also paradoxically induced an even more terrible blindness and denial. It demands that we understand that the violence of ethnic tribalism is not confined to Africa, or Asia, or the Middle East, or the cities of Eastern Europe – it is here, at home – *We are the Savage* (see Conrad 1902; Lindqvist 1996). For many of us of West European ancestry this is still impossible to accept. International human rights provide one mechanism whereby we might atone for this terrible denial.

The second time our guest came to talk to our students he did not talk about his personal experiences but rather about the historical background to the Holocaust. He discussed the transformation of empires in Europe, the position of Germany, the movement of history across the continent in an attempt to explain what had happened. This account was less moving on one level but perhaps more revealing on another. How does one come to terms with such experience? How does one 'explain' the Holocaust (Bauer 2001)? For Europeans the Second World War and the mass killing of civilians was a revelation. It was easy for them, and for us, to forget the extent of murder that had gone on in overseas colonial territories both before and after the war. Europeans had created an image of themselves that could not accommodate such barbarity. To discover that the 'heart of darkness' was not in Central Africa, but in Central Europe, was a stunning realisation.

After the first talk ended each and every student came up and spoke to our guest at the front of the classroom. They also each had to touch him. Every student shook his hand or touched his arm or in some way made physical contact. My colleague and I both noticed it, indeed we did the same ourselves, but I still cannot explain it. Nor can I explain the tone of forgiveness in which this survivor spoke of his persecutors. I have heard this same note of forgiveness in the voices of indigenous people discussing their own sense of loss. It is not that anger and despair are not part of the emotional response any human being would feel if confronted by such experience, but rather as if, in order to continue as a human being, the anger and despair

must somehow be transformed into something else. I felt then, and feel now, that human rights are not just a set of legal doctrines or idealistic principles but are in fact part of a journey. This journey began in earnest long before the drafters of the Declaration were first shepherded into agreement by Eleanor Roosevelt or John Humphrey scribbled his first draft of a document on a piece of notepaper.

Decolonisation and human rights treaties

The world order that was envisioned after the Second World War was also built, over the profound objections of France, Belgium and other colonial powers, upon an agenda of decolonisation. Self-determination and conflicting definitions of human rights were made part of the post-war rebuilding agenda mainly through American and Soviet initiatives carried against the immediate wishes of older European colonial powers. This had also been an important part of the settlement after the First World War with a notable lack of success. Although the concept of 'self-determination' was not invented by President Woodrow Wilson (it owes more to Lenin) he nevertheless made it an important part of his plan for a post-war settlement that would guarantee lasting peace under the Treaty of Versailles and the League of Nations (Hannam 1993: 3). But Wilson could not even convince his own Congress of the wisdom of this plan.

Decolonisation became the principal expression of self-determination after the Second World War. Neither of these terms is present in the Declaration, although as Waltz points out, newly decolonised states seized on the drafting of the Declaration as an opportunity to extend human rights protection beyond the control of the colonial powers (2001: 65–66). With the brief exception of the United Kingdom under Clement Attlee's post-war Labour government, Europe was not anxious to divest itself of its colonial possessions. Self-determination and decolonisation came, however, to be defined as the right of human beings, contained within collective entities called 'peoples', to achieve the status of citizens within newly created nation-states or some other connection to an existing nation-state (UN Charter, Preamble, Arts 1, 2 and 55 and Chapters XI, XII and XIII). This principle was crystallised in Common Article I of the two main UN covenants on human rights in 1966. But the law of self-determination developed slowly only as it became clear through protracted anti-colonial wars in French Indochina, Algeria and elsewhere in colonial Africa and Asia that the old European empires could not be maintained. After 1960 the drive towards decolonisation and the creation of new nation-states accelerated rapidly. This was reflected in the attention paid to this process by the UN particularly with the backing of the Soviet Union and the Eastern bloc. By the late 1940s the United States had retreated towards a more conservative position and tended to see claims of self-determination in terms of the Cold War and the spread of communism. The division of the world into blocs unquestionably had a distorting effect, not only on the decolonisation process itself, but also on the development of human rights and their division into separate categories of rights.

Extensive treaty obligations have been created by the UN and other international bodies both globally and regionally since this early expression of human and peoples' rights. The rights protected include classic civil and political rights explicitly derived from Bills of Rights formulated in France and the United States in the late eighteenth century. These include freedom of expression, freedom of religion, the right to a fair trial, the right to participate in political affairs and other rights (Dowrick 1979: Introduction). International human rights also include economic, social and cultural rights developed as a result of Marxist, socialist and anti-individualist movements of the nineteenth and twentieth centuries. These rights include the right to work, the right to equal pay, the right to an adequate standard of living, social security, health, education and participation in cultural life, all of which are in the Declaration. Finally, and more contentiously, collective or 'peoples'' rights have been added to the individual rights with which we are most familiar. These include the right to self-determination, a closely associated right to democracy, the right to development, the right to control of natural resources, the right to a clean environment and the right to peace. Besides the two UN covenants specific conventions were drafted on genocide; refugees; human rights violations against civilians during times of war or armed insurrection; racial discrimination; women's rights; indigenous populations; the rights of the child; and migrant workers. There are also conventions dealing with specific infractions of human rights such as torture. The Rome Convention 1998 provides for a permanent International Criminal Court to try individuals for war crimes, crimes against humanity, genocide and crimes of aggression. Conventions are in force dealing with human rights violations on a regional basis in Europe, the Americas and Africa (see the Bibliography for references to all the above-mentioned human rights conventions). The Asia–Pacific remains the only part of the world that does not have its own regional human rights system. The European system was originally designed to cover Western Europe only but since the collapse of the Eastern bloc and the Soviet Union from 1988 to 1991 many former Eastern European countries have joined or are attempting to join European human rights structures. The American Convention is applicable to countries in the Western Hemisphere. Neither Canada nor the United States has ratified it. Nevertheless, they are bound by the American Declaration of the Rights and Duties of Man 1948. The Inter-American Commission on Human Rights can address complaints made under the American Declaration against a non-state party to the Convention under certain conditions (OAS 2000).

The two main covenants have a contentious history. The Declaration is supposed to represent global consensus on human rights, but when there was an attempt to create a binding convention incorporating the standards set in the Declaration it was not possible to draft a single document. The process of creating binding and to some extent enforceable human rights provisions within the UN took another eighteen years. Two covenants instead were necessary mainly owing to disputes between Western and Eastern blocs over the priority to be given to civil and political versus economic, social and cultural rights (Shestack

1984: 70–71). But temporary political differences do not provide a full explanation for the proliferation of human rights documents, or deep divisions over the content and standing of particular human rights or indeed any human right.

The Bretton Woods system and human rights

International economic law was also being transformed at the same time as human rights and self-determination became major principles in international law. But the two discourses rarely if ever conversed with each other. It is as if the international law of human rights and the international economic law of globalisation and development have been progressing within parallel universes. They eerily replicate similar principles (the universality of basic Euro-American economic and political principles; rights to control of natural resources and development; massive incursions into the concept of state sovereignty; the general spread of international law both within and between states) but never seem to touch. The one area of human rights that does directly address economic issues, economic and social rights, seems to have had no influence on the development of international economic law.

The massive post-war internationalisation (or globalisation) of currency values, monetary policy making, banking and trade developed out of the Bretton Woods Conference initiated by the United States and the United Kingdom in 1944. The World Bank and the International Monetary Fund were both created as a result of this Conference. A parallel trade body failed, but the General Agreement on Tariffs and Trade provided a mechanism for the regulation of international trade until 1994 when the World Trade Organisation was established (Guitian 1992: 5–10; Hudec 1990). The original goal of this system was to encourage the removal of trade barriers, rigid monetary and fiscal policies and gross inequities in wealth that, it was believed, would drag the world into another 1930s-style Great Depression after the Second World War. 'Keynesian economics', inspired by the work of British economist John Maynard Keynes, was the new orthodoxy (Keynes 1997). This included high levels of government intervention in fiscal policy through the manipulation of revenue raising and distribution and the creation of a secure social safety net. A more equal distribution of wealth would in turn, it was thought, encourage consumer spending. The thinking proved to be largely correct for European, North American and Australasian economies as the boom years of the mid-twentieth century attest (Galbraith 1998). These were largely driven by massive increases in consumer spending as well as rapid industrialisation fuelled by this spending, and by the expansion of the 'military industrial complex' (in the words of President Eisenhower), the aerospace industry and new technologies during the Cold War. This 'boom' came to a dismal halt in the early 1970s as 'stagflation' (combining inflation with recession, previously unheard of), the 'OPEC' oil crisis, and the increased removal of favourable trade arrangements between Europe and its former colonies brought seemingly impervious First World economies back to reality (Bruno 1985).

The Bretton Woods System went through substantial changes in the early to

mid-1970s. During this period fixed exchange rates, co-ordinated economic stimulation and use of the US dollar as the world's reserve currency were abandoned and development policies shifted to structural adjustment programmes in the new nation-states of the developing world (Sassen 1999). The World Bank had been set up to provide long-term financial assistance to countries in post-war reconstruction. After 1970 it refocused its attention on Third World development. Those states that gained independence after 1945 played no part in the setting up of these organisations and, as a result of weighted voting in which the interests of the major economic powers are safeguarded, still have little say in their management. Weighted voting means simply that the more a country contributes financially to the organisation the more votes it has, with the United States having by the far the greatest say. The WTO has abandoned such a system and all members now have an equal voice. The UN system provided an alternative structure that was more heavily influenced by developing nations but which has had little real power in economic policy formation (Onomode 1988; Tomasevski 1989).

But there are signs that the separation of economic thinking and human rights may be diminishing. The IMF was sharply criticised for the severity of the fiscal and monetary measures that it attempted to impose on Indonesia after the economic downturn of 1997–1998. These measures included a severe reduction in public spending, the removal of food subsidies and drastic measures to clean up corruption and 'crony capitalism' that had become endemic in Indonesia under Suharto (Wright 2000). During the 1999 East Timor crisis the IMF also insisted with unprecedented vigour that the human rights of East Timorese people must be respected. Indonesia's inability to implement many of these policies contributed to Suharto's fall from power in 1998. It also forced a certain modification of the stringency of fiscal measures the IMF was imposing on Indonesia. Although rooting out corruption and dealing with a serious banking scandal remain priorities of the IMF, and of the post-Suharto Indonesian government, the IMF has also been forced to reappraise seriously the social consequences of its policies. As a result the restructuring programme instituted for Indonesia has arguably proven less economically punitive than other so-called 'recoveries' in the past (see Orford 1997).

In 1991 the World Bank accepted the broad concept of development defined in the UN Declaration on the Right to Development (1986). The World Bank has committed itself to development policies that

> [encompass] not only higher incomes but also better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom, and a richer cultural life.
> (Shihata Ibrahim 1992: 28)

The World Bank is prohibited in its Articles of Agreement from straying into political or 'non-economic' territory. For example, in Article IV, paragraph 10 the Bank may not 'interfere in the political affairs of any member. …Only

economic considerations shall be relevant to their decisions' (1944 International Bank for Reconstruction and Development, Articles of Agreement, Art. IV, 10; Shihata 1992: 30). In addition the Bank must ensure that

> the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.
>
> (Article III, 5b; Shihata 1992: 31)

In the past such provisions have been used to limit the Bank's mandate to narrow considerations of economic efficiency and acceptability. The inclusion of broader issues is a new and promising step in the direction of the Bank's activities. Reduction of poverty became at the end of the twentieth century of much greater importance to Bank policies (World Bank 2001). In addition in 1996 the Bank and the IMF launched a programme to reduce the level of debt owed by the poorest countries (Kohler and Wolfensohn 2001). This, in combination with a greater awareness of the impact of Bank policies on the poorest, particularly women and children, has meant a reduction in spending on 'mega-projects' such as dams and greater attention to grassroots work. NGO consultation, through more open Bank processes of public scrutiny and review, also instituted in the early 1990s, has seen a positive change in the operation of the Bank towards the incorporation of civil society in its policy formation.

The consequences of IMF and World Bank policies on the economic well-being of a country can still be severe. Currency devaluations often translate into inflation as foreign imports rise in price. The aim is to make national exports more attractive, but where a country has little to sell overseas or where it relies on one or two commodities controlled by First World cartels the result may simply be a drastic lowering of the standard of living. Reduction in public spending may decrease a country's debt burden but the principal losses will usually be in the areas of education, health care, social assistance, poverty relief and the provision of basic supplies of food, shelter, clean water and reasonably priced fuel. Women usually have the primary responsibility for providing these essentials to their families. Where the state retracts from assistance in these areas the increased burden falls on women (Stark 1991, 1993; Wright 1995).

Development as it is channelled through the financial, monetary and trading wings of the 'Bretton Woods System' has tended therefore to entrench and extend a Western free market economic model in both the First World and the Third World. This capitalist model depends on growth and expansion, the proliferation and export of First World technology, the gearing of developing economies to servicing First World industrial needs and the exploitation and frequently despoliation of Third World economic, social and cultural structures as well as the environment (Hutton and Giddens 2000; Sassen 1999; Seabrook 1993; Shiva 1989). Women, children and indigenous peoples, because of their invisibility within the international economic system, have tended to suffer a

disparate proportion of the burden. Even more seriously the traditional unpaid labour of women as household workers, subsistence farmers and marketers, and as the providers of basic services, provides the safety net and supporting infrastructure for the international economic order. Without the exploited labour of women the system could not function (Seabrook 1993; Shiva 1989; Waring 1996).

The development of international law

Divisions over the importance of civil and political versus socio-economic rights have continued since the end of the Cold War, carried on now mainly between North and South or between the developed and the developing worlds. This is partly due to reluctance by many countries to provide adequately for the enforcement of civil and political rights, seeing these rights as a threat to the legitimacy of existing regimes that may have little or no popular support. The law of international human rights will generally only intervene where a state fails to live up to internationally binding obligations prohibiting interference with the private rights of individual citizens. Rights involving a more complicated relationship between individual and state, such as economic, social and cultural rights, present serious ideological problems for that 'most public of public realms', the international legal order (Charlesworth *et al.* 1991). Collective rights are also inherently threatening to this primary relationship between the state and the individual, or between public institutions and private citizens (see Barsh 1994). Self-determination, the most well recognised of collective or peoples' rights, is built on the premise that distinctive groups will inevitably move towards statehood or a formal relationship with a state that can be relatively easily accommodated within international law, as the proliferation of new nation-states since 1945 attests. Other collective rights, such as the right to development, the right to a clean environment, the right to peace and security, are viewed with enormous suspicion within the circle of the former colonial powers.

It was these powers, situated primarily in Western and Central Europe, who can be said to have invented modern international law with the Treaty of Westphalia in 1648. These European powers and their colonial settler offshoots (mainly the United States) have dominated its development up to the present. The treaty signed at Westphalia established the primacy of states based on territorial control. The primacy of the state has been the basis for all international law since (Charlesworth and Chinkin 2000: 23–25). The *nation*-state, with ethnic or cultural unity as a goal, came much later. The settlement represented by the Treaty ended the Thirty Years War that had engulfed most of Central Europe for the first half of the seventeenth century. Peripheral but no less radical shifts of power away from a continent splintered by competing aristocratic influences and religious schisms and towards absolutist monarchies (in France) or bourgeois governmental regimes (in England) were occurring at the same time. These included the English Civil Wars and Revolutions of the 1600s and the French religious wars of a slightly earlier period. Significant aspects of the dispute began

to spread overseas involving control of the principal trade routes (as in repeated wars between England and the Netherlands at this time) and the early establishment of European beachheads in Asia, Africa and the Americas. The Treaty also ended the assertion of political power by the Roman Catholic Church and began a process of sublimating European religious disputes into overseas evangelisation and colonisation. Violent confrontations over religion had largely disappeared in Europe by 1800, partly because of the transformation of these disputes into 'missions' among the 'savages'. The religious wars of the Reformation and Counter-Reformation in Europe could be safely set aside once they were transferred overseas.

The supremacy of the state and the dominance of natural law created the idea of natural rights for states protected by *international* law, and natural rights for individuals protected by *domestic* law (Anaya 1996: 13). This was the prevailing balance within the 'law of nations' until the nineteenth century. After the Congress of Vienna 1814-1815 the division of territorial states came to be dominated, not by naturalist theories of states' rights, but by positivist claims to the development of specific international legal norms based on each state's individual self-interest. Over-arching principles of natural law or divine ordinance were largely dismissed as 'nonsense on stilts' (in Jeremy Bentham's famous phrase). If the Westphalian period was the era of Hobbes, Locke, Grotius and de Vattel, the Vienna settlement was the era of Bentham, Metternich, Marx and Bismarck. Human rights as an aspect of natural law theories went through a significant decline only to be revived after the end of the last, great, modern European war in 1945. This conflagration seemed to show that positivist theories of legal development were inadequate in preventing major conflict and massive violations of humanitarian concern. The law of international human rights is therefore partly the product of a strong revival of natural law theories. But this time natural law has been used to transpose the natural rights of individuals from domestic protection to the international regime. Therefore the 'law of nations' now incorporates human rights. This represents a dramatic shift in international law.

The relationship between the development of international law, the expansion of European colonialism and the direction of European economic development has not been sufficiently highlighted among commentators and analysts (Anaya 1996; Anghie 1999; Berman 1999). It is clear that one of the foundations of the Peace of Westphalia and other treaties of the period was the retention of lucrative colonial possessions already obtained by France, Spain, Portugal and the United Kingdom. There is no doubt from treaties of the time that this purpose was intentional and that European claims to overseas territories were accepted as fundamental to the law of nations. For example, the 1670 Anglo-Spanish Treaty of Madrid, confirmed by the Treaty of Utrecht of 1713, stated:

> [T]hat the most Serene King of Great Britain, his heirs and successors, shall have, hold, keep, and enjoy for ever, with plenary right of sovereignty,

> dominion, possession, and propriety, all those lands, regions, islands, colonies, and places whatsoever, being or situated in the West Indies, or in any part of America, which the said King of Great Britain and his subjects do at present hold and possess.
>
> (Green and Dickason 1989: 60)

Grotius, de Vattel and other seventeenth- and eighteenth-century commentators tended to ignore indigenous claims while espousing principles of war and international law that furthered the colonial project. The significant exception was the very early Spanish commentator Francisco de Vitoria in his *De Indis Noviter Inventis* in 1532 (Anaya 1996; Green and Dickason 1989: 60).

Property and the public/private dichotomy in human rights

Human rights were incorporated into international law after the Second World War based primarily on their European roots in theories of natural law. But such theories carry with them significant limitations, at least for women and non-Europeans. Some ideas about natural law stress a proprietary basis for their existence. The genesis of rights within the American tradition is derived from the work of John Locke whose discussion of rights was centred on 'Man's' inherent rights to property in himself and what he produced by his own labour. Inherent rights to 'life, liberty and the pursuit of happiness' were strongly influenced by the desire of white men in the American colonies clearly to own and control property, including slaves, without state interference. The US Constitution was particularly designed to limit governmental interference in the private sphere with property rights underlying the whole (Macpherson 1975).

A closely related ideological foundation for human rights is the division between public and private. Usually this division is characterised as the separation of the state from interference in the 'private' realm of commerce and individual initiative. The effect is, at least theoretically, to protect property from state regulation. The separation of the public and private realms is also the basis on which the state is obliged to refrain from interfering in 'natural rights' such as freedom of expression, religion or privacy itself. The 'private' sphere also includes the home, or the domestic sphere, the putative domain of women and children. The key social structure within the private sphere, the middle-class family, itself went through a profound transformation from the sixteenth to the nineteenth centuries and again into our own time within European societies (Chartier 1989; Gottlieb 1993; Stone 1979). During the political, religious and economic revolutions of seventeenth-century Europe the position of women became ruthlessly subject to an ideology of extreme patriarchy (Stone 1979). By the end of the eighteenth century in Europe the more brutal aspects of this patriarchal rule were disappearing, at least in theory. The familial model became the closed, nuclear, bourgeois family, the site of 'virtue', affection, comfort and graciousness. Middle-class and aristocratic European women and children were

confined to the home to a much greater extent than in previous centuries and their economic role or value outside the home diminished. Women were not seen as participants in the public world of 'rights' and political and economic achievement. What few privileges they had previously had in relation to property or public participation disappeared. The subordination of women to patriarchal structures did not end with the development of liberal, or even later socialist, theories, but was entrenched in the new political order and conceived of as 'natural'. In 1776 (the year of the American Declaration of Independence) Adam Smith could write in his book *Wealth of Nations*:

> There are no public institutions for the education of women, and there is accordingly nothing useless, absurd or fantastical in the common course of their education. They are taught what their parents and guardians judge it necessary or useful for them to learn; and they are taught nothing less. Every part of their education tends evidently to some useful purpose; either to improve the natural attractions of their person, or to form their mind to reserve, to modesty, to chastity and to economy; to render them both likely to become the mistress of a family, and to behave properly when they have become such.
>
> (Quoted in Rendall 1987: 69)

Connections between the development of international law, European colonialism, theoretical bases for 'natural rights' and notions of proprietary control go a long way to explaining why there was and remains such a major disjunction between the international economic law of trade and development and the international law of human rights. The 'Bretton Woods' agreements and the UN human rights system represent major attempts at globalisation, but their shared theoretical basis requires a radical division between public and private. Human rights (including socio-economic rights) developed within the public sphere of the UN while international economic law seeks to reform and deregulate the operation of market forces in the private sphere of trade and development. Social, economic and cultural rights clearly indicate that this division is artificial and increasingly irrelevant. The impact that the freeing of money flows, banking practices and the unregulated operation of large corporations has in the public realm, such as in the apparent erosion of state sovereignty, further dissolves this dichotomy. As international economic and political structures move closer in the regulation of economic practices and their impact on human rights, labour rights and the environment this division will disappear. International law is now a major force for change across these lines.

The European Enlightenment

It is impossible to understate the importance of the Enlightenment on the development of modern human rights. In some ways it may be said that human rights represent the highest expression of Enlightenment philosophy. This philosoph-

ical tradition can be dated more or less from the end of the seventeenth century to the end of the eighteenth century. René Descartes' establishment of principles based on intuitive understandings prior to any empirical observation, and the division between intellectual and physical endeavour are important aspects of this transformation. The entrenchment of the belief in universal principles based on rationality, and the primacy of the individual thinker and actor personified as the rational European man, were also major developments during this time. Human and ecological diversity could be subsumed within this wider field of universal Truth and the contingency or ambivalence of reality could be ignored or characterised as an incomplete (as yet) manifestation of this Truth which would gradually be revealed so long as rational principles of scientific logic were applied. The particular understandings of indigenous peoples and others were seen as childish, mythical or inaccurate if they did not accord with the Truth as it was revealed to mainly European male discoverers and researchers.

The subject 'Self' of this perspective was the rational, self-aware, unified and sovereign individual best exemplified by European Man himself. All other human beings, along with existence more generally, were relegated to the category of objects to be observed, studied and analysed. The nature of this kind of subjectivity necessarily meant that, as human rights were developing as the natural birthright of 'Man', they could be confined to those individual men who created, benefited from and best represented this form of 'selfhood'. Women, indigenous peoples and many others were not seen as fully human. Their status further declined as they became objects of rational observation and their identities disappeared as autonomous subjects. The objectification and dismissal of most human beings as neither rational nor (as a logical consequence) autonomous became entrenched as a significant component of 'enlightened' thinking, so much so that it is extremely difficult to move beyond this paradigm even now at the supposed end of the colonial period.

The nature of Enlightenment subjectivity was seen, however, as a priori and universal, i.e. it was not theoretically dependent on cultural, racial or sexual variables. Thus, while it was always determinedly local and specific in content it could eventually be characterised as universally applicable to all human beings. The cultural specificity of this form of subjectivity became buried and masked by its claims to universality. Although human rights were originally devised in France and the United States as very specifically class, race and gender bound, their connection to universal Truth meant, at least theoretically, that they could be expanded to include all human beings. On the one hand this has tremendous liberating potential for human beings oppressed within social, cultural or political systems that devalue and denigrate the worth of the individual (Williams 1987). On the other hand, the form of subjectivity underlying human rights is itself culturally and temporally bound to a very short period of Western European history.

The expansion of this particular model of subjectivity, in the shape of human rights or constitutional forms of democratic government or other types of

political and economic 'progress', can also be justified on the grounds that the revolution of European Enlightenment is being given to the non-European world. International law can therefore see colonialism as inevitable and natural (Anghie 1996: 321; Otto 1999). More typically descriptions and analyses of international law have simply ignored its ties to colonialism even when discussing significant treaties or judicial decisions that are precisely about colonial relationships. International human rights cannot be seen as somehow separate from the colonial history of Europe more generally, or of international law more specifically, but are a quintessentially important part of this history.

Immanuel Kant

A key figure of the Enlightenment in the development of ideas about human rights and civil society (including the idea of the state based on rational principles) is Immanuel Kant. Kant did not fully develop his principles of political or constitutional structures, human rights or international law. He did not believe in the efficacy of revolutionary action. But the ideas of the late eighteenth century obviously greatly influenced his political thinking. Some of these thoughts can be found in *The Metaphysical Elements of the Theory of Right* first published in Königsberg in 1797 (Reiss 1991: 131–175).

Kant talked about 'right' as opposed to 'rights' but the relationship between the two concepts is apparent from his description of 'right':

> *The Universal Principle of Right* – 'Every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*.' Thus if my action or my situation in general can co-exist with the freedom of everyone in accordance with a universal law, anyone who hinders me in either does me an injustice; for this hindrance or resistance cannot co-exist with freedom in accordance with universal laws.
>
> Right is therefore the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.
>
> (Kant 1797: 133)

'Right', however, in order to be protected, must be contained within a system of positive law or 'public right' in which universal laws of freedom can be protected (Kant 1797: 136–137). Kant's notion of public right is intimately connected to his discussion of private right, or property. According to Kant, private rights to property can only exist where public right exists to limit external freedom. In a 'state of nature' possession can never give rise to property but is only ever provisional. Public right and private rights are therefore intimately connected through civil society, the state and, ultimately, international law. Where any one of the three spheres of public right fail adequately to contain unfettered external freedom the whole system will collapse.

The authority of the state relies on the legislated will of the people. This in turn is based on rights to citizenship including 'fitness to vote' which is crucial to the operation of the system. But 'fitness' depends on what type of citizenship a person has:

> The legislative power can belong only to the united will of the people. For since all right is supposed to emanate from this power, the laws it gives must be absolutely *incapable* of doing anyone an injustice. …The members of such a society (*societas civilis*) or state who unite for the purpose of legislating are known as *citizens* (*cives*), and the three rightful attributes which are inseparable from the nature of a citizen as such are as follows: firstly, lawful *freedom* to obey no law other than that to which he has given his consent; secondly, civil *equality* in recognising no-one among the people as superior to himself…and, thirdly, the attribute of civil *independence* which allows him to owe his existence and sustenance not to the arbitrary will of anyone else among the people, but purely to his own rights and powers as a member of the commonwealth. …
>
> Fitness to vote is the necessary qualification which every citizen must possess. To be fit to vote, a person must have an independent position among the people. He must therefore be not just a part of the commonwealth, but a member of it, i.e. he must by his own free will actively participate in a community of other people. But this latter quality makes it necessary to distinguish between the *active* and the *passive* citizen, although the latter concept seems to contradict the definition of the concept of citizen altogether.
>
> The following examples may serve to overcome this difficulty. Apprentices to merchants or tradesmen, servants who are not employed by the state, minors (*naturaliter vel civiliter*), women in general and all those who are obliged to depend for their living (i.e. for food and protection) on the office of others (excluding the state) – all of these people have no civil personality, and their existence is, so to speak, purely inherent. The woodcutter whom I employ on my premises; the blacksmith in India who goes from house to house with his hammer, anvil and bellows to do work with iron, as opposed to the European carpenter or smith who can put the products of his work up for public sale; the domestic tutor as opposed to the academic, the tithe-holder as opposed to the farmer; and so on – they are all mere auxiliaries to the commonwealth, for they have to receive order or protection from other individuals, so that they do not possess civil independence.
>
> (Kant 1797: 139–140)

The class, race, age and gender lines are absolutely explicit here. Civil and political rights, as the guarantors of private rights to property, are dependent on the possession of active citizenship rights or 'civil independence'. 'Independence' means 'not dependent', i.e. as having sufficient property so as not to be dependent on others for a livelihood (see Fraser 1989, 1996).

Kant is careful to point out that the possession of civil independence and consequent civil and political rights does not mean that all others are denied freedom and equality as human beings (Kant 1797: 140). The attainment of civil independence is something that 'all men' may be allowed to work their way towards. Women do not seem to be included in this general respect to be accorded to all human beings on the basis of universal laws of freedom. Also, the assumption is that all those males who are servants, children or dependent in some way must naturally wish to live in the kind of society Kant is postulating and must all want to attain the political rights of full citizenship. It is not clear how such passive citizens may actually demand any respect from anyone. The characterisation of those who possess active citizenship is clearly dependent on expectations about property rights and the possession of a certain class position which can only be attained by wealth or related status. Passive citizens are those who do not have sufficient property rights to justify their active membership in civil society. This clearly reflects late-eighteenth-century expectations about property rights, citizenship and the connection between property and civil rights (see Debene 1990).

Kant's characterisation of a 'state of nature' as prone to violence and injustice, although milder in its tone than others of the period, clearly harks back to an earlier understanding of the commonwealth and the state as discussed, for example, in Hobbes's *Leviathan* (1651). This thinking was clearly drawing on the colonial experiences of Europeans in the Americas. It was there that humans living in a 'state of nature' were thought to be really observable (Anaya 1996). By characterising indigenous peoples as 'savages' and non-Europeans, servants, women, children and others generally as, at best, passive citizens dependent on the will of others to ensure their equality and freedom within civil society or the state the colonial mission was justified and entrenched. This included the increasing sequestration of middle-class women and children in the home and the gradual stripping away of any property, public rights or privileges that women, servants and others may have previously held. What it ensured was an extension of the benefits of a patriarchal state to a brotherhood of middle-class male citizens while explicitly excluding others from those benefits and justifying the continuing subservience, dispossession and silencing of the majority of human beings (Pateman 1988). The inheritance that human rights owe to the formation of civil and political society in eighteenth-century Europe indicates a profoundly uneasy ideological base for their existence. It also indicates the main reason why, at least in the West, civil and political rights take such precedence over other kinds of rights. The roots of this division lie in the colonial history of Western Europe and the justification of the colonising project through the development of ideas about subjectivity, universality, public right and private property.

Kant himself is a significant figure in the development of human rights not only because of his ideas about political participation, constitutional law and the law of nations but also because of his more general ideas about the nature of human beings (Tesón 1992). For Kant, the dignity and worth of human beings stems from the internal autonomy of subjects who are 'ends in themselves' rather

than means to some external end. This internal unified subjectivity is the quality of all rational beings. It means that each individual is unique and priceless as a matter of moral certitude.

> Thus virtue [*Sittlichkeit*], and humanity to the extent that it is capable of it, is that which alone has dignity. Skill and diligence in work have a market price. Wit, lively imagination and humor have an affection price. But faithfulness in promises and kindness out of principle (not instinct) have an inner value. Absent these, neither nature nor art can set anything in their place.
>
> (Kant, quoted in Shell 1996: 148)

It is, however, important to be aware of the inner contradictions contained in Kantian thought. Although Kant's principles of morality and political reason are posited as universal there are significant 'loopholes'. Drusilla Cornell insists that we can adapt Kant's notion of 'freedom' (the capacity to coerce others so as to ensure their freedom harmonises with our own) to ideas of freedom for women (Cornell 1998:18). But, are women faithful and kind 'out of principle' or do we behave from 'instinct'? Even if we can expand this logic to include women, are we not sacrificing necessary and common features of humanity in the process? Why does acting kindly out of instinct (whatever this might be) disqualify any human being from being treated as unique and priceless? Why do these qualities rest on 'rationality'? By segregating human experience along lines separated by what is mental or spiritual from what is corporeal or material we replicate and reinforce distinctions between ourselves (as human) from the non-rational 'natural' world. We are also replicating yet again the division between public (rational) and private (material). Those humans who are deemed less rational, closer to nature, will necessarily fall more and more into the category of creatures who are not ends in themselves but means to ends, as chattels, tools, vessels, objects.

Jeffersonian contradictions

Thomas Jefferson is a compelling, even poignant, example of the deep contradictions at the heart of the Enlightenment revolution in political thinking that he most vividly represents. On the one hand Jefferson was one of the earliest and most ardent supporters of the principle of liberty and of stringent limitations on governments in interfering with individual freedoms. The Declaration of Independence, although not the first such statement of the importance of freedom, is nevertheless one of the clearest and most eloquent examples of this principle of liberty (Maier 1997; Schwartz 1992). Freedom, according to Jefferson, takes precedence over all other human rights including rights of equality and solidarity (*égalité et fraternitê*) which were also being developed at the end of the eighteenth century. It is clear from the Declaration itself and from the subsequently drafted Constitution and Bill of Rights that liberty is closely associated with the inherent right to own property which men

acquire through their physical, but especially intellectual, labour. Lockean principles influenced Jefferson's thinking. Liberty is defined as the right to be left alone, to do what one wants, to engage in 'the pursuit of happiness' at one's own discretion, to speak freely in political matters and to participate as a freely determined equal in the public sphere. These principles are at the heart of the American ideal of constitutional government and human rights. This legacy of liberty strongly coloured the drafting of the Universal Declaration of Human Rights in 1948 and all subsequent instruments outlining civil and political rights. These rights are arguably the pre-eminent expression of individual human rights in the world, taking precedence over socio-economic and collective rights. Indeed, in extreme versions, they are said to subsume socio-economic rights and the rights of the collective ('We, the people…') under the promise of individual freedom, personal accumulation and ownership of private property, and democratic political participation. The stress on individuality and the right to create conditions of socio-economic prosperity and happiness for one's self without interference are clearly inconsistent with the aims of egalitarian redistribution and sharing of material benefits and solidarity which are at the heart of social, economic, cultural and peoples' rights.

But in a discussion of Thomas Jefferson and the 'civil religion of liberty' Conor Cruise O'Brien points out the deep and seemingly intractable contradictions apparent in Jefferson's own life (O'Brien 1996, 1998). The principal problem as O'Brien sees it is the deep contradiction between Jefferson's views regarding liberty as the fundamental article of faith in the new Republic, and his own inability to recognise the right to liberty of others who were not white male property-owners like himself. Jefferson's views on anti-slavery are well known. They are, however, according to O'Brien, greatly misunderstood. On the Jefferson Memorial in Washington are inscribed the words:

> God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God? Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever. Commerce between master and slave is despotism. Nothing is more certainly written in the book of fate that these people are to be free.
>
> (Quoted in O'Brien 1996: 56)

O'Brien points out that the last sentence of this statement is in fact taken from a different source than the first four sentences, i.e. Jefferson's *Autobiography*, where the passage continues:

> Nor is it less certain that the two races, equally free, cannot live in the same government. Nature, habit, opinion has drawn indelible lines of distinction between them.
>
> (Quoted in O'Brien 1996: 56)

For Jefferson the solution to slavery was the removal of all Africans back to Africa or to some other place outside of America. Liberia was set up in the early nineteenth century as an American colony where freed slaves were sent to establish a homeland for all African–Americans. The creation of the English colony of Sierra Leone (whose capital is still called Freetown) performed a similar function for part of its history. Jefferson saw the institution of slavery as inherently corrupt, but the solution was not the recognition of the humanity, equality and freedom of African slaves *as fellow Americans*, but their removal. What most struck Jefferson and his contemporaries was the extreme difference between white and black, with the African seen as barely human. To some slave-owners (not including Jefferson) slavery was seen as a benevolent institution bringing Africans into the enlightened European values of Christianity, appropriate forms of labour, sexual morality and civilisation. For Jefferson slavery was a disease eating into the heart of Republican values, not because it destroyed the freedom of Africans, but because it betrayed the ideal of freedom for white slave-owners such as himself.

Jefferson's views on slavery and the rights of those held in slavery, and of freed slaves, appear to have been strongly coloured by his own inability to see Africans as human beings. As O'Brien points out, Jefferson was responsible for legislative proposals in Virginia restricting the freedom of liberated slaves and of severely punishing sexual relations between black men and white women (O'Brien 1996, 1998). This was despite his notorious relationship with one of his own slaves (Wade 1999: 20). Although Jefferson was an ardent foe of the slave trade he himself bought and sold slaves at will and was at least as unrelenting in pursuing runaways as his contemporaries were (Cohen 1969).

For Jefferson the right of liberty so radically proposed for 'all men' was not applicable to everyone. Slaves or freed slaves (inevitably African), women, the 'dependent' poor, children, or anyone else who did not fit Jefferson's own persona of the white, property-owning male had a much more tenuously recognised right to liberty or freedom than Jefferson's ringing phrases are usually credited with. The interesting exception to these views was his tolerance towards and even admiration of Native Americans (Jefferson 1782 in Koch and Peden 1998: 197–200). Women were clearly disappearing into the private realm at this period in history and even white middle-class women were losing rights over property, public participation and economic viability just as the 'rights of Man' were being consolidated and limited democracy was gaining acceptance. Slaves, children, foreigners were all largely excluded from the libertarian ethic. Even freed slaves or men of colour who were not defined by their status as chattels or dependants were not entitled to rights usually associated with liberty, such as ownership of property, the right to vote, the right to participate in public processes, freedoms of expression and assembly, etc. Institutions of freedom remained limited even in post-Revolutionary America, and the more radical ideals of *liberté* propounded during the early years of the French Revolution were quickly contained within the bourgeois limits of white, middle-class, male privilege (Landes 1988; Singham 1994)

3 Witches, slaves and savages

> They have brought me back seven head of women, girls and adults.
>
> (Christopher Columbus)

Memory and history

The idea of the 'rights of Man' has spread globally mainly through the agency and at the instigation of individuals and organisations developed during the colonial transformation of world politics from the nineteenth century onwards. This process is part of what has been called 'Eurocentric diffusionism' and is related to and dependent on colonialism. 'Diffusionism' is the process by which Europeans claim for themselves the capacity to spread civilisation and the benefits of European rationalism and enlightenment to the non-European world sharply separated from Europe and defined as non-rational, unenlightened, uncivilised and backwards. This mode of thinking began in earnest during the nineteenth century but has roots going back to the beginning of the European colonial period (Blaut 1993:18). This way of thinking has resulted in a resolutely Eurocentric or Euro-American view of the world. This is not, however, simply a prejudicial attitude easily eliminated. As Blaut says,

> the really crucial part of Eurocentrism is…a matter of science, and scholarship, and informed and expert opinion. To be precise, Eurocentrism includes a set of beliefs that are statements about empirical reality, statements educated and usually unprejudiced Europeans accept as true. …If they [European historians] assert that Europeans invented democracy, science, feudalism, capitalism, the modern nation-state, and so on, they make these assertions because they think that all of this is a *fact*.
>
> (1993: 9)

But this expansion or diffusion was a complex process in which much that was allegedly 'European' was taken from non-European sources and reintroduced in different guises and in different locations. The 'diffusion' of human rights thinking was not simply the introduction of this body of law to post-colonial constitutions or the new international order by former European powers. Often it was a process of

revolutionary struggle in which rights consciousness was forged out of direct opposition to colonisation. New rights or new approaches to human rights have been created out of the need to clarify the requirements of post-colonial societies, as in the demand for socio-economic rights or collective rights such as self-determination or the right to development. Even where the demand for freedom and equality bears a resemblance to modern human rights standards recognition of these rights may in fact rely on cultural traditions and understandings which pre-date European contact. For example, the Asante people of West Africa developed an elaborate system of constitutional checks and balances long before European colonisation. The memory of how human rights fit into this system still pervades Asante culture in Ghana (Davidson 1993: 53–63; Djorgee 1999). Black activists in the United States, principally Dr Martin Luther King, were directly influenced by the non-violent political and human rights agenda created by Mahatma Gandhi, an Indian educated as a lawyer in South Africa (Jack 1956). Sometimes human rights have been rejected altogether as a form of Western imperialism. Unfortunately this may involve the rejection of human rights traditions embedded within non-European structures that have nothing to do with imperialism, Western or otherwise.

Euro-American commentators tend to dismiss colonialism as a minor consideration in the search for universal standards. Discussion is usually limited to the topics of 'cultural relativism' or 'difference' as problems and how they may be contained or dealt with (see Ayton-Shenker 1995; Charlesworth and Chinkin 2000: 222–229; Kim 1993; Otto 1999; Perry 1997; Pritchard 1995; Tesón 1985). Commentators from the Third World are much more sensitive to histories of colonialism that may affect the expression and implementation of human rights in non-Western countries (An-Na'im 1990; Ghai 1994; Nesiah 1996; Pannikar 1982; Steiner and Alston 2000: 366–402). These perspectives explore the reciprocal influences between colonisers and colonised including a frequent interchange of roles with non-Europeans as colonial collaborators ('colonisers with brown faces') or legitimate beneficiaries of some aspects of colonial intrusion (see Alexander and Mohanty 1997; Ashcroft *et al.* 1995; Chatterjee 1993; Gandhi 1998; Pieterse and Parekh 1995; Williams and Chrisman 1994). Euro-American perspectives typically ignore the reality of cultural exchange that was an important by-product of colonialism, although one that was deeply coloured by the weight of insistently proclaimed European superiority. All sides in this debate frequently forget that the American Bill of Rights was itself a manifestation of anti-colonial struggle. The American Revolution was principally a civil war (arguably merely a continuation of the English Civil Wars of the mid-seventeenth century) but the rhetoric of human rights was easily transposed from an anti-monarchist to an anti-colonial arena that were both included in the American experience (Phillips 1999).

Human rights are at their core radical, even revolutionary, statements about the pre-eminence of human dignity and integrity (Schacter 1983). These statements, whether couched in the language of political struggle, or confined to the more sedate field of juridical claims and counter-claims, are often fundamentally opposed to the demands of political and economic elites. Our modern expressions of civil and political rights took on historically specific forms at the end of

the eighteenth century. They have become entrenched in the mythologies of nationhood of many countries and are contained within the constitutional norms of most modern nation-states (with Australia as the significant exception). But the development of even this 'first generation' of human rights and their roots in European and American history are much more diverse than is generally acknowledged. The European colonial experience was not an entirely one-sided imposition of white values, just as decolonisation is not a kind of gift granted by the colonisers to their dependants. In many cases our modern nations are not built on a remembered, or even a romanticised, past, but on the remains of what is buried, what we would rather *not* remember, on what is no longer necessary or permitted within national remembrance (Reynolds 1999). This includes the contribution that indigenous peoples and others have made to the development of human rights.

The Iroquois and the US Constitution

An example of human rights history only recently receiving much attention is the role indigenous cultures made to the constitutional development of the United States (see Jemison and Schein 2000). It can be argued, based on a serious reappraisal of the historical evidence, that the original Euro-American ideals of democracy, equality, liberty, civil rights, local autonomy and federal forms of government were at least partially borrowed from indigenous peoples in the Americas. Future American political leaders such as George Washington and Thomas Jefferson were aware of the sophisticated political organisations that existed in indigenous societies in the eighteenth century. The Haudenosaunee, or Iroquois Confederacy, seem to have inspired ideas about federalism, constitutional checks and balances, and even the formation of international institutions such as the League of Nations or the UN itself within European and North American minds. Benjamin Franklin as the Indian Commissioner for Pennsylvania for a time was also well aware of these ideas. Between 1736 and 1762 he and his partner, David Hall, carefully printed and distributed thirteen treaties between the Iroquois and the colony of Pennsylvania (Van Doren 1938).

The Haudenosaunee have insisted from the seventeenth century to this day that they are an independent federation of nations neither part of New France, New England, Canada or the United States. When the European colonists were looking for a model for their own union of states they gained inspiration from the example of the Six (originally Five) Nations of the Confederacy (Anaya 1991; Weatherford 1989, 1991; Wright 1993). As Canasatego, Chief of the Onondaga, told treaty commissioners from Pennsylvania, Maryland and Virginia at Lancaster in 1744:

> Our wise Forefathers established Union and Amity between the Five Nations; this has made us formidable; this has given us great Weight and Authority with our neighbouring Nations. We are a powerful Confederacy;

> and, by your observing the same Methods our wise Forefathers have taken, you will acquire such Strength and Power; therefore whatever befalls you, never fall out with one another.
>
> (Quoted in Van Doren 1938: x)

Onondaga Chief Oren Lyons maintains that the constant interaction between the Iroquois and white settlers throughout most of the seventeenth and eighteenth centuries meant that ideas inevitably changed hands (Nies 1996: 184–185). For the drafters of the US Constitution democratic models within Europe were scarce, whereas models of democratic governance in Indian Country were common. Not only the Iroquois and other northern groups but also the 'Five Civilised Nations' of the southern American colonies (Cherokee, Chickasaw, Choctaw, Creek and Seminole) provided more accessible models than did the nations of Europe. George Washington, Thomas Jefferson, Benjamin Franklin and others had frequent intercourse with Indians during negotiations, wars, peace settlements and land deals from the mid-eighteenth century onwards.

Perhaps the most famous and the most intriguing acknowledgement of such influence comes from Benjamin Franklin. In 1754 it was clear that war between the British and the French was imminent. A meeting was called that year in Albany, New York, of all the colonial Indian commissioners and the *sachems* of the Haudenosaunee and other First Nations. The colonists wanted the Iroquois at least to maintain neutrality during the war. Some did side with the British. But many eventually fought with the French who had a better record in dealing with Indian nations. The North American policies of France centred on the fur trade, involving heavy indigenous co-operation and involvement to their mutual benefit, rather than land-grabbing and colonial settlement which characterised the British policy south of the St Lawrence River and the Great Lakes (Nies 1996: 181–185). The Iroquois in particular were dissatisfied with having to deal with each British colonial administration separately. They complained of mistreatment by the British in America including land swindles by colonial administrators, bigotry, the slave trade and the liquor trade. Chief Hendrick of the Mohawks described how the British had

> thrown us behind [their] back and disregarded us, [while the French], a subtle and vigilant people, [were] ever using their utmost endeavors to seduce and bring our people over to them.
>
> (Quoted in Nies 1996: 184)

The *sachems* wanted the colonies to form a single union, to 'speak with one voice' as the Iroquois chiefs did. Franklin was at the Albany meeting as the Indian Commissioner for Pennsylvania. Partly in response to the demand of the chiefs, and partly out of a belief that the Iroquois example was necessary for the strengthening of the colonial presence in North America, Franklin drafted a preliminary document forming the basis for the subsequent Albany Plan of

Union (Franklin Papers 1962, Vol. 5). Under this Plan the colonies would set up a central council, maintaining their constitutional autonomy, but agreeing on a common course of action in relation to Indian, and other, affairs. The commissioners voted for the Plan but it was not ratified by the colonies.

Franklin was also drawing on an earlier plan that he had drafted for uniting the colonies. In a letter to James Parker of 20 March 1750, Franklin was clearly drawing on constitutional principles of confederation from the Iroquois and wrote:

> It would be a very strange Thing if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet, that a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary and must be more advantageous; and who cannot be supposed to want an equal Understanding of their Interests.
>
> (As quoted in Franklin Papers Vol. 4: 118–119)

This quotation is very famous and the subject of scholarly debate (see Nies 1996: 180–182; Wright 1993: 116). It appears in private correspondence attributed to Benjamin Franklin. The editors of the Franklin Papers accept its authorship (Vol. 4: 117–121). Although this can hardly be described as an unqualified endorsement of Iroquois constitutional arrangements, it is nevertheless an acknowledgement by a thoughtful European observer at this time in history of the value of looking at indigenous patterns of political and legal organisation.

The various proposed plans of colonial union strikingly resemble Iroquois constitutional arrangements (Johnston 1986). The Proceedings of the Albany Congress and earlier meetings show that the Haudonosaunee and other Indian nations fully participated in discussions of the Albany Plan and other arrangements (Franklin Papers Vol. 5: 344–353; Nies 1996: 180–182; Wright 1993: 126–133). Although the Albany Plan was rejected by the colonies, just twenty-three years later it influenced the Articles of Confederation of 1777, again partly drafted by Benjamin Franklin. This document drew directly on concepts of confederation outlined in the Plan and even borrowed language from the Iroquois (Nies 1996: 203). In 1788 a copy of the old Plan was found and Benjamin Franklin was asked to amend or comment on it. He submitted his final remarks in 1789 just as the Constitution of 1787 came into operation (Franklin Papers Vol. 5: 397–417). He concludes, probably correctly, that had the Albany Plan been accepted the severance with Great Britain may not have happened 'so soon…nor the Mischiefs suffered on both sides have occurred'. But the Crown had disapproved of it 'as having plac'd too much Weight in the democratic Part of the Constitution; and every [Colonial] assembly as having allow'd too much to Prerogative' (quoted in the Franklin Papers Vol. 5: 417). The American balance between democratic principles, federation, local autonomy and combined leadership, borrowed from the example of the Haudonosaunee, had taken another thirty years to achieve. Under the Articles of Confederation the Iroquois and

other Indian groups were treated as separate nations. The first ten amendments to the Constitution, the Bill of Rights of 1791, also drew on well-known and previously discussed elements of Indian political society (Nies 1996: 185).

Thomas Jefferson also had considerable experience with different Indian nations throughout his career and retained admiration for them tinged with his own sense of racial superiority. However, unlike his inability to see Africans as human (and whom he unfavourably compared to Indians) he saw the Iroquois and other indigenous nations as examples of freedom and independence that were compelling models for this ardent exponent of liberty (Jefferson 1782 in Koch and Peden 1998: 237–240). His reference to Indians in his Second Inaugural Address of 1805 is famous:

> The aboriginal inhabitants of these countries I have regarded with the commiseration their history inspires. Endowed with the faculties and the rights of men, breathing an ardent love of liberty and independence, and occupying a country which left them no desire but to be undisturbed, the stream of overflowing population from other regions directed itself on these shores; without power to divert, or habits to contend against, they have been overwhelmed by the current, or driven before it.
>
> (Quoted in Koch and Peden 1998: 315)

But Jefferson's other writings on Indians are perhaps more interesting. For example, in a letter to Colonel Edward Carrington of Virginia written in 1787 from Paris, Jefferson commented:

> I am convinced that those societies (as the Indians) which live without government, enjoy in their general mass an infinitely greater degree of happiness than those who live under the European governments. Among the former, public opinion is in the place of law, and restrains morals as powerfully as laws ever did anywhere.
>
> (Quoted in Koch and Peden 1998: 381)

And to James Madison two weeks later:

> Societies exist under three forms, sufficiently distinguishable. 1. Without government, as among our Indians. 2. Under governments, wherein the will of everyone has a just influence; as is the case in England, in a slight degree, and in our States, in a great one. 3. Under governments of force; as is the case in all other monarchies, and in most of the other republics. …It is a problem, not clear in my mind, that the first condition is not the best. But I believe it to be inconsistent with any great degree of population.
>
> (Quoted in Koch and Peden 1998: 382)

The Louisiana Purchase of 1803 instilled the idea that eastern tribes of Indians could be convinced to move west as the Delaware and other groups had already

done. Jefferson himself saw the eventual removal of all Indians west of the Mississippi (just as he believed in the efficacy of the removal of all blacks from the American continent) as the only solution to the competition between incoming Europeans and Indians for land and resources. Franklin would probably not have agreed with Jefferson that the Iroquois had no government or laws but both men were limited in their view of what they observed by the prejudices of their age (as indeed we all are). It appears, however, to be no accident that adoption of the ideals of constitutional government and human rights began in the American colonies and in colonising countries such as France and Great Britain. Citizens of these nations had early direct contact with the Iroquois and Huron Confederacies, the Cherokee Nation and other North American indigenous groups which most clearly exemplified democratic forms of government.

The indigenous law of respect and democracy

The flood of European settlement into North America eventually overran Iroquois country. Despite this the Iroquois have never given up their claim to exist as independent nations. In the 1920s

> Deskaheh, speaker of the [Council of the Iroquois Confederacy] led an attempt to have the League of Nations consider the Iroquois' longstanding dispute with Canada. Although Deskaheh found support among some League members, the League ultimately closed its door to the Iroquois, yielding to the position that the Iroquois grievances were a domestic concern of Canada and hence outside the League's competency.
>
> (Anaya 1996: 46)

From these efforts much of the modern initiatives by indigenous peoples to have their human rights, including the right to self-determination, recognised in international law have come. Even though the indigenous influence on American institutions seems clear, such inheritance remains intensely controversial. Indeed the English and American colonial constitution drafters misinterpreted much of what they saw. As Anaya describes, drawing on the work of Duane Champagne and Oren Lyons, the Iroquois Confederacy and other Indian nations do not identify themselves on strictly national or political lines. Political structures were and still are divided between different kinship, geographical and functional elements. 'The Great Law of the Peace promotes unity among individuals, families, clans, and nations while upholding the integrity of diverse identities and spheres of autonomy' (Anaya 1996: 79). Many modern indigenous scholars and activists from the United States and Canada insist that these models of constitutionalism and international law are in fact more 'appropriate foundations for understanding humanity, its aspirations, and its political development than the model of a world divided into exclusive, monolithic communities', i.e. states (Anaya 1996: 79).

To romanticise the Six Nations would, however, also be a mistake. Serious conflicts developed within the Confederacy that their constitutional model has never fully resolved, in particular the division between Mohawks and the other members of the Longhouse (Wright 1993: 131). In addition the Iroquois and other nations of northeastern North America used war and violence for political, economic and cultural reasons that would give rise to serious problems within any international legal context (Richter 1995). The Iroquois model is also not unique. The Asante also developed sophisticated constitutional mechanisms, unity among different tribal groups, and an aggressive and successful expansion of influence both economically and politically in pre-colonial West Africa. This included war as much as diplomacy and consensus building (Coetzee 1998: 356–357; Davidson 1993: 52–73).

The democratic nature of many (although not all) indigenous societies, their respect for the rights of individual members of the group and the focus on relations and responsibilities between individuals and others, is now beginning to be understood by non-indigenous writers. The basic principle seems to be that of respect – respect for one's self, other humans, other living creatures, the land and the spirit world – and a strong sense of personal responsibility. Rupert Ross (a non-indigenous lawyer who works as a criminal prosecutor in northwestern Ontario among Cree-speaking peoples) writes about certain basic characteristics of North American indigenous cultures which express respect for human beings in relationship to the world around them (Ross 1992). He finds the basis for a human perspective which is both profoundly different from the European one but from which we can detect the roots of some modern human rights thinking.

A significant component of the concept of respect is 'the ethic of non-interference' which is summarised by Dr Clare Brant, a Mohawk psychiatrist, as the 'principle…that an Indian will never interfere in any way with the rights, privileges and activities of another person' (quoted in Ross 1992: 12). Respect not only represents the negative quality of non-interference. It also contains positive substantive rules on etiquette and personal behaviour; ethical standards in social relations; specific rituals and ceremonies connecting individuals to people and the living world, including the spirit world; intergenerational structures designed to teach and promote respect for elders, ancestors and the young; rules regarding relations between and within gender lines and sexuality; and ceremonies or rules connecting individuals, families and communities in kinship with each other, with other living creatures and with the land or specific aspects of the landscape. These rules constitute the law for indigenous peoples and obviously differ to a greater or lesser extent from people to people. But this basic importance placed on the notion of respect seems to be central to most indigenous cultures around the world and may be one of the common determining characteristics of what it means to be 'indigenous'. As Linda Tuhiwai Smith has said of Maori perspectives on negotiation:

> In today's environment negotiation is still about deal making and it is still about concepts of leadership. Negotiations are also about respect, self-respect

> and respect for the opposition. Indigenous rules of negotiation usually contain both rituals of respect and protocols for discussion. The protocols and procedures are integral to the actual negotiation and neglect or failure to acknowledge or take seriously such protocols can be read as a lack of commitment to both the process and the outcome.
>
> (Smith 1999: 159)

Within a North American context it is not hard to see how European settlers translated this basic respect for the rights of others into specific rights guaranteeing non-interference by the state in the private lives of individuals. It is difficult to see where concepts such as democratic rule, federal forms of government, constitutional checks and balances, freedoms of expression, thought, conscience, association and assembly might have come from if some extra-European source cannot be found. These political forms and freedoms did not exist in Europe during the early colonial period and had largely disappeared from smaller European nations after their own 'colonisation' by neighbouring powers. Great Britain likes to distinguish itself on this basis from France or Spain but the principles of constitutional monarchy, Parliamentary supremacy and basic civil rights were developed slowly throughout the period from the sixteenth to the nineteenth centuries. The beginning of English colonialism overseas coincided with the English Revolutions of the seventeenth century and the battle between Crown, Parliament and the courts over political and juridical supremacy. These issues were not resolved until the eighteenth century or later. Parliament, even the House of Commons, remained largely unrepresentative of the population until the early twentieth century when universal enfranchisement was finally achieved. Devolution of power from Parliament to Scottish, Welsh and Northern Irish legislative bodies; major reform of the House of Lords; and the entry into force of the Human Rights Act in October 2000 indicate that this constitutional debate is far from over even at the beginning of the twenty-first century. The Human Rights Act, in particular, grants significant power to the courts to ensure that administrative and even legislative authority complies with the European Convention on Human Rights, now formally incorporated into the law of the United Kingdom by the Act.

Ideas about constitutional government, decentralisation of power, consultation, some form of representation and human rights first appeared as constitutional revolutions in Great Britain, North America and France. These ideas were grafted onto notions of 'rights' which go back no earlier than the English Revolutions of the seventeenth century crystallised in the compromise of the English Bill of Rights in 1689. The Magna Carta of 1215 is often cited as an early expression of human rights. This is largely a matter of English myth making. The Magna Carta was a purely political arrangement dividing power between the Crown and the nobility. There are elements of an earlier democratic tradition within Europe in the parliaments, assemblies and *cortés* of medieval Europe (Fuentes 1992). There was also a history of democratic ideas

taken from classical sources (rediscovered from the fifteenth century onwards) and in the formation of urban centres during the High Middle Ages (where 'liberty' meant the attainment of freedom from feudal serfdom). It is nevertheless very unclear, in the absence of significant outside influences, how these ideas could have coalesced into specific constitutional and international legal norms challenging the autocratic nature of statehood that existed in much of Europe up until the second half of the twentieth century. The theoretical foundations of the 'rights of Man' in Europe and their colonies are products of the colonial era.

Aspects of democracy and equal rights widely practised in the Americas but not appropriated by European colonisers were the equal rights of women and men (Shoemaker 1995). It has been argued that much of the virulent destruction of indigenous communities in the 'New World' had to do with deep European fears about the power of women and the gynocratic character of the Indian societies they saw. Paula Gunn Allen reports the words of John Adair, an eighteenth-century commentator, that 'the Cherokee had been for a considerable while under petticoat government and they were just emerging, like all of the Iroquoian Indians from the matriarchal period' (1986: 32). In order to try and contend with American demands the Cherokee largely abandoned their previously existing political institutions that provided a powerful role for women (Allen 1986: 36–38).

Within the Haudenosaunee equality of citizenship was something that had existed long before European influence.

> The Great Law also provided for the selection and removal of civil chiefs who sat on the confederate council. The women of each extended family holding title to a chiefship were charged with the responsibility of nomination. The nominations had to be confirmed by the popular councils, comprised of men and women, and ultimately by the confederate council. The women's sphere of influence did not end here. They monitored the conduct of the chief closely and, if it became apparent that the welfare of the people was not uppermost in his mind, they were obliged to warn him to abide by the rules of the Great Law. After three warnings by the women who nominated him, the recalcitrant chief would be removed.
>
> (Johnston 1986: 8–9)

But the Iroquois also sacrificed this strong role for women as they came under increasing pressure from European colonists, especially after the American Revolution (Allen 1986: 32–33).

The debate over the nature of civil society in Europe

The impact of indigenous cultures on Europe was not confined to Great Britain and France nor to the Iroquoian-speaking peoples of North America (Hale 1994; Williams 1990).

> [W]hat most affected Vespucci's more serious readers was that…something like an ideal society did seem to exist there [in America]. 'They wear no clothes of wool or linen or cotton because they have no need of them. There is no private property; everything is held in common. With neither king nor magistrate each man is his own master. They have as many sexual partners as they want. …They have no temples, no religion, worship no idols. What more can I say? They live according to nature.'
>
> (Vespucci, quoted in Hale 1994: 49)

In a protracted debate between Juan Giñes de Sepulveda, Chaplain to King Charles V of Spain, and Bartolomé de las Casas, a priest who had worked for many years on behalf of indigenous peoples in the Indies, the humanity of the 'Indians' of Central and South America was discussed. The debate, in which the two men never actually met, continued from 1550 to 1551 in Valladolid (Pagden 1992: xxix–xxx; Venn 1998: 5–8). It was eventually agreed that indigenous peoples were human beings with souls requiring salvation and some legal rights requiring protection. The direct result of this decision was that the enslavement of indigenous peoples was no longer seen as morally justified (although it still continued). This encouraged the import of other human beings into the Americas who were not seen as human and who could therefore be justifiably enslaved – Africans. Indigenous people were dying in numbers so large that they would have to be replaced by others or else the forced labour necessary to run the South American silver mines, and the new plantations of sugar in the West Indies, would no longer be possible (Thornton 1987). The effect on huge profits flowing back to Europe could have been incalculable. African slavery in the Americas began almost immediately after Columbus's first voyage. Columbus himself imported African slaves into the Caribbean. As European consciences were pricked over the annihilation of indigenous peoples there were also attempts to justify the slavery of Africans by characterising them as bestial by nature, as the Portuguese royal chronicler Zurara assured the Lisbon court as early as the mid-fifteenth century. He described the slaves then being imported from West Africa as 'sinful, bestial and, because of that, naturally servile' (quoted in Davidson 1993: 340).

The recognition of some level of humanity for the indigenous peoples of the Americas was achieved at least partly because of the successful establishment of the transatlantic slave trade. As disease, depredation and warfare killed off the indigenous inhabitants they were replaced by Africans who seemed to have better resistance to European diseases and could withstand the brutalities of enslavement in greater numbers. This pattern was similar regardless of whether the slave-trading country was Spain, Portugal, Brazil, the United States, France, Great Britain or the Netherlands. The pattern continued throughout the colonial era until the slave trade was finally abolished in the early nineteenth century (although an illegal traffic continued for some years afterwards). The apparent hardihood of Africans should not, however, disguise the extreme suffering and very high death rates of Africans brought to the Americas. In the British islands

of the Caribbean one African in three died within the first three years of their arrival (Walvin 1992: 75–76). The largest transporting colony was Brazil, mainly from Angola. Out of possibly more than 24 million people taken as slaves in Africa only 11 million are estimated to have survived the crossing to America (Walvin 1992: 37). Thus the number of survivors was halved *before* the people involved had to face the rigours of their new lives on the Western side of the Atlantic. Hugh Thomas suggests the figure was probably much lower depending on which century we are looking at and which slave-trading country was involved (Thomas 1998: 420–422). Regardless of what figure we accept the numbers were extremely high, especially for the Brazilian trade that did not end until slavery was abolished there in 1888 (Thomas 1998: 709). Causes of death included dysentery and dehydration, smallpox, brutal conditions (especially where the journey was prolonged), violence, fights and rebellions. Thomas estimates that slaves rebelled in one out of every eight to ten sailings, mostly unsuccessfully (1998: 422). Another cause was *banzo* or melancholy, a kind of 'involuntary suicide' (as the Brazilians defined it). One British surgeon estimated that it was the cause of two-thirds of all deaths on the slave ships (Thomas 1998: 420).

At the same time as racist categories were being established for the peoples of the world the nature of political life was debated in Europe (Hannaford 1996). This debate was generated partly as a result of contact with different cultures that Europeans discovered during the early colonial period. It was agreed during the debate in Valladolid that civilised life could be demonstrated by the observance of certain laws passed in relation to matters spiritual and civil. These 'laws' included urban settlement; money and trade (rather than a 'natural' economy of 'theft and barter'); the exploitation of nature rather than the balancing of human and other living needs; and sophisticated uses of language, costume, diet and etiquette. Most importantly there needed to be ethical systems of right and wrong modelled on European ideas (Hale 1994: 361–362). These debates had a significant impact on the development of international law and human rights. Thinkers of the period attempted to delineate the nature of civil society, the attributes of humanness and entitlement to respect.

That this debate occurred against a background of chattel slavery and extermination should make us cautious in our assessment of it. But it does not necessarily mean that we need to dismiss 'Humanism' altogether. Rather we need to respect the many histories which were part of this discussion or which have been silenced because of it. We also need to remember that the debate over 'civil society' in Europe was already of considerable significance even before the Enlightenment and the development of ideas on these issues by Locke, Kant and Jefferson. The input, and the negation of input, by indigenous peoples and African slaves was and is crucial to this debate.

The impact that the 'discovery' of an apparently New World had on the Europeans who went there was profound. The impact of colonisation has been not only a story of dispossession and destruction but also of the discovery by Europeans of different ways of thinking and living together. Many of these ideas have coalesced into what we now call human rights. They developed out of

Utopian visions that were clearly based on sometimes very romanticised and inaccurate ideas about what native cultures were like. Felix Cohen, the author of the magisterial American *Handbook of Federal Indian Law* (Cohen 1941), is worth quoting at some length:

> We need to remember that the Europe that lay behind Columbus as he sailed toward a New World was in many respects less civilized than the lands that spread before him. Politically, there was nothing in the kingdoms and empires of Europe in the fifteenth and sixteenth centuries to parallel the democratic constitution of the Iroquois Confederacy, with its provisions for initiative, referendum, and recall, and its suffrage for women as well as men. Socially, there was in the Old World no system of old-age pensions, disability benefits, and unemployment insurance comparable to the system of the Incas.
>
> Of what nation, European or Asiatic, in the sixteenth century could one have written as the historian Prescott wrote of the Incas: 'Their manifold provisions against poverty…were so perfect that in their wide extent of territory – much of it smitten with the curse of barrenness – no man, however humble, suffered for the want of food or clothing.'
>
> Out of America came the vision of a Utopia, where all men might be free, where government might rest upon the consent of the governed, rather than upon the divine right of Kings, where no man could be dispossessed of the land he used for his sustenance. The vision that came to that great modern saint and legal philosopher, Thomas More, with the first reports he had from Amerigo Vespucci and other explorers of the New World – the vision of a democratic society in which a forty-hour work week left time to enjoy life, in which even the humblest worker could afford to have windows in his home to let in the sunlight – this vision lived on. When More's eyes became dim on the tyrant's scaffold that Henry the Eighth erected for his chancellor, the gleam that had lightened them had become a proud possession of a whole generation and of many generations to come.
>
> (Cohen 1960: 319)

Although it is doubtful that either Thomas More or the Incas can be credited with the invention of the forty-hour work week, a commitment to human rights of all kinds does seem to have had its origins in the possibilities opened up in the 'New World'. The traffic was not only in slaves, gold, silver, tobacco, sugar and cotton, but also in ideas, and this traffic went both ways. Respect for the rights of individuals, freedom of speech and political participation, an expectation of support in times of hunger or poverty, can all be found in indigenous societies, not only in North and South America but also in the Pacific Islands, Australia, New Zealand and among many nations in Africa and Asia. The terrible irony is that, in discovering a land where 'no man could be dispossessed of the land he used for his sustenance', Europeans promptly introduced international and colonial laws that legitimised precisely that. The indigenous inhabitants of colonised territories, while teaching European settlers how to live on this new land, lost most of it.

Any society that could be characterised as 'human' in European terms had to reflect the then newly emerging shape of social structures in Europe itself. Europeans were drawing on indigenous examples while *at the same time* attempting to destroy them. This destruction not only was caused by the failure to acknowledge the full humanity of indigenous peoples that Europeans were emulating, but also contributed to the perception that indigenous peoples were in fact savages. Peoples who either did not or (in European eyes) *did not appear* to conform to emerging European structures and principles of civilised society were simply not considered to be fully human. Or if they were, in Kant's thinking for example, they were not granted full rights of active citizenship and civil independence. Rather they were treated as dependants, like women, children, servants and the poor.

The debate over human rights and civil society in Europe and America was not only about institutional structures but also about the nature of 'Man'. As Europeans discovered radically different cultures from those few they were used to dealing with in the Old World they began to ask themselves 'What is a human being?' But the 'Other' side of this debate, the indigenous perspective, was almost completely lost. In the early years of colonial settlement some indigenous voices were heard. Visitors from the Americas and Africa brought back intriguing first-hand accounts of 'life among the savages'. Representatives of indigenous nations, described as visiting 'kings', went to European courts in an attempt to establish contact and appropriate relations. But this soon disappeared. Neither side could find a common means of understanding. Most Europeans and soon many indigenous people were too suspicious or arrogant to try. The dialogue quickly became a monologue – the 'Rise of Europe' – and the political, economic, technological and philosophical bases for its success. What was forgotten, what is no longer permitted in our memories, is the indigenous contribution to this debate. When indigenous peoples appear within human rights discourse they appear as victims. This is itself a gross injustice.

In the *De Indis Noviter Inventis* of 1532 Francisco de Vitoria attempted to establish a more equitable and balanced foundation for international law and the claims over colonial territory made by Spain. He denied that the Pope had any temporal or civil powers over the whole world or spiritual powers over non-believers (Green and Dickason 1989: 39). The Indians, or 'barbarians' as he called them, were the true owners of the lands they held in the New World. Their failure to accept Christianity could not be used as an excuse to make war on them or expropriate their property. For de Vitoria, as with other theorists of this period, the first question to be asked in deciding whether or not Indians were entitled to respect was whether they were rational or not. Based on reports of their social relationships, religious beliefs, family relations, work and exchange that were spreading throughout Europe in the fifty years after Columbus's first voyage, de Vitoria believed they were (Anaya 1996: 11). Although de Vitoria rejected Spanish claims of authority over the Indians on the basis of discovery or papal grant he went on to argue that Spain did have such a right for the Indians' own benefit. Indians, he felt, had only rudimentary forms of social structure and

> are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts.
>
> (Quoted in Anaya 1996: 11)

As a result Spain was justified in administering the country for the benefit of the natives. In addition rights of conquest could also be imposed once Indians had lost their lands after a 'just war' based on European values of what this might be. Indians had to allow foreigners to travel through their lands, trade and proselytise Christianity. If they did not then 'natural law' permitted war and conquest (Anaya 1996; Green and Dickason 1989; Williams 1990).

Although de Vitoria's views are deeply troubling in many respects they do represent an early attempt to justify Spanish territorial claims in the Americas at least partly for the 'benefit' of the Indians themselves. They are the basis of future paternalistic patterns of thought whereby Indians could be assisted in reaching cultural, social and political standards similar to Europeans (Anaya 1996: 12; Cohen 1960a: 230). Where they refused to recognise these standards, or refused to admit the 'foreigners' into their lands to teach them these values, then the beneficial aspect of rule could quickly change into that of war. This pattern of thinking obscures the debt that European thinkers owed to these same indigenous societies for much of the vitality of debate over political life in Europe in which de Vitoria and others were participating. It created a long-standing historical blindness that is still prevalent.

Witchcraft and holy war

The debate over the nature of humanity and the replacement of religious with secular orthodoxies in Europe itself was not always a peaceful philosophical discourse. It could be, and frequently was, manifested with extreme violence. The triumph of the rational and secular philosophies of the European Enlightenment followed the last of the religious wars of the seventeenth century. The foundation of international law through the Treaty of Westphalia itself represented a pause in endemic European warfare based on religious as well as political grounds. The early colonial period was fuelled by religious competition between Catholic and Protestant monarchies (Portugal, Spain and France versus England and the Netherlands). The Enlightenment itself might be seen as a kind of resolution of the terrible battle over political, economic and Church control that characterised the colonial period from 1450 to 1700. Witch-hunts, usually relegated to a footnote in this history, can be seen as a microcosm of this battle within the family and the community. From one village to another, for more than 200 years in Europe and North America, criminal proceedings were used to impose a new patriarchal order on women, men and children.

The colonial period began as a major step back for women (Anderson and Zinsser 1988; Lerner 1986, 1993; Muir and Ruggiero 1990). There is now a

considerable literature on the witch-hunts in Europe (Barstow 1995; Boyer and Nissenbaum 1974; Ehrenreich and English 1973; Hester 1992; Klaits 1985; Kors and Peters 1972; Larner 1981; Macfarlane 1970; Trevor-Roper 1969). Thousands, perhaps millions, of individuals were accused, tried and executed for alleged practices described as acts of the Devil. About 80 per cent of the victims were women, particularly single, elderly or unpopular women who did not fit within the increasingly narrow parameters of the European patriarchal family. Curiously this fact has only recently received attention in histories of the period as Anne Llewellyn Barstow has pointed out (1995: 1). The witch-hunts were sanctioned by the Roman Church and spread throughout Europe at about the same time as the Protestant Reformation was leading to the break-up of European Catholic hegemony. Persecution and killings occurred within both Catholic and Protestant communities.

With the witch-hunts there appears to have been both race and class concerns as independent peasant women and, in North America, women of colour were targeted (Anderson and Zinsser 1988: 161–173; Larner 1990). The massive increase in prosecutions began with the publication of a treatise by two Dominican brothers, Henry Krämer and Jacob Sprenger. On the instructions of the Pope they were sent to investigate claims of demonology in northern Germany. The treatise, the *Malleus Maleficarum* (The Hammer of the Witches), first published in 1486, became the basis for later investigations. In this document women are clearly tied to witchcraft, sorcery and the Devil – 'where there are many women there are many witches' (quoted in Anderson and Zinsser 1988: 166–167). The treatise explains in great detail 'why a greater number of witches is found in the fragile feminine sex than among men' (Krämer and Sprenger 1486: 114–127). The treatise was widely publicised through the new technology of printing and laws prohibiting witchcraft were enacted throughout Europe beginning in France (1490), the Hapsburg Empire, England, Scotland, Russia and Denmark. Penalties ranged from imprisonment to death (Anderson and Zinsser 1988). Conservative estimates of the numbers of European women killed range from 100,000 upwards. The worst period was between 1560 and 1670 in Germany, France, Switzerland, England and Scotland (Geis and Bunn 1997). The terror continued for some fifty years afterwards in Scotland, the American colonies, Italy, Denmark, Sweden, Finland and Russia (Anderson and Zinsser 1988).

Various theories have been proposed as to why this massive campaign against women began and why it eventually disappeared. A fear and hatred of women, sexuality and difference appears to have fuelled at least some of the hysteria. It is interesting to note that this extreme reaction against differences based on gender and class, as well as race, was also playing out within the area of sexuality with the appearance of syphilis in Italy in 1494. This new and lethal disease was quickly associated with sexual intercourse, but its origin remained a mystery. Indians of the Americas, Africans and European Jews were proposed as progenitors. In all discussions European scientists accepted that the disease came from 'outside', was associated with sexuality and the body and was a sign of filth and

death. More rigid rules regarding sexual conduct, including greater attention paid to female virtue and monogamy within marriage, may owe something to the appearance of venereal diseases in Europe at this time. The debate surrounding syphilis shows a remarkable similarity to modern debates about HIV/AIDS (Foa 1990). This includes the sudden emergence of virginity as a politically debated choice by girls in South Africa and elsewhere during the 1990s.

I would suggest that it is no accident that the worst period of European misogyny coincided with the first major waves of colonisation, or that it was accompanied by death in the 'New World' itself. Although persecution, murder and the destruction of whole populations are not peculiar to early modern Europe the objects of this hatred are. From the fifteenth century onwards the most virulent hatred against a range of groups broke out resulting in the deaths of millions of women, Jews, gypsies, indigenous peoples and Africans mainly by or at the instigation of Europeans. The Nazi Holocaust has a long and terrible history behind it.

The processes of colonisation

It is arguable that this violence was simply an extension of European practices that had begun much earlier. As Robert Bartlett has described:

> The 'expansion of Europe' in the High Middle Ages clearly shared many characteristics with the overseas expansion of post-medieval times. It showed, also, however, certain distinctive structural features. …When Anglo-Normans settled in Ireland or Germans in Pomerania or Castilians in Andalusia, they were not engaged in the creation of a pattern of regional subordination. What they were doing was reproducing units similar to those in their homelands. The towns, churches and estates they established simply replicated the social framework they knew from back home. The net result of this colonialism was not the creation of 'colonies', in the sense of dependencies, but the spread, by a kind of cellular multiplication, of the cultural and social forms found in the Latin Christian core.
>
> (R. Bartlett 1993: 306)

The colonial period is usually dated from the year of Columbus's first voyage in 1492. In fact it began in Europe itself at a very early stage and was carried overseas sporadically from about AD 1000 through Viking excursions to Iceland, Greenland and Newfoundland, or in attempts to conquer small offshore islands such as the Canaries (Fernández-Armesto 1995). Denmark's presence in Greenland is a result of this very early European expansion overseas (Seaver 1997). The colonial project began in earnest, however, with the establishment of the first major Portuguese trading post in Saharan Africa at Arguim in 1448 (Fernández-Armesto 1995: 228). In 1492 the rather tentative efforts of Portugal were supplemented by the major enterprise begun by Spain, followed by France,

the Netherlands, Great Britain, Russia (into Central and Far East Asia), Belgium and, very belatedly, Italy, Germany and the United States.

Aggressive territorial expansion was not confined to European states. Ottoman Turkey was also a major imperial power from the fourteenth century onwards. European attempts to circumvent or compete with Turkish expansion were a major force behind the external drive of European colonialism which in turn was a continuation of the old conflict between Christianity and Islam for control of the known world. The 'discovery' of hitherto unknown territories to the west of the Old World after 1492 was a massive upset to the existing balance of power that ultimately favoured European over non-European empire builders. The world as a whole was changed utterly as a result of these events. We do not in fact live in a post-colonial world but one that is deeply structured at all levels by the European colonial experience. This includes the still continuing conflict between the Christian West and the Islamic East, now usually presented as secular liberal democracy or 'human rights' versus a rising tide of 'fundamentalist Islam' (Said 1997). To paint human history in its broadest terms the world is still caught up in the ancient conflict between and within the monotheistic patriarchal religions of the Middle East and their many perceived enemies both within and without. Human rights law, as the secular heir to Latin Christendom, is very much a part of this old and frequently violent struggle.

Europe itself was arguably 'Europeanised' only from the tenth to the fourteenth centuries (R. Bartlett 1993). This 'Europeanisation' built on and against the Islamic presence in Europe, competing with even older imperial traditions of Roman and Muslim origins. This colonisation, including the Christianisation of peripheral Europe (Spain, Portugal, Eastern Europe, Russia, Scandinavia) by other Europeans, was largely accomplished by the end of the fifteenth century (R. Bartlett 1993). The movement of these peripheral areas across the oceans and the surrounding Eurasian landmass was both a radical leap into a new phase of colonisation and a continuation of a very old one. The sailors, soldiers, missionaries, traders, administrators and settlers who formed the front line of these colonial ventures were often themselves recently colonised or dispossessed peoples. Columbus, John Cabot and Amerigo Vespucci were Italian adventurers who owed no primary loyalty to any nation. Cortés and Pizarro, the conquerors of Mexico and Peru, were members of the upwardly mobile *hildalgo* class of Andalusia, the last great stronghold of Islam in Western Europe. Cartier and Champlain paved the way for young adventurers, both secular and religious, from Normandy and Celtic Brittany. The vanguard of British colonialism was frequently Scottish, Irish or even Welsh.

European colonialism began as a continuation of 'cellular multiplication' using medieval patterns of acquisition and control. New Zealand, colonised after 1830, was perhaps the last area to be infiltrated in this way. Colonial settlement of course continued until well into the twentieth century but usually only where these patterns had already been established. After the middle of the nineteenth century an imperial rather than a colonial pattern was adopted through military force and administrative structures designed to bring the new 'colonies' into the

industrial economic orbit of metropolitan Europe (Ferro 1997). This was particularly true in Africa north of the Zambezi River and in much of Asia. The earlier attempt to reproduce European settlement structures, as in older colonies, was much less pronounced, although this pattern of cellular multiplication was never entirely abandoned. Small settler remnants in Central and East Africa, Southeast Asia and the Pacific are evidence of this continuing presence. What was more common during this later period was the massive resettlement of non-European populations from one place to another. An example of this is the major relocation of people from southern India into Ceylon, Southeast Asia, eastern and southern Africa, the Caribbean, the Pacific and eventually to Europe itself.

Both these stages of European expansion were built on the destruction of indigenous populations. What perhaps differentiated the earlier colonial period was a greater need to purge Europe and its offshoots of 'Others' through witch-hunts against women, pogroms against Jews and gypsies and the enslavement of millions of Africans. This tendency towards 'ethnic cleansing' (or, as more appropriately designated by its name in international law, genocide) has not ended. It can be seen in the recurrent holocausts of the nineteenth and twentieth centuries including the destruction of indigenous peoples everywhere by incoming European settlers, Armenians by Turks, Jews and others by Nazi Germany and, at the end of the century, Bosnian and Albanian Muslims in the former Yugoslavia. Colonisation by 'cellular multiplication' requires a much greater allocation of resources than an imperial pattern of resource stripping and plantation development, which in turn requires much higher levels of central control. This need for control seems to have been accompanied in Europe and elsewhere by the fear that processes of alienation and fragmentation in the new overseas colonies could not ultimately be contained. This anxiety extended to secession or subversion by 'Europeanised' peoples in Europe itself, as in Ireland, the Basque country, Cataluña, Brittany, Corsica and elsewhere. The older colonies gradually separated from their 'Mother Country' beginning with, of course, the United States but followed within two generations by most of Spain's possessions in Latin America.

Both the early European colonial period from 1450 to 1850 and the later imperial period can be distinguished from medieval and Islamic efforts. Our own history of colonialism and imperialism is distinguished by the sheer scale of expansion, the elaborate social and political structures and justifications devised to rationalise the accompanying destruction, and colonialism's legacy of racism, anti-Semitism (against both Jews and Muslims) and sexism. This period of history also saw, for the first time, a sharp distinction being drawn between Inside and Outside (Blaut 1993: 1–30), between the European centres of civilisation and the peripheral areas of barbarism, backwardness and subordination. This division of the world eventually came to include everything outside of Greater Europe consisting of Western Europe, the United States and white settler states in Canada, Australia and elsewhere that more nearly resemble the medieval colonial pattern of 'cellular multiplication'. Greater Europe also corre-

sponds to what is called the 'developed world', distinguished from the have-not 'developing' or Third World, or 'the North' versus 'the South'. The boundaries and definitions are not exact. But in political, economic, cultural and legal terms the old colonial divisions are still with us.

The creation of boundaries

The requirement of boundaries, geographical and otherwise, is absolutely essential to Enlightenment thinking. This is reflected in the extreme importance boundaries have in delineating the international territorial claims of nation-states. Map making is crucial to this process. A recent and tragic example is the war between Ethiopia and Eritrea. This conflict began as a border war in May 1998. After a brief truce the bloodshed resumed in February 1999, subsided five months later, then re-ignited in October of that year. The original source of the conflict is an imaginary line between the Mereb and Tekeze Rivers, but it soon expanded to other border areas and, as of May 2000, deep into Eritrean territory. The town of Badme lies on one side or other of this line. The position of the line, to the east or to the west, was the initial source of the conflict. The difficulty lies in three treaties signed by Italy and Ethiopia between 1900 and 1908 attempting to position the eastern boundary of Ethiopian territory from Italy's new colonial acquisition of Eritrea. The problem arises in the imprecision of the maps of that time. The line may lie to the east or west depending on the whereabouts of the traditional lands of the Kunama people (nomadic cattle drivers), the existence of Mount Ala Tacura (which no one can now find) and the transient nature of the rivers which move significantly every hundred years or so due to the violence of the rainy season. The boundaries were not remapped when Eritrea separated from Ethiopia in 1993, there wasn't time (Fisher 1999: 16).

The Ethiopian and Eritrean peoples are of similar cultural descent, language and religion. They both appeared to have successfully recovered from the long civil war ending in Eritrean independence, and had rebounded from crippling droughts and famine with remarkable resilience. They were among the more successful of African nations demonstrating real courage and ingenuity out of seemingly hopeless conditions just ten or fifteen years before. As of March 1999 something like 10,000 Eritrean and Ethiopian soldiers had died trying to capture or recapture Badme. By the end of the year thousands more combatants and civilians were dead. Hundreds of thousands of people on either side of this border have been displaced and precious resources have been wasted. Neither side would retreat from intransigent positions of charge and counter-charge until pushed to do so by the UN and the Organisation of African Unity who worked together to achieve a precarious peace by late 2000 (United Nations Security Council 2001: 45). But by this time most of the Horn of Africa was again in the midst of drought and famine, putting millions of lives at risk while this border war flared off and on. In early 2000 shadowy skeletons of dying children were again appearing on Western television sets and Western donors began scrambling to provide assistance. Despite pleas from the international community (and

agreement by Eritrea to allow relief convoys through its ports and on its roads over the border) Ethiopia at first refused to call a truce to the hostilities. This barred the path of crucially needed supplies of water and food. Instead, relief convoys had to traverse the much more difficult route through Djibouti and Somalia to the east. The absurdity of such territorial disputes, wasting millions of dollars and thousands of lives, would appear to be insane if not seen in the context of the intense international legal preoccupation with the fixing of territorial boundaries.

But the creation of boundaries is also psychological. The individual, the focus of the human rights that developed from the eighteenth century onwards, became a solitary unit purged of extraneous and possibly treasonous ties to groups or structures antithetical to the monopoly over social formation claimed by the modern nation-state. This severe version of centralised power gradually gave way in Greater Europe to forms of constitutional government in which specific human rights were recognised. But the overarching paradigm of the state remains with the nation-state and its association with capital accumulation and production as the norm. This combination has if anything strengthened with the supposed 'triumph' of the West in the post-Cold-War era beginning in 1989. This obsession with the nation-state as the central organising paradigm of world order remains fundamental to international law and international relations, just as it does in the area of international human rights. Only very recently has this intense preoccupation with the nation-state begun to crumble.

The operative word to describe both the modern nation-state and the individual citizen and bearer of rights is the word 'purged'. In order to create the singularity of national vision that the colonial nation-state system requires, different and potentially subversive groups and individuals have to be purged. Both internal and alien 'Others' (Jews, Muslims, Gypsies, Celtic cultures in Great Britain and France, Basques, foreigners generally) had to be confined, removed or eliminated. Peasant cultures, as in the land enclosure movement in Great Britain during the seventeenth and eighteenth centuries, were dispossessed and 'freed' to engage in contractually created terms of employment with individual or corporate employers. It is rarely acknowledged that an important aspect of revolutionary movements in Europe, in particular the French Revolution, was a conservative peasant backlash *against* liberalising changes. In France these were instituted under Louis XVI who, rather than being the ignorant autocrat he is usually portrayed as, was interested in modern scientific, political and economic developments, and encouraged law reform and innovation. This disturbance of pre-existing feudal arrangements not only upset the more conservative of the old aristocracy, but also the peasant class who depended on feudal benefits to survive. Demands for security of land tenure and the revival of ancient feudal obligations owed by landlords to their tenants were part of the rallying cry of insurrection and revolution by the rural poor (Schama 1989). But these rural movements quickly gave way to the dynamics of urban and industrial reform (Hobsbawm 1962). The inculcation of the values of the citizen/soldier made individuals see themselves as aligned in obedience to centralised authorities situ-

ated ultimately in the state. Although this alignment of loyalties has never been completely successful, failure or refusal to fit into this model marks individual citizens/soldiers/labourers as deviant and subject to various forms of overt disciplinary power, again ultimately controlled by the state.

Others outside Europe had also to be controlled. Colonisation was never a purely economic or political exercise but has always involved the psychological and cultural need to label, analyse, stigmatise and, frequently, destroy the nonconformist and the stranger while of course dispossessing them of all they have. This was and is an important aspect of governance typical of the modern era as Michel Foucault and others have described (Otto 1996a: 349–352). Indigenous peoples the world over bore, and still bear, the brunt of this, but the process eventually incorporated all non-Europeans. Peoples who were not white, male or European were likened to children or beasts to be either converted or slaughtered. The very earth itself became part of this 'Other'. This neurotic impetus towards genocide that seems to be so typical of modern history is not simply a result of psychological stresses or philosophical disruptions. Nor is it inevitable. It has occurred because it has been characterised by the perpetrators as politically and culturally necessary. The modern nation-state requires intense levels of conformity in order to operate successfully. Even the introduction of democratic institutions does not necessarily rid states of this need for 'manufacturing consent' where it cannot be coerced (Herman and Chomsky 1988). The expansion of colonialism helped siphon off non-conformist elements to distant territories where their troublesome activities could be exhausted in the effort towards settlement, or at least could be ignored – for a time. Many of these subversive and non-conformist elements became the catalysts for political change leading to the break-up of early colonial efforts in the new republics of the Americas (Durey 1997). The need for conformity with imperial aims and unity of national vision is the main impetus behind modern versions of the pogrom, 'ethnic cleansing' and genocide (see Saul 2000).

The nation-state is also built on deeply patriarchal institutional structures and mental attitudes (Knop 1993). These are not simply theological or philosophical in origin. They also perform economic and political functions. The sharp division between public and private meant that the twin engines of colonial expansion – political control of administrative structures and private entrepreneurial control of capital creation and investment – could work in collaboration with one another rather than in competition. But this division was always more ideological than real. Patriarchal institutions exist at all levels of both public and private institutions. The control and position of women is crucial to the stability of these institutions. The witchcraft trials were at least partly in response to political, economic and social changes, not just religious intolerance or misogyny. The purging process operates at many different levels simultaneously, each layer reinforcing the others. Fear and hatred of the 'Other' merged into the need for national conformity in the pursuit of hegemonic goals. Political loyalties betrayed are characterised as treason. Family betrayal can be seen in the same light, as demonstrated by the 'honour killing' of women who are alleged to have

transgressed sexual boundaries (e.g. Human Rights Watch 1991). 'Grand treason' was committed against king or country but 'petty treason' might also include betrayal of a husband or father. The destruction of indigenous peoples or minorities reflected the need for a single national vision based on linguistic, ethnic or religious unity. It was also based on the political need for control and the economic needs of resource acquisition and appropriation, especially of land.

The Ethiopian insistence on protecting its territorial integrity is, arguably, no more than the observance of a central concern in international law. The fact that tens of thousands of soldiers have been killed and many more people displaced is largely irrelevant according to the model of territorial integrity fundamental to international law. Also apparently irrelevant is the expenditure of massive amounts of capital on what, by mid-2000, was the largest conventional war on the planet while millions of people in both countries remained at imminent risk of starvation from drought. The political, the religious, the familial, the economic and the social are interrelated and mutually reinforcing. Indeed, they are paradigmatic and thus 'normal'. That many countries in Europe and North America condemned Ethiopia and Eritrea for their actions might seem like gross hypocrisy in the face of existing international norms devised and fought for in repeated bloody wars by Europeans themselves. The condemnation might, however, be evidence that the world is growing weary of this preoccupation with territorial boundaries and that the human rights of the people affected by this insanity are finally gaining ground.

Decolonisation

Colonialism involves the deep cultural and psychological penetration of both colonisers and colonised as well as profound economic, political and legal changes (Said 1993). Decolonisation must therefore go well beyond the creation of new nation-states or even the reformation of neo-colonial economic structures. It must also involve the decolonisation of our minds and bodies (Battiste and Henderson 2000; Pieterse and Parekh 1995).

> There is, for example, a greater and more immediate need to understand the complex ways in which people were brought within the imperial system, because its impact is still being felt, despite the apparent independence gained by former colonial territories. The reach of imperialism into 'our heads' challenges those who belong to colonized communities to understand how this occurred, partly because we perceive a need to decolonize our minds, to recover ourselves, to claim a space in which to develop a sense of authentic humanity.
>
> (Smith 1999: 23)

This process of decolonisation is perhaps even more essential for the coloniser. It is not only the minds and bodies of the colonised that have been penetrated and changed by these processes, but also those within the dominant power struc-

tures of Euro-American thinking. In a sense we all share colonial cultures (Smith 1999: 45). There needs to be a much greater understanding of the intense complexity of the colonial experience for both the colonised *and* the coloniser, and the realisation that groups, individuals, even whole nationalities, have experienced colonisation both as victim and as perpetrator. Europeans saw indigenous peoples and African slaves in much the same light as they saw Jews and Muslims, and later as they came to see all non-European peoples. This malevolent characterisation also carried over to women. During the debate over the humanity of indigenous peoples at Valladolid, Sepulveda likened Indians of the New World to barbarians and wild beasts. Indians, slaves and animals did not have souls, he claimed. We know that this debate over whether Indians had souls or not was part of the great debate over what was meant by 'humanness' during this period. Later this debate would be put into secular terms, i.e. whether or not indigenous peoples, women or non-Europeans were individual 'selves' entitled to rights. Although Sepulveda represents a particularly virulent form of European superiority even the gentler de Vitoria believed that 'just war' on the Indians was sometimes necessary. Decolonisation is, at its heart, a process of psychological transformation not just political, economic or social (Fanon 1990; Memmi 1991).

Barstow (1995) makes a convincing argument that the source of much of this violence exhibited by Spain and other European powers was the need to purge themselves of all internal and external 'Others'. This clearly was a continuation of policies begun by Christian Europeans against Muslims during the Crusades and the *Reconquista* of the Iberian Peninsula, southern Europe and much of modern Russia. Extermination or expulsion of Jews also became particularly virulent prior to and coterminous with the colonial period. This is most vividly illustrated by the famous example of the expulsion of all Jews from Spain in 1492. On 2 January Catholic forces under Isabella of Castile and Ferdinand of Aragon entered Granada. The struggle between Christian forces and Islam for control of the Iberian Peninsula, a struggle that had lasted for 800 years, was over (Lewis 1995: 8). There were many Muslims who remained in Spain and who were not finally expelled until 1614 (Lewis 1995: 48). Jews were, however, a simpler problem and provided experience in the more difficult task of ridding Spanish Christian soil of all vestiges of the infidel. On 31 March an Edict of Expulsion of all Jews in Spain was proclaimed in Granada and promulgated on 29 April. All Jews must accept baptism by 31 July of that year or leave. Many Jews chose to leave. At least 100,000 of them escaped to Portugal. This refuge was denied to them with a further order of expulsion just four years later (Lewis 1995: 35–36).

The *Hammer of the Witches* had been first published in 1486. In a period of ten years the witch-hunts had begun, the last Muslim stronghold in Western Europe had been captured, the largest expulsion of Jews from Christian soil had been accomplished, colonial penetration of America was well under way and the African slave trade was established. The Protestant Revolution of Luther was just a few years over the horizon and the religious wars of the sixteenth and seventeenth centuries had already begun.

The need European men felt to purge the 'Other' from European society extended not only to foreigners and aliens, such as Muslims and Jews, but to the women of their own languages and cultures. One source of this hysteria is arguably the division between mind and body and its extreme exacerbation during the modern period. As Sepulveda had written, Indians and slaves were like animals. They had no souls of their own, only bodies to be manipulated and used or destroyed. Thus 'war' on these peoples was justified because they were not really human, rather they were a part of nature itself, the object of despoliation and destruction by European Man. This virulent sundering of the mental and spiritual from the corporeal has sometimes been traced to the deepening schism between Catholic and Protestant Churches that also coincided with this period. Those humans who fell on the corporeal side of the equation were defined as lesser, different, the 'Other', evil. But it should be remembered that the first major justification for the witch-hunts, the first massacres of indigenous peoples in the Americas and the first enslavement of Africans occurred twenty to thirty years prior to Luther's break with Rome.

This process of dehumanisation more nearly resembles the expulsion and killing of Jews and Muslims, part of the Christian holy war against the infidel. In a very real sense colonialism was an extension of the Crusades. At the beginning of the twenty-first century we are still fighting this ancient holy war but with significant differences. Much of the conflict in ex-Yugoslavia can be explained in terms of this ancient feud between Christian and Turk. It also surfaces with the intense discrimination against Turkish and other Muslim populations in Bulgaria, Germany, France and elsewhere. Finally we can see evidence of this ongoing and very ancient conflict in the characterisation of Islam as 'fundamentalist' and inextricably linked to terrorism and anti-modern forces, while modernism and rationality are represented by the West and its proxy in the Middle East, Israel (Said 1997). The use of Jews by Christians as either allies or enemies in their fight against Islam over the last thousand years (and the occasional sheltering and protection of Jews by Muslims with the same motives) provides an interesting commentary on the ongoing holy war between Christianity and Islam (Lewis 1997). The formation of the nation-state of Israel contains clear echoes of this constantly shifting balance in the internecine conflict between what Muslims call the 'peoples of the book' – Judaism, Christianity and Islam itself.

Women were and are the most insidious of 'Others'. We are not foreign, we do not live elsewhere. We inhabit the very homes and are part of the very bodies of men. But it is this association with the body that has proven fatal. The insanity of misogyny, which reached its greatest extent during the witch-hunts, is a reproduction of the ultimate purging of all that is corporeal, treacherous and liable to deviate from the single-minded pursuit of national and colonial purposes. Women were not only likened to Indians and slaves. Any culture that respected women was itself to be doubly feared not only because it was itself different – 'Other' – but because it was not afraid of the Otherness within itself. Thus when Europeans discovered sophisticated societies outside Europe, such as in North and

South America, which could accommodate powerful women and who gave women an equal voice in political and economic decisions, there were multiple reasons for European men to respond with neurotic fear and destructiveness.

But this fear and destructiveness is not the whole story. While indigenous societies were being displaced, much of what they valued was being preserved, often secretly and with great difficulty. The preservers of indigenous cultures often were and are these very same women so denigrated by their colonial masters. Their languages and cultures did not all die. In some cases these older cultural traditions are now resurrecting themselves, reimagined by indigenous and colonised peoples attempting to recreate lives no longer dominated by Europe (Alfred 1999; Battiste 2000; Battiste and Henderson 2000; Behrendt 1995; Langford Ginibi 1999; Minor 1992; Monture-Angus 1999; Rose 2000; Smith 1999). In addition, shadows of those older traditions live on within ostensibly 'European' cultural traditions as well. Human rights, democracy, federal forms of political organisation and the idea of unity within diversity, even the 'law of nations' itself, have cultural roots far more diverse and more interesting than the monolithic and universalist claims many commentators would have us believe.

4 Subjects, soldiers and citizens

My name is Gladiator.

(Russell Crowe as Maximus Decimus Meridas)

The 'individual'

What is meant by human rights within international law depends on a unified and potentially sovereign subject as the holder of rights. This can be either a single person viewed in isolation from his or her fellow humans and the environment in which they live, or a 'people' onto which the characteristics of the 'individual' are projected. In both cases uniformity of identity seems to be essential. Gender, class, age, physical and mental 'normality', race and sexuality underlie the nature of the individual subject of human rights even where these categories are hidden or denied by claims of equality. This uniformity of subjectivity and accompanying claims of equality extend even to nation-states. The creation of international law was based on the sovereign will of states acting much as individuals were said to do. Although 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law' (Lauterpacht 1970: 489) human rights now insist that individuals must also be seen as subjects, not just objects, of the law of nations.

Human rights are normally predicated on a relationship between the individual and the state in which individuals co-exist on the basis of formal equality of treatment. Thus indigenous and other groups who wish to negotiate their relationship with the state in international law, not as individuals, but as communities or 'peoples' who are subjects in themselves, have serious problems (Barsh 1994; Knop 1993). But the difficulties are more complex and more insidious than this. The 'individual' is usually constructed in human rights discourse as without context, as if individuals exist without distinguishing characteristics or as if these characteristics should have no bearing on the provision of human rights on the basis of equality. This view of individuality is axiomatic and repeated in all international human rights instruments, including Article 2 of the Universal Declaration, the ICCPR and the ICESCR. Thus the communal or group identity which individuals possess is obliterated within most liberal human rights discourse as irrelevant, making claims based on group identification seem

strange or, worse, contrary to the meaning usually given to human rights as universal and equal presupposing sameness of treatment as the norm. Individuals are entitled to rights but where 'the individual' is defined as context free it is easy to assume that human rights are universal on the basis of an abstract unity of human subjectivity that may not in fact exist. Many indigenous groups, while supporting human rights generally, insist that 'Universality' positing a decontextualised individuality can be extremely harmful to the cohesiveness of group identity and is also a false picture of how individual identity is in fact created (Schouls *et al.* 1992: 12). This doubt about a concept of individuality divorced from social, cultural and economic contexts is also a principal feature of feminist critiques (Charlesworth and Chinkin 2000; Otto 1999).

Human beings are always tied to a group or community and human identity is always and inevitably dependent on this connection. This is so even where the group or community consensus on identity-formation is that the group is irrelevant. The 'rugged individual' exists and believes he or she exists because a community of human beings (rugged or otherwise) has as part of its cultural and social traditions something called 'rugged individualism' within these traditions and social structures. No human beings can exist in complete isolation from other humans even if they spend all or most of their time alone. Even Robinson Crusoe carried early English bourgeois social and cultural ideas with him to his desert island, as Defoe's novel clearly portrays. His relationship with Friday, designating the black man as 'Other' and subservient, was based on ideas about colonialism and race that were becoming increasingly important in European society in the early eighteenth century when the novel was written. The lonely individual can never be truly indivisible or solitary not even when his society creates such a position for him (or, very rarely, her). Even John Wayne needed an audience. Individuality as autonomous, alienated from others, rational, self-interested and competitive is based on a model of white male individuality that is peculiar to modern Euro-American societies from no earlier than the seventeenth century (see Rawls 1971). This period coincides with European colonialism and the establishment of white settler societies of hardy pioneers in the Americas and elsewhere. John Wayne himself specialised in roles exemplifying this model of the tough lonely 'outsider' engaged in 'taming the West'. The self-actualising subject of individual rights owes a great deal to this model even where it has been modified by the expansion of human rights to include economic, social, cultural and collective rights. The 'individual' in its extreme form is an essentially colonial model of the human subject.

The social contract

Within liberal democratic political theories the individual is said to exist in a social contract in which he or she gives up certain types of power, mainly the use of coercive force, to the state. In return the state has obligations of non-interference in certain basic human activities such as expression, conscience, thought, religion, association, family life, private life generally. This is the classic definition

of the relationship between the individual and the state as formulated during the seventeenth and eighteenth centuries by such differing writers as Locke and Rousseau (Oppenheimer 1942: 4). The late eighteenth- and early nineteenth-century liberal ideal does not allow for anything to stand between the individual and the state. Communities, religious organisations, private clubs, neighbourhoods, work, and especially the family are seen as part of the private sphere which individuals negotiate among themselves without (theoretically) any regard for gender, race, class or other differences (Olsen 1983; Pateman 1988).

From the eighteenth century onwards civil society, whether in the form of republicanism or constitutional monarchies, attempted to eliminate the tribal characteristics of a widening class of citizens by limiting the power of religious bodies, workers' or guild organisations, ethnic and cultural groups and other forms of group solidarity. The modern state attempted to focus attention on an individuality subject only to the control and construction of the state itself defined increasingly on nationalist grounds. 'Nationalism' refocused tribalism onto the *nation*-state and treated lingering loyalty to sub- or supra-state entities as treasonous. This state-based focus included a range of power structures such as the military, the hospital, the prison, the school and other institutions that were increasingly controlled by state mechanisms from the early nineteenth century onwards. The result was to enshrine individual autonomy and state sovereignty as matters of ideological acceptance ensuring high levels of conformity and uniformity among individual citizens loyal to the nation-state above all else (Tilly 1995).

A concept of citizenship based on the rule of law and civil rights was at first restricted to white property-owning adult males. Nevertheless, the vision of freedom and democratic rule within a liberal state that civil rights promise has enormous appeal, and the discourse of rights tremendous potential for including the disenfranchised within its purview (Williams 1987: 417). As a consequence of this the social contract was gradually demanded by and extended to former slaves, non-whites, the working poor and, finally, women and indigenous peoples throughout the nineteenth and twentieth centuries. But behind these apparent guarantees of non-interference lie a range of social and legal practices in which conformity to state ideals is ensured and enforced. In addition, not all nation-states have extended this liberal model of citizenship to their residents. Kuwait and Saudi Arabia refuse to grant women basic citizenship rights and indigenous peoples are still sometimes denied citizenship, as in parts of Thailand. Migrants and refugees travelling to the developed world, frequently stigmatised as 'illegal', are finding citizenship an increasingly difficult concept in their own circumstances.

Group loyalties, sexuality, gender, family relations and appropriate social behaviour are not left unregulated but are inculcated into each citizen through a range of techniques until they become 'second nature'. 'Deviant' practices including homosexuality, unmarried sexual relations, refusal to perform military or national service, or juvenile behaviour labelled as 'delinquent' have all been and still usually are tightly controlled by a range of legal rules backed up by state enforcement. Where the state or its organs are unable to control individuals or collectives through non-coercive means state mechanisms of an overtly coercive

form may be called in. This includes high levels of surveillance by state officials. Groups and individuals singled out for such attention often include gay men and lesbians, juveniles (especially young males), non-conformist girls and women, members of racial or cultural minorities, those belonging to religious groups not given sanction by the state, propagators of divergent political ideas, and indigenous people. This differentiation and discriminatory treatment has been adopted by most states such that deviant individuals or members of minority groups (or sometimes, such as in apartheid-era South Africa, majorities) are routinely singled out for 'special' treatment of a detrimental type. Even pluralist democracies such as the United States, Canada and Australia have prisons, detention centres and other institutions full of those who will not or cannot conform to prevailing social and national requirements. Where legislation has been passed to ensure beneficial 'special' treatment, this can be interpreted and used by state organs, including courts, to disentitle minorities. Again, indigenous people are often singled out.

The rule of law provides a means by which rights and freedoms can be enforced, not only against other individuals but also against the state itself, and is arguably a core human right essential to political and economic stability within the Euro-American nation-state model incorporating the social contract and modern governance. The legal personality and juridical rights of the citizen are central to this model. But the rule of law may not in fact benefit those who do not fit the accepted model of the individual citizen. A specific example of the failure of the rule of law to protect groups or individuals against state mechanisms of control and 'special' treatment is the interpretation of the 'race power' under the Australian Constitution. The Commonwealth Constitution was amended in 1967 to give the federal government the power to legislate in relation to 'people of any race, for whom it is deemed necessary to make special laws' (s. 51 xxvi). Federal heritage legislation was passed in 1984 specifically protecting Aboriginal cultural artefacts and sacred sites (Aboriginal Heritage Protection Act 1984). This legislation was amended in 1997 to allow for the building of a bridge by two developers in South Australia (Hindmarsh Island Bridge Act 1997). The proposed bridge to Hindmarsh Island impinges on what women of the Ngarrindjeri people claim is sacred land (Bell 1999; Bourke 1997; *Kartinyeri v. Commonwealth* 1998).

> At the High Court hearing, John Howard's Government instructed its QC to argue that [the 1967 amendment] gave Canberra almost unlimited power to make laws against Aborigines. Sure, there was 'an expectation' back then that the power would be used for their benefit – but that's not what the words of the Constitution were actually changed to say. …The QC conceded – after startled questioning from Justice Michael Kirby – that under this interpretation 'there may well be' power in Australia to pass laws like South Africa's Group Area Acts and Germany's anti-Jewish Nuremberg laws.
>
> (Marr 2000: 5)

The social contract as the basis for the state's legitimacy is deeply flawed as an explanatory theoretical construct. Oppenheimer describes this theory of the state as 'utterly untenable'. His own description is quite different:

> What, then, is the State as a sociological concept? The State, completely in its genesis, essentially and almost completely during the first stages of its existence, is a social institution, forced by a victorious group of men on a defeated group, with the sole purpose of regulating the dominion of the victorious group over the vanquished, and securing itself against revolt from within and attacks from abroad. Teleologically, this dominion had no other purpose than the economic exploitation of the vanquished by the victors.
>
> (Oppenheimer 1942: 8)

As Foucault has demonstrated, one of the hallmarks of modern society is the high level of surveillance and intrusion into individual lives through various discursive and power systems (Foucault 1975, 1979; see also Dreyfus and Rabinow 1982). A monopoly on force exercised by the modern nation-state involves a reciprocal relationship with an expanding citizenry. This can be portrayed in both a negative and a positive light. Giddens suggests that the build-up of surveillance 'marginalizes the state's dependence upon…violence as a medium of rule of its subject population' (Giddens 1987: 201). This statement is open to some criticism. A characteristic of the modern nation-state, both in its absolutist and in its democratic forms, is a massive increase in control over the use of violence and other means of coercion by the state. Private or 'self-help' dispute resolution, communal coercion and discipline are now part of the monopoly power of the state. This is enhanced and reinforced by surveillance, both direct and indirect, which can itself operate as a form of coercion. This monopoly of force allows for the selective application of disciplinary power, including violence, by the state where necessary to curb individual and especially collective resistance to authority. Authority itself becomes defined as the legitimate use of force by the state. State sovereignty depends on this authority and legitimacy.

Austinian legal theorists would define sovereignty as supreme legal authority that does not rely solely on force. But the power to command and the duty to obey as facts characterising European political and legal systems of the nineteenth century are central to John Austin's argument. It is very unclear in Austinian arguments how 'authority' differs from 'command' in any coherent sense. This theory of Parliamentary sovereignty goes back to the debates of the seventeenth century which eventually resulted in a notion of sovereignty clearly based on power (Dummet and Nicol 1990: 59–63). A model of sovereignty based on republicanism as in the revolutions of France and the American colonies at the end of the eighteenth century describes authority in a legal sense as genuinely sovereign only if it accords with 'moral authority' (J. K. Wright 1994). Thus authority may not be legitimate unless it is based on the 'General Will' of the people, usually as expressed through a legislative body of some kind (Dummet and Nicol 1990: 63–67, 81). This would accord with Rousseau's depiction (Morgenstern 1996:

157–179). The power to impose this 'General Will' or 'will of the people' could, and frequently does, include the use of coercive force. But the lawfulness of the force depends on extra-legal or moral factors. From another perspective sovereignty may have nothing to do with morality or even authority but may simply be the power residing in a 'sovereign' to exercise force through a monopoly over the instruments of coercion whatever these might be. A fourth type of sovereignty conceives of authority as 'supreme coercive power exercised habitually and co-operatively by all' (Rees 1979: 237–239). For all types of authority habitual obedience is always important, except perhaps where sovereignty may be exercised by force alone as in the third example. Most writers concede that some forms of sovereignty can rely for at least short periods of time on the use of force regardless of whether it can be described as 'legitimate' or not. No modern European writer has asserted that the sovereign state may never use force; indeed it is usually assumed as a factual 'given' to be accounted for, or legitimised, through some form of constitutional, moral or sociological explanation. All these types of sovereignty rely on authority structures that ultimately depend on the use of coercive force in at least some instances. In addition they are usually hierarchical in at least a practical sense of actually implementing the 'will of the people' through legislative and executive powers. Finally, these different analyses do not acknowledge their hidden assumptions of entitlement to positions of authority based on gender, race and social class (Knop 1993; Lord Lloyd of Hampstead 1979).

These are not simply theoretical differences underlying liberal thinking about the state but reflect real problems within European social and political structures from the seventeenth century onwards. These problems undercut the liberal ideal of the social contract's protection of individual freedoms and human rights while at the same time promoting them as a matter of political ideology (Tilly 1995). The 'individual' which human rights law recognises is largely a construction of the state and the relationship between citizens and states. This idea of the 'individual' implies that human beings owe not only their primary allegiance but also their very existence as 'individual citizens' to the modern nation-state. There are more or less extreme versions of this ideology. Where liberal democratic theories predominate, and where civil and political rights discourse is most powerful, individual existences are allowed at least a rhetorically significant private sphere in which to negotiate and develop individual differences. But the private sphere is itself a construct of modern political theory and is nowhere completely unregulated by state power (Olsen 1983; Pateman 1988).

The location of individuality within the state relies on a basic theoretical construct. The normality of the individual or the subject, as Gayatri Spivak writes depends on its contrast with the 'Other' – the 'non-individual' defined as savage, female, communal, irrational, i.e. the 'non-citizen' (Spivak 1994). People who are identified openly and primarily with a collective entity can be seen as incapable of personal uniqueness or individuality. They appear to be necessarily blinded by their own allegiance to a group, having given up or never been allowed the 'freedom' that comes with individuality. Thus indigenous peoples, members of ethnic minorities or religious groups, workers or followers of political beliefs that

stress the group over the individual are seen as retrograde, threatening, even destructive. The difficulty with this is that the 'individual' has always been modelled on a particular type of group identity – white, European, male, heterosexual, middle-aged, Christian (preferably Protestant), etc., etc. Anyone who differs from this model is automatically seen as somehow attached to a group rather than seen as a separate individual. Even where women or people of colour may wish to embrace the ethos of individualism in their own lives they will always be handicapped by their 'difference' defined by the 'group' they apparently belong to, and the invisible group they obviously do not belong to – white European males. Individualism is therefore insidious in not only denying group identity but in reinforcing a particular type of group identity at the expense of all others at the same time. The sovereignty of the individual is only a partial sovereignty at best as it depends on the sovereignty of the state defined in a particular way and the determinants of a particular type of group identity masked as such (Orford 1996). Openly espoused group identity must be sacrificed and replaced with the politics of personal choice. That this 'choice' is actually quite limited and masks a striking level of interference in individual lives is not obvious, but is nevertheless important in our definition of what an 'individual' is in international law.

Sovereign subjects

Within human rights there is a reliance on a notion of subjectivity or the Self that, at least to some extent, is 'sovereign' or autonomous. This is as true of collective or group rights as it is of individual rights. Self-determination means the act of creating a Self. It implies a sense of empowerment in that subjectivity is created through acting on behalf of one's self and not solely through the agency and manipulation of others. The collective right of self-determination, like individual rights, posits that a subjectivity that is autonomous or 'self-actualising' is possible, even necessary. Thus, not only individuals are Selves but groups can be as well. But the model is the individual Self, forcing the collective rights and identities of groups through self-determination into a constrained and singular vision of sovereignty. It means that differences within the group, and genuine dialogue regarding those differences, are very difficult to resolve or even imagine. A group's pluralistic stories or 'histories' about itself are forced into one 'History' that becomes the official version (Bhabha 1990). Deviations from this one History can be seen as treasonous and can result in punitive measures through force or major conflicts between competing factions. The relationship between states, once self-determination has resulted in the creation of nation-states, seems to carry on this conflict-laden narrative of a particular type of sovereignty.

A postmodern analysis undermines this notion of sovereignty. Humanism can be seen, not as a liberating discourse, but as the discourse of 'subjected sovereignties' or the 'pseudosovereign'. According to Foucault this translates into the idea that an individual can be a 'ruler' even though he does not actually exercise any power. Indeed the more an individual denies himself power and submits to authority the more this increases his 'pseudosovereignty' within

contemporary society (Foucault 1977: 221–222; see also Barrett 1992: 147). The difficulty is once we destabilise the notion of subjectivity or individual sovereignty we open it up to a point where it seems to have little real content. Humans may seem to be little more than containers for the inscription of power. Subjectivity ceases to have any unified core around which it can exist outside the invasive powers of knowledge systems or discursive practices within society as a whole. Foucault is interesting, however, because he brings us back to the central problem for subjectivity at least as it has been represented by the Cartesian 'I'. This central problem is the body (Foucault 1988, 1988a). But we must be cautious about using Foucault as a guide. His own writings are seriously compromised by his depiction of the body as resolutely male and emphatically European, indeed French. Foucault's gender and cultural blindness is almost complete (Barrett 1992: 150–152; Fraser 1989; Martin 1984; Said 1984: 222, 1988: 9–10; Spivak 1994). In addition, as Said has also pointed out, Foucault's analysis can lead to political paralysis, particularly in his failure to deal with the discourses of colonialism:

> [C]onsider the roughly contemporary work of Michel Foucault and Frantz Fanon, both of whom stress the unavoidable problematic of immobilization and confinement at the centre of the Western system of knowledge and discipline. Fanon's work programmatically seeks to treat colonial and metropolitan societies together, as discrepant but related entities, while Foucault's work moves further and further away from serious consideration of social wholes, focusing instead upon the individual as dissolved in an ineluctably advancing 'microphysics of power' that it is hopeless to resist. Fanon represents the interests of a double constituency, native and Western, moving from confinement to liberation; ignoring the imperial context of his theories, Foucault seems actually to represent an irresistible colonizing movement that paradoxically fortifies the prestige of both the lonely individual scholar and the system that contains him.
>
> (Said 1993: 335–336)

Said himself says relatively little about gender (Said 1993: 263–264, 377, 405). The polarities within gender as a category were also exacerbated during colonial history partly as a consequence of colonisation itself. This is true not only for women and men outside Europe who were colonised but also for Europeans themselves. The movement towards constitutional reform and the development of fundamental liberties and human rights from the eighteenth century onwards may have provided a form of liberation for some men. But for white middle-class women it involved an increased submersion in the private sphere and the narrowing of that private sphere to the patriarchal nuclear family (Pateman 1988). For working-class, poor or non-white women it could mean far worse: sweatshop labour, rural poverty, prostitution, servitude and slavery. The public sphere became increasingly not only the province of white men but also the site of intellect, rationality, objectivity, the search for truth and knowledge and the

acting out of political and economic decisions in the world, i.e. the place of the mind. It was also the place of History. The private sphere (the province of women, children, servants and slaves) was the site of virtue and feeling, compassion and the 'passions', procreation and nurturance, both nature and culture, i.e. the place of the body. This place was seen as ahistorical, timeless, unchanging, the denizen of dependants and social inferiors. By hiding the body in the private sphere, European Man attempted to domesticate it, freeze it into immobility and thereby control it (Haraway 1991).

The word 'subject' is itself a dubious signifier to use in this context (Butler 1997; Spivak 1994). To be a subject means to be 'subject-to'. Subjects in a political sense are those humans who are subjects of a specific sovereign, usually a monarch (Dummet and Nicol 1990). To be subject is not to be sovereign. As John Austin wrote early in the nineteenth century:

> The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters. – 1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior:…2. That certain individual, or that certain body of individuals [who is habitually obeyed] is not in a habit of obedience to a determinate human superior. …
>
> If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society. …
>
> To that determinate superior, the other members of the society are subject: or on that determinate superior, the other members of society are dependent. That position of its other members towards that determinate superior, is a state of subjection, or a state of dependence. The mutual relation which subsists between that superior and them, may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection.
>
> (Quoted in Lord Lloyd of Hampstead 1979: 233–234)

Even if we reject Foucault's analysis of the 'pseudosovereign' the idea of the 'sovereign subject' is still, by definition, an oxymoron.

For example, in the 1763 Royal Proclamation by King George III which divided lands in North America occupied by Great Britain and those occupied by indigenous peoples the word 'subject' is used in a very specific sense.

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid;

> and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever; or taking Possession of any of the Lands above reserved, without Our special Leave and License for that Purpose first obtained.
>
> (Quoted in Canada Royal Commission on Aboriginal Peoples, Vol. I, 1996: 732)

The 'said Indians' are earlier described as

> Nations or Tribes…with whom We are connected, and who live under Our Protection…in…such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.
>
> (Royal Proclamation 1763)

In this document Indians as 'Nations or Tribes' are clearly distinguished from 'Our loving Subjects'. Although the King describes his relationship to these 'Nations or Tribes' as in some sense dependent on the Crown, they are not subject to the royal authority but are treated as separate political units governed by their own laws, i.e. 'sovereign'. The fact that Indians in North America were not treated as subjects of the British Crown meant that they did not automatically become American or Canadian citizens unless, as individuals, they surrendered allegiance to their own nations and swore loyalty to the Crown or Republic. In Latin American colonies, however, Indians were always treated as subjects of the Spanish Crown enjoying access to the courts and other privileges of 'subjecthood' (Dummet and Nicol 1990: 74–75).

The confusing equation of subjectivity with sovereignty appears to have two main sources. The first is a matter of language. We talk about the subject of a sentence. The pronoun 'I' is subjective, not objective or possessive (which are designated by 'me' and 'mine'). To be an individual subject is to be an 'I', active and not acted upon. Therefore a subject is something or someone who is not an object, i.e. subjects are those who are in positions of observation and control as contrasted with those who are observed or controlled. The nature of European languages (quite different from many indigenous languages) is grammatically constructed so as to divide subjects and objects. This grammatical rigidity intensified with written and, especially, printed forms. The first dictionaries and grammars of European languages appeared on or shortly after the introduction of printing and were closely associated with colonialism. Antonio de Nebrija published the first grammar of the Spanish language in that very eventful and significant year – 1492 (Fuentes 1992: 81). The development of 'grammars' and dictionaries of indigenous languages was an important part of the colonising project, particularly in spreading Christianity and European institutional arrangements into indigenous and colonised populations. The grammatical model usually used was Latin, which had disappeared as a common language of the literate elite but which retained its stature as the linguistic paradigm, the model of linguistic correctness, even for those languages which were not based

on Latin (such as Dutch or English). Latin, as taught in European universities and schools, has a relatively complicated and rigid grammatical structure requiring close adherence to case and gender categories (the subjective, the objective, the possessive, masculine, feminine, neuter, etc.). This Latin linguistic paradigm deepened and entrenched a notion of the subject as a grammatical category that was and is confused with a sociological and psychological person: the one who colonises, as opposed to the object or the one who is colonised.

The other source of the confusion is the transformation of the non-sovereign subject into the citizen. The citizen more nearly resembles what Foucault describes as the 'pseudosovereign'. The individual subject of human rights is a product of the development of citizenship out of the older concept of the subject as in 'subject-to'. Citizens are inherently endowed with human rights whereas subjects were endowed with obligations to the sovereign. Citizenship denotes individual autonomy, or sovereignty, partially given away to the collective representation of sovereignty embodied in the 'will of the people' by way of the social contract. Sovereignty is therefore divided with human rights representing the balance between individual and collective sovereignty. But only some subjects became sovereign in this sense. Our familiar list of outcasts – women, servants, slaves, children, indigenous peoples and colonised populations – remained subjects in the sense of 'subject-to' or dependent on the will of another. The citizen endowed with rights existed in a patriarchal and colonial relationship with his dependent subjects. This is at the heart of Kant's model of citizenship and human rights. Citizenship was gradually expanded to include these subject peoples, but the model of citizenship draws heavily on such dualistic concepts as the public/private dichotomy, the split between mind and body and social categories of gender, race and class.

Feminism and the social welfare state

The creation of social welfare systems in many countries has posited a much more active role for the state in the private lives of citizens. The classic formulation of political and civil liberties accompanied by the unregulated operation of the marketplace gave way in the mid-nineteenth century to state activity in support of different kinds of rights, i.e. economic, social and cultural rights (de Swaan 1988). These include the right to work, the right to strike, the right to equal pay (or a living wage), social welfare, health care and universal access to education. This was part of the increasingly intrusive role played by the modern state in the lives of people and organisations operating within its boundaries. This intrusion could take on an apparently benevolent role, defusing collective and individual resistance to the entrenchment of capitalist modes of production and state-controlled disciplinary power.

The introduction of social welfare rights in many states also came about as a result of the efforts of women attempting to revalidate their own roles (Bock and Thane 1991; Koven and Michel 1993). This was at a time when most middle-class women were confined to the domestic sphere as wives and mothers. Their

participation in the public sphere was extremely limited. An example of this is the campaign for independent social support for women, including mothers' allowances, which gained momentum in many European countries in the early twentieth century (Pederson 1993: 246–247). Campaigns for allowances for dependent children, family allowances, old age pensions, social security, unemployment insurance, universal health care and free, or at least readily accessible, public education were often spurred on by the work of women, many of whom would have rejected the label of feminist (Bock and Thane 1991). What might be described as 'maternalist feminism' sometimes worked in co-operation with more mainstream versions of secular feminism and Marxist or materialist feminism in achieving the establishment of economic and social rights at the domestic level. This was both within the domestic spheres of individual states and as related to the family (Koven and Michel 1993). The role of women in labour and workplace reform, particularly Marxist and socialist feminists, has probably been significantly under-reported in the literature on the development of social and economic rights (Rosenberg 1992; Waters 1970).

The theoretical bases for these major social reforms varied but most incorporated a profound unease with prevailing ideas about individualism and attempted to enhance the value given to collective effort, as in the formation of trade unions, communities, co-operatives and, particularly within 'maternalist' feminism, the family. In France, the *Union Feminine Civique et Sociale* (UFCS) worked within traditional models of femininity prevailing under Catholicism and nineteenth-century bourgeois economic formations. These structures regarded the family as the site of virtue, affection, sharing, collective identity and escape from the public world of aggressive competitiveness (see Prost 1991; Segalen 1983; Traer 1980). These ideas were not confined to Catholic France but were also influential in Protestant England and Germany (Evans and Lee 1981; Stone 1979; Trumbach 1978). The emphasis was on separate spheres for men and women with women, especially mothers, representing the 'private' virtues (Pederson 1993: 251–253). This particular strand of woman-centred thinking often consciously opposed itself to early emancipist or liberal feminism that seemed to fall within the individualist model. Emancipatory women's movements embraced a wide variety of views, including Marxist and more radical feminisms. Radical Feminists saw women's oppression in such issues as prostitution and reproductive rights involving unwed motherhood, the lack of birth control and, eventually, battles over abortion rights and sexuality issues. Early Marxist feminists, while rejecting the family as a fundamental social unit, nevertheless saw collective struggle and a far greater role for public interference in the private realm as the direction women's liberation should take (Delphy 1984; Engels 1884).

There has always been a very strong strand of anti-individualism within all but the most strictly liberal varieties of feminism. Much of the energy of feminists and other women in the nineteenth and twentieth centuries was directed not only towards women's suffrage, but also towards legislative reform creating social welfare structures benefiting women, children, indigenous peoples and others. The different strands have not always been in conflict. Women's suffrage

was supported by many women (and men) not solely on grounds of equal rights to political participation but on the grounds that women could bring a special, different, superior moral capacity to political dialogue attributable to their primary roles as mothers and caregivers. It was thought that women could bring into the public sphere of rampant individualism a more co-operative, less aggressive approach to resolving disputes and allocating political and economic power, as well as higher standards of moral purity and good conduct. As was said: 'if politics was too dirty for women then women must clean it up' (Tickner 1989: 153). During the twentieth century post-colonial feminists, indigenous women, women of colour and lesbians significantly redirected women's rights movements away from Euro-American models and towards a greater respect for the wide diversity of women on a global basis (Alexander and Mohanty 1997; Basu 1995; Mohanty *et al.* 1991; Moreton-Robinson 2000; Said 1993; Spivak 1994). Feminist debates within international law and human rights have reflected this movement (Charlesworth and Chinkin 2000). Even here, however, the emphasis has been less on a liberal feminist model focusing on individual women, but rather on the relationship between women and men in different cultural, social, economic and political environments. The family, the community, the neighbourhood and the nation are always significant within this debate.

Women and socio-economic rights

The strong connection between women and economic or social rights carries over into the international sphere. Women representing their countries in the early formation of human rights within the UN played a strong role in bridging the ideological divide between East and West, allowing for the acceptance of economic and social as well as civil and political rights. Eleanor Roosevelt was a key figure in the debate between proponents of civil and political rights and those who wanted the incorporation of economic and social rights in the Universal Declaration and any subsequent convention. In a response to a debate between socialist and non-socialist representatives at the first meeting of the Commission, and in the face of US State Department reluctance, Mrs Roosevelt is reported to have insisted that economic and social issues must be included in the Declaration (Lash 1972: 62).

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual persons; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
>
> (Eleanor Roosevelt, quoted in Lash 1972: 81)

But the connection between women and this 'second generation' of rights can be traced to a deeper level. Barbara Stark has argued that women within the private sphere in fact already largely provide the economic, social and cultural rights protected under international law (1991; see also Chinkin and Wright 1993). Most if not all of the rights listed in the ICESCR would probably have a far greater impact on women's lives if they were fully implemented than civil or political rights. More particularly, women are instrumental in providing many of these rights as part of their normal roles as mothers and caregivers in the daily life of most communities around the world.

Article 2 of the ICESCR provides that states are under an obligation 'to take steps…with a view to achieving progressively the full realization of the rights recognized in the present Covenant'. In other words, where states are unable to provide these services owing to inadequate resources or where ideological forces move states away from active interference in social and economic issues these 'rights' may be taken away and are otherwise unenforceable. The direction of much economic development (based on neo-liberal capitalist market principles), both nationally and internationally, seems to be directed towards undercutting gains in governmental assistance in these areas. Women remain the real 'safety net' under economic globalisation where economic and social rights are ignored or cut back. The World Bank and other development bodies, including organs of the UN, are very well aware of the importance of women in providing basic social services to their families and communities. Even given current reforms, they still rely on the unpaid labour of women where economic retrenchment is perceived as necessary (JCGP WID 1992: 8).

The formulation of basic social and economic needs as 'rights' similar to individual civil and political rights facilitated the submergence of women's central role in their creation and provision. The liberal state became the paternal state with duties to protect women, children and the 'less fortunate' not as equal citizens but as beneficiaries or dependants while using a citizen-based model of rights discourse in spelling out the 'benefits' to which people may be entitled. This has created a serious contradiction that carries over into the international realm. Are these real 'rights' which all citizens are entitled to? Or are these simply needs which the state has voluntarily taken upon itself to fulfil, obligations that can be just as voluntarily rescinded? Because human rights were originally expressed as civil and political rights, the classic 'rights of Man', 'rights' talk is not gender neutral even where the rights are genuinely woman centred. This can create serious problems for the recognition and implementation of these human rights as enforceable entitlements.

This is particularly crucial as we attempt to delineate the meaning of citizenship and human rights within the globalisation of economic forces. These forces are normally thought of as being within the private realm of the marketplace, unregulated by governmental power, either national or international. Women are submerged in an inner private world of the home and family (Charlesworth and Chinkin 2000: 30–31, 43–44, 56–59). Human rights, at least civil and political rights, are usually envisioned as individual rights regulating relations between the

state and the citizen in the public realm. None of this ideological apparatus corresponds to the reality of how market forces in fact operate or how most women and men live (Moore 1988). The discomfort that economic and social rights give rise to is not just a holdover of the Cold War conflict between capitalism and socialism, but represents a deep theoretical confusion about the nature of these rights, the public/private domains of international law and the forces of economic globalisation.

Militarism, gender and the citizen/soldier

Another complicating factor in the international legal protection of human rights and the individual also centres on gender. Robert Connell suggests that the modern formulation of 'masculinity' appears to be largely defined in militaristic terms (1987, 1995). In pre-modern Europe, or in other cultures, the cult of the warrior prepares males for membership in the group. Boys must go through certain initiation ceremonies before they can be accepted as adults. Their entitlement to be initiated is sometimes based on class, caste, inheritance, kinship or other categories. Girls also go through initiation processes associated with their roles as 'life-bearers' or mothers, and full adults within the group. Male and female roles may be segregated but generally are given equal importance within their separate spheres for the group as a whole (Bell 1983).

Up to the eighteenth century in Europe only certain men could be 'warriors'. Although other men, and sometimes women and children, could be conscripted into a conflict or even form classes of mercenaries, the warrior cult's values of masculinity (chivalry, honour, courage, leadership, loyalty) were not usually extended to working-class, peasant or non-white men, and certainly not to women. Soldiers in European armies did not need to be subjects of a specific state and were frequently mercenaries of no particular national allegiance. But with the adoption of liberal ideas about freedom and equality at the close of the eighteenth century some values of the warrior could be extended to all men through the notion of the 'citizen/soldier' (Keegan 1993: 221–234). The creation of the citizen/soldier as a respected component of military structures was itself a part of the democratisation of modern societies. Modern military values have displaced personal strength, honour and chivalry and now emphasise discipline, order, conformity, efficiency and technological superiority. These attributes of militarism were first developed within armies associated with the new centralised nation-states of Europe, particularly the eighteenth-century Prussian Army under Frederick the Great. They were quickly adopted by others including those countries outside Europe attempting to resist the advantage such militarism gave to European colonial powers (most successfully Japan). These militarised values were also extended to factories, schools, prisons and hospitals and are prevalent in modern corporate structures.

Sporting events continue to have an important association with warrior values. The international regulation of sport is clearly connected to the inculcation of obedience to authority, conformity and controlled aggression. Organised

sport, both amateur and professional, developed during the nineteenth century and became integral to nationalist movements in the twentieth century. The Olympic Games, the World Cup of Soccer, the Commonwealth Games, the Pan-American Games, the World Cup (formerly the Canada Cup) in Ice Hockey are probably the most obvious but are not the only examples. One disturbing aspect of international sports is its association with violence of a paramilitary nature, such as the well-organised 'hooliganism' associated with soccer. Sarajevo provides a poignant example of sports and war intersecting. Less than ten years after the 1984 Winter Olympics the Olympic Stadium became a place of shelter from bombings and sniper-fire. Now many soccer fields in Sarajevo have been turned into graveyards.

The cult of the warrior has become the cult of both the soldier and the athlete. Access to full citizenship through induction as a soldier is curiously paralleled, or perhaps even parodied, by the world of sport. One of the most common means by which men of colour have achieved respect and some measure of equality in modern Western societies is through either their willingness to serve the nation as soldiers or in their talents as representatives of the nation in sporting events. The quintessential example of this is the runner Jesse Owen, a black man who represented the United States in the 1936 Olympic Games held in Berlin. Not only did he win against white European rivals but he was also touted as the representative of true American democracy and equality against fascism and Nazism. This was at a time when most black men and women were denied civil rights on a massive scale in the United States.

The Australian Aboriginal runner Cathy Freeman and her gold-medal win in the 400-metre race at the Sydney 2000 Olympics embodies a fascinating variation on this story. Her portrayal by both the Australian and international media focuses on her role as representative of 'her people' as well as her country. The fact that she is not only black but also female is not usually stressed but may indicate a significant shift on gender lines towards an androgynous model of representation in relation to citizenship. She herself seems to be well aware of her special status as an athlete, as an Australian and as an Aborigine. During the 1994 Commonwealth Games in Canada, Freeman carried both the Australian and Aboriginal flags during her victory lap to a storm of controversy both at home and overseas. Six years later in Sydney she was given special permission by President Samaranch of the International Olympic Committee to carry both flags in the event of her winning, and did so to universal acclaim. This may indicate a profound shift in Aboriginal and non-Aboriginal relations within the context of Australian citizenship and nationhood.

Universal conscription was first introduced in the mid-eighteenth century in Europe by Frederick the Great of Prussia but did not become fully a part of European military cultures until French Revolutionary leaders turned political defeat into spectacular victory by creating conscripted armies after August 1793. The price paid for 'citizenship' and the acquisition of the 'Rights of Man' was military service to the embattled state of Revolutionary France (Keegan 1993). Napoleon turned these Revolutionary armies into the formidable imperial

fighting machine which dominated continental Europe until 1815 and changed the nature of European warfare for ever. Conscription was accepted in most European states after the mid-nineteenth century, most notably during the First World War. Militarism was universalised on the basis of gender (male, i.e. 'not female') and gradually became detached from class. Women were among the last to receive the full benefits of citizenship for reasons that are closely associated with militarism and male citizenship.

As Keegan says:

> [C]onscription may be seen as a form of tax. Like all taxes, however, it had ultimately to make a beneficial return to those who paid. In France [after 1793] the benefit was citizenship for all who served. The monarchical governments that adopted it during the nineteenth century could not concede that weakening of their power. They offered the exhilarations of nationalism as a substitute, in the German states with great success. Nevertheless, the French idea that only the armed man enjoyed full citizenship had taken root, and rapidly became transmuted into the belief that civic freedoms were the right and the mark of those who bore arms. …In the long run, the establishment of universal conscription in the advanced states of continental Europe was matched by the extension of the vote.
>
> (1993: 234)

Men who achieve distinction or at least experience in the military are able to claim entitlement to the benefits of full participation in the nation-state, something which women have greater difficulty arguing other than on the basis of their roles as mothers and caretakers of future soldiers. The immolation of women's roles in the private sphere means that a patriarchal distribution of entitlement to citizenship will still fetter women in their demand for inclusion as full participants in the public life of the state. At its most minimal level men are perceived as having a right to citizenship because they may be called upon to defend or even die for their country. Women's suffering and death in and out of war do not appear to give them this right. For example, freed black men were eventually granted full citizenship in the United States partly as a consequence of having served as Union soldiers during the American Civil War (Foote 1992). Black women, although as or more oppressed than their husbands and brothers, did not achieve American citizenship until women did generally after the First World War. Fuller recognition of civil rights in the United States, Canada and Australia for other non-European men has tended to follow participation in wartime. This was not always a matter of the state voluntarily recognising, however belatedly, the rights of men who proved their worth by fighting and sometimes dying for their countries. Non-white servicemen returning home from war brought with them memories of a rough equality and promotion by merit that did exist to some extent even in segregated military units. They may have fraternised with white men, learned trades, carried and used weapons, saved lives, exhibited courage, lived close to danger and death and suffered wounds

and trauma. These gains and sacrifices made the discrimination still existing at home seem outrageously unfair. Those who had earned respect and learned fighting skills 'overseas' obtained rights, including voting rights, through militant demands and long-term struggle once they returned home.

Constructions of masculinity and femininity took different paths during the nineteenth and twentieth centuries and these paths were often heavily determined by the construction of different gender roles within military structures and war:

> Two figures emerged from the Crimea as heroic, the soldier and the nurse. In each case a transformation in public estimation took place, and in each case the transformation was due to Miss [Florence] Nightingale. Never again was the British soldier to be ranked as a drunken brute, the scum of the earth. He was now a symbol of courage, loyalty and endurance, not a disgrace but a source of pride. 'She taught officers and officials to treat the soldiers as Christian men.' Never again would the picture of a nurse be a tipsy, promiscuous harridan.…The nurse who emerged from the Crimea, strong and pitiful, controlled in the face of suffering, unselfseeking, superior to considerations of class or sex, was Miss Nightingale herself. She ended the Crimean War obsessed by a sense of failure. In fact, in the midst of the muddle and the filth, the agony and the defeats, she had brought about a revolution.
>
> (Woodham-Smith 1950: 256–257)

The ascendance of the British soldier eventually resulted in the enfranchisement of the British working man. This was not completed until the second half of the nineteenth century. But the result for women was less clear cut. The construction of femininity as epitomised by the wartime nurse, a construction which was repeated on the Nightingale model in other wars from the 1850s onwards, represented all the quintessentially feminine values of self-sacrifice, moral purity, caring and devotion to male objectives. However this model also allowed women a respectable role in the workforce and public sphere that had previously been denied to them. The 'Nightingale syndrome' would give rise to heated arguments over women's suffrage in many European countries and their white colonial offshoots. The question often revolved around whether women should be granted the vote so that they could bring their greater sense of moral purity into the public realm, or whether this different but superior quality disentitled them from participation in that realm. Nightingale herself opposed the extension of the franchise to women. But where women worked selflessly in pursuit of male military aims, as they did in large numbers during the First World War, the right to vote seemed an obvious reward. In a few isolated cases women achieved this goal in the absence of participation in the war effort (as in New Zealand and Australia which had both granted women the vote by the end of the nineteenth century). But in most other nations the vote was extended to women only very reluctantly. French women were granted the franchise at the end of the Second

World War for reasons similar to those in the United Kingdom or the United States. Swiss women did not achieve full franchise rights until the 1980s. Kuwaiti and Saudi women are still waiting.

A warrior cult mentality, filtered through the citizen/soldier and the athlete, can be seen in a range of different attitudes and behaviours. These include the pride of soldiers, athletes and men in such values as personal daring and courage; capacity to work in a group or team; obedience to superiors; technical skill with weapons and other hardware; attributes of efficiency, charisma and 'leadership' in officers; loyalty; rigidly entrenched hierarchies; self-discipline and the ability to discipline others; conformity to rigid codes of morality; high levels of conformity to regulation; and the adoption of uniforms, flags and other symbols of modern tribalism. This militaristic warrior ideal has been translated into most aspects of modern life, including education, imprisonment of offenders, factory regulation, corporate hierarchical structures, the public service and bureaucracies generally. These structures are gendered as male, primarily through the influence of militarism, and the masculine is now defined in what are fundamentally militaristic terms. Appropriately socialised males exhibit the above-mentioned characteristics and are deserving of citizenship. Inappropriately socialised males (delinquents and convicted criminals, homosexuals, pacifists, political radicals and many non-European men) must either be 'disciplined' through militaristic-style training, policing or imprisonment – the taming of 'wild' masculinities as Connell describes it – or be eliminated (Connell 1987). Elimination or marginalisation of deviant males may be done directly through the use of long prison sentences and capital punishment or through the periodic winnowing out of young males through conscription or warfare. Men from minority racial or cultural groups may be effectively denied citizenship rights through these means where formal entitlement to citizenship exists. For example, in many states in the United States a criminal record disentitles the bearer to basic rights of citizenship, such as the vote, even after penal sentences have been served. The fact that black, Hispanic or indigenous men are far more likely to be subject to criminal penalties acts as an indirect means of disentitlement of basic citizenship rights. The same effect can also be achieved indirectly through the glorification of male-on-male violence and the use of ineffective or psychologically reinforcing policing techniques to 'control' such violence. There is also the failure to redress other forms of self-destructive behaviour, such as high rates of suicide among young males in many Western countries. Killings of children in American schools by young boys and men during the last years of the twentieth century focused attention on gun control and violence in the media as further problems associated with male violence. But the militarised values associated with citizenship and entitlement to rights is a foundational principle of modern liberal democracies going well beyond immediate and superficial searches for the causes of violence and self-destructiveness in boys and young men.

Appropriately socialised masculinity is heterosexual, conformist and obedient to authority. Its competitiveness and aggression are constrained within boundaries set by rules and rulers. It is also a largely Euro-American model.

Non-European men have a much harder time being accorded respect as acceptably male even where they do in fact conform to this model. This type of masculinity is clearly contrasted with 'other' masculinities that are largely ostracised. It is also clearly distinguished from femininity. Masculine virtues of courage, toughness, leadership and assertiveness become for women aggressiveness, harshness, 'bitchiness', and are associated with lesbianism or transgressive femininity. Both 'other' masculinities and transgressive femininities sit on the margins of modern political cultures and the debates surrounding gays and women in the military (similar to earlier arguments about a multiracial military) are an indication of the intense association of militarism, masculinity, sexuality and social control.

International human rights cannot be separated from issues of militarism, the nature of the individual or the construction of gender, race and class in the modern world. The individual 'citizen/soldier' as the most appropriate bearer of human rights owes a great deal to the militarisation of European societies as they moved towards nation-statehood from the eighteenth century onwards. This expression of nationalism and citizenship was moulded into the successful drive towards European imperialism in the nineteenth and twentieth centuries, which in turn reinforced this model as the 'norm' for all states and for all those who claim citizenship. This model of both nation and individual citizen has now become global.

As usual of course our story has many variations. As the citizen/soldier has become the model for the individual protected by at least civil and political rights, the category of the soldier is also changing. Rules in relation to the conduct of warfare have become very elaborate and are more and more becoming part of the soldier's training in preparation for combat (Geneva Conventions 1949 and Protocols 1977). Even where this is not the case the difficult and complex nature of guerrilla warfare and internal conflicts that characterise much of modern warfare means that soldiers are more and more frequently called upon to make difficult decisions in the field. UN and regional peacekeeping have become the norm for many national armies giving rise to new issues of tactics, weaponry, diplomacy, intelligence gathering, chains of command, and even dress (Gordon 2001). Modern warfare has become highly specialised even for those armed forces in poorer countries where national budgets would not seem to be large enough to afford the expensive weaponry and equipment, training and infrastructure that modern militaries require. The citizen/soldier, whatever else he or she may be, must at least be able to operate under circumstances that require significant levels of moral as well as tactical decision making.

This can be illustrated by one of the most egregious examples of the misuse of military power in post-war history, the Indonesian takeover of East Timor in 1975–1976. 'Operation Komodo' became a protracted guerrilla war in which hundreds of thousands of East Timorese and thousands of Indonesian soldiers were killed or died of starvation and disease resulting from dislocation and enforced impoverishment. The level of human rights abuse practised by the

Indonesian Army in East Timor is well documented and included rape, torture, kidnapping, murder (including mass murder), forced starvation, even genocide (Aditjondro 1997; Aubrey 1998). It appears that the military used East Timor as an anti-guerrilla training ground for its troops with the *Falantil* resistance fighters as the objects of attack. During the first half of 1999 leading up to the 30 August Popular Consultation the situation appeared to change from one of direct military intervention to the arming and training of paramilitary groups, although the military was still very clearly involved in anti-independence action (Gusmao 1999; *Sydney Morning Herald* 1999). It now appears that significant elements of the military could not tolerate the idea of giving up a province of Indonesia for which they fought and sometimes died. There was a real fear that granting independence to East Timor would exacerbate similar secessionist movements in Aceh and Irian Jaya (West Papua). Immediately prior to the August ballot it appeared that, unless the UN initiative succeeded in establishing a peaceful process of self-determination in East Timor, the country would descend into orchestrated genocide yet again. This concern was borne out by the post-referendum violence that left more than a hundred thousand people dead, injured, dislocated or exiled.

But even this horrific example of militarism and corruption of citizenship and humanity along military lines is not universally bleak. As José Ramos Horta has described:

> In 1981, around August/September, in Baucau, a whole [Indonesian]unit refused to fight. They left abandoned their weapons and returned to Dili. We know they were arrested and taken to Bali, including their commander. We heard their commander was badly tortured; his leg was amputated in a hospital in Bali. We follow developments with the Indonesian army very closely, and we have friends in the Indonesian army who do not agree with the war – they consider it a waste of time, a waste of energy.
>
> (Ramos Horta 1984: 121)

The withdrawal of the Indonesian military from East Timor in the final months of 1999 made it clear that the fissures within the Army ran very deep. On the eve of the final departure of the last Indonesian troops senior members of the military publicly criticised the army's role in East Timor and elsewhere in Indonesia.

> [Seventeen] officers said the military's 'pervasive' power prevented it from improving its professionalism. Brigadier-General Saurip Kadi, a special investigator at the Ministry of Defence and Security, said that ending the military's dual role, *dwifungsi* [twin functions in civilian and military affairs institutionalised since independence] was the only way to put an end to the 'deviation of commands'.
>
> 'Our forefathers never taught us to shoot real bullets at our own people', he said.
>
> (Murdoch 1999: 19)

The Army did leave East Timor, but it left a burned and wasted ruin behind it.

Although soldiers, police and other citizens of highly militarised nation-states are frequently cited as abusers of human rights, the capacity for independent thought and moral decision making can never be completely obliterated. Human beings resist even the most intractable levels of discipline. This would seem to indicate that this type of militarised masculinity is not natural but must be heavily reinforced by coercion, surveillance and brutality. It can, therefore, be changed. Responsibility under international law, as in war crimes trials, can then have real meaning not only as deterrence but also as a way of moving away from the association between national and military objectives with citizenship and rights (Minow 1998). The divisiveness within the Indonesian military resulted in bloody conflicts over control in the region and even threatened to trigger a military coup short-circuiting attempts at democratic processes in Indonesia as a whole, as well as in East Timor. Indeed, this had been the pattern of power transition in Indonesia since its independence and was how Suharto came to power in the mid-1960s. As the century closed Indonesia's pattern of military control and corruption seemed to be loosening. For the first time in many years Indonesia genuinely had a democratically elected government from the President down to local representatives. Military despotism seemed to be waning and soldiers responsible for killings in Aceh, East Timor and Java itself were being identified and investigated for human rights abuses. Even General Wiranto, the commander of the military throughout the débâcle of East Timor, was finally forced out of government. But nothing in Indonesia is ever entirely as it seems. Vice-President Megawati Sukarnoputri's increasingly close relationship with hardline military elements and a sustained attack on President Wahid's credibility heralded a return to instability as the twenty-first century opened (Murdoch 2001; Vatikiotis and McBeth 2001).

'Hidden in plain view'

Histories of resistance, belief in human rights and active support of the goals of self-determination, freedom and dignity frequently follow a pattern of agency and action which are not dependent on Euro-American ideas about sovereignty, individualism or citizenship. The subject of human rights may well be 'hidden in plain view' (Tobin and Dobard 1999). A remarkable story of human rights is contained in the geometric patterns of quilts made by enslaved African women in the southern United States prior to the Civil War. These quilts were used to map the route of the Underground Railroad to freedom from the South to the northern states and Canada. It has long been known that the African–American quilt is a complex and hybrid cultural expression in which much of African culture was preserved by slave women through the passing down of techniques, colours and patterns from one generation to the next. This tradition is partly based on the role of the '*griot*' or storyteller in local African communities. The *griot* is often female and the story of the community or its history is often oral or represented in artistic expressions rather than in writing. This is especially so of

those West African cultures that avoided the influence of Islamic and Christian teaching, both of which emphasise literate over oral communication. This history or knowledge is often secret, known only to an initiated storyteller or a few others. The communication of more generally useful knowledge is often done through the shaping and decoration of ordinary objects 'seen so often they become invisible. These objects are creative expressions of African artisans and give tangible form to the cultural and religious ideas of their kingdoms' (Tobin and Dobard 1999: 35–36). Examples of artisans who perform this function are blacksmiths, weavers, musicians and the beaters of 'talking drums' used as a form of long-distance communication. Membership in these artisan communities often depends on lineage, as with the musical aristocracy of Mali and other West African countries.

Secret societies segregated by gender were also common in West African communities from which most African-American slaves came. Female secret societies were sometimes called '*Sande*' (Tobin and Dobard 1999: 40–41). The production of textiles and the learning of specific ideographs to convey emotion and information were commonly part of the learning of the *Sande*. African women brought these skills with them on the slave ships and passed on the knowledge to their daughters and granddaughters, often adapting the patterns and designs to their new circumstances on the plantations and farms of the American South. Specific geometric symbols and colours, based on older African designs, were sewn into quilts. These could then be used to indicate direction, locations, danger, who could be trusted or not, i.e. a complete Underground Railroad Quilt Code made by women and used by both men and women in their attempts to travel north towards freedom. This knowledge is still retained and passed on by modern-day *griots* like Mrs Ozella McDaniel Williams of South Carolina (Tobin and Dobard 1999: 67). Quilts as ordinary household objects could be displayed to passers-by through hanging them out on fences or in open windows in the sunshine. For those who knew how to read the code each quilt could act as a signpost on the road to freedom indicating the best route to take (usually meandering – evil travels in a straight line according to this tradition), which houses were safe, and so on. To those not familiar with the code the quilt was just a quilt, beautiful or ragged, an object to be ignored, invisible although visible. Like the 'Negro spiritual' the quilt was not just a decorative object of cultural or household utility or an expression of culture in a purely artistic or even a religious sense. It had a dual purpose, one obvious and one hidden. Quilts, music, the rhythm of daily work provided the unwritten language of subversion, resistance and active engagement in self-determination and human rights at the most basic level.

As a result of the efforts of quilt-makers, singers, storytellers and others in the slave communities (entirely invisible to the pervasive surveillance of their masters) conditions for freedom and equality were created. This thinking later came to be written down in the Fourteenth Amendment to the US Constitution and, much later, the Universal Declaration of Human Rights. An African-American quilt, an Iroquois wampum belt, an Australian Aboriginal sand painting are not just beau-

tiful objects. Nor are they simply expressions of religion or spirituality separate from more practical considerations. Although they may give rise to a romanticised attitude of mystical reverence on the part of observers not part of the culture from which these objects and expressions come, their role may be surprisingly prosaic. They can also be the concrete physical manifestations of human rights. Physical objects of great beauty can be maps, codes, stories, national documents, land deeds or genealogies – the expression of human rights in other forms. A child's fairy tale, a woman's needlework, a man's drum or a people's story – all are part of the invisible history of human rights 'hidden in plain view'. Whether human rights are written down in documents such as the Universal Declaration, or whether they are manifested through oral stories, physical objects or the very bodies of human beings, they are still part of what we call human rights and should be recognised for their real power and purpose.

That the human body itself might be a text incorporating human rights seems odd and may be problematic (see chapter 8). But the scars of those tortured, beaten, raped, murdered, starved or scourged with sickness do often act as the direct and eloquent testimony of human rights abuse upon which demands for protection under human rights law rest. Although these representations may often be sentimental and transitory they can still be a powerful goad to action (see e.g. *Time Magazine* 2001: Cover). Photographs of the torture, rape and killing of East Timorese prisoners by members of the Indonesian military have become an important part of the documentary evidence of human rights abuse. This is the graphic material evidence, the silent testimony of the long resistance to those abuses and demands for self-determination and democracy by the East Timorese people (Aubrey 1998: 114–115). But it is not just the physical scars of brutality that can act as a form of human rights communication, it is also the passing down from one generation to the next of a tradition of resistance to oppression that can also embody human rights. Agency in human rights need not be embodied in the usual terms of subjecthood or ctizenship.

Sally Hemings, Thomas Jefferson's slave, had at least one child by him. She made Jefferson promise that upon his death her children would be freed. The nature of her relationship with Jefferson and the paternity of her children and grandchildren were known during Jefferson's life and consistently denied by him as political scandal-mongering. Joseph Ellis examined the evidence and rejected the stories as scurrilous propaganda (1998: 257–262). Careful sifting of evidence and DNA testing now appear to prove conclusively that at least some of Sally's descendants are indeed also descended from Jefferson (Wade 1999). Sally Hemings has not left us her own story in her own words. There is no written evidence to prove conclusively her relationship with Jefferson. But the physical evidence, taken from the bodies of the living and the dead, indicates that Sally's story is not just a 'massive self-deception' or an 'outright lie' (Ellis 1998: 25).

Too often the unwritten records of the histories of those denied access to the written word and the official categories of history have been dismissed as myth and deception. By denying Sally's story Ellis and others are in effect silencing her and the many others like her who achieved victories of freedom and dignity

hidden by the 'plain view' of victimisation and lack of agency told by the biographers of liberty. By negotiating freedom for her children Sally, like the anonymous makers of African-American 'freedom quilts', wrote a small story in human rights of her own which led to the better-known 'bigger' stories of emancipation and anti-discrimination that followed in the coming centuries. These black slave women, denied citizenship in the land of freedom and individuality, made for themselves and their descendants a place in history as subjects of human rights. Nor does Jefferson's relationship with Sally and his denial of it diminish his importance as a creator of modern human rights. Rather it humanises him, allows us to see him for what he was, a complex and interesting man of his time – a human being, not a god. And, in the end, he kept his promise.

5 Peoples of the book

> Men have had every advantage of us in telling their own story. Education has been theirs in so much a higher degree; the pen has been in their hands. I will not allow books to prove anything.
>
> (Jane Austen)

Cultural diversity

Since the eighteenth century the word 'culture' has gone through many changes in meaning (Eagleton 2000). At times it has been restricted to the field of aesthetics and the cultivation of the 'fine arts'. At other times it has been used as synonymous with 'civilisation'. It also has an anthropological use referring to the traditions of mainly non-European societies. I use the term in a wider sense as that range of social, economic, political, linguistic and spiritual discourses in human communities that create an organic whole within which individual human beings gain identity and connection (Williams 1983). It is much more than tradition, although 'tradition' is obviously important. It is perhaps an essentially conservative definition with roots in the thinking of Edmund Burke, Matthew Arnold and George Orwell (Lloyd and Thomas 1998: 8–16). This may explain in part why human rights proponents are so reluctant to take on fully the implications of cultural diversity. Edmund Burke proposed the value of tradition or culture as protecting the organic continuity of human societies in opposition to the revolutionary Enlightenment ideals of Tom Paine and others who supported the universal validity of natural rights and freedoms for all individuals *as individuals* (Burke 1790; Paine 1792). For Paine and others the idea of 'culture' as social continuity and cohesion was antithetical to their vision of revolutionary change towards individual freedom. Cultural relativism is still seen by many human rights proponents as a dangerous or even barbaric impediment to the goal of universal human rights standards applicable to all (Donnelly 1989; Macklin 1999; Robertson 1999).

Despite this, or perhaps even because of it, cultural revival of formerly colonised and oppressed peoples has become the new renaissance of our time (Battiste 2000). This is an inevitable and necessary part of the process of decolonisation. But this process will take time as the expanding global economic order continues to rely on the power of nation-states to maintain political and legal

stability even as it subsumes the sovereignty of states to its own agenda. This ensures the steady incursion of international capital, trade and monetary flows on a global basis. As nation-states continue to guard jealously the interests of small elites, human rights may be the only tool which people can use to hang on to some measure of communal as well as individual integrity. From being the antithesis of human rights during the Enlightenment, culture may now be essential to them.

The sovereign power of the state is increasingly slipping into regional and international entities from the European Union to the WTO, to large multinational corporations, to the UN itself. The proliferation of small states, based primarily on ethnic or cultural identity, may eventually spell the demise of the state as the supreme sovereign in international law (but see Annan 2000). International human rights are gaining ground as the suffocating weight of state sovereignty begins to crumble and some bulwark against the increasing power of private and public organisations at all levels becomes necessary. As a consequence of this movement culture revival is shifting from state control to the local level. These local revivals of 'mini-sovereignty' are often in conflict with supranational global forces. Human rights can become the mediating influence between intense forms of reactionary cultural revival, the rights of individuals and cultural groups, and the lingering authoritarianism of the modern state and larger international forces (Okafor 2000). There is, however, a note of triumphalism creeping into some discussions on the universality of human rights. International human rights and cultural practices are not necessarily in contest with each other and one need not 'trump' the other when a conflict does arise, as suggested by Edward Broadbent in a discussion of the issue in 1995 (Broadbent 1995). A failure to see the close connection between human rights and culture may be a serious misinterpretation of the changes occurring on a global basis as the twenty-first century begins.

'Her own imaginary domain'

By insisting on universality without examining the underpinnings of this term it becomes impossible to deal with such difficult problems as presented by Zenebu Tulu, a woman of the village of Moulu, Ethiopia:

> When a girl is born, people are not very happy. They think it is much better when a woman gives birth to a son. When a girl is born, people do not celebrate like they do with a boy. …I want women to be equal, but it is our culture [for them not to be] and I accept that. …I've heard that women are treated as equals in many foreign countries, but I do not know it for a fact. For myself, I want to stay as I am. I want to fit in this society, with this culture. …My daughters are not circumcised, but [my son] Teshome is already circumcised. …It is a tradition – our tradition. I have no idea why, but it is a tradition. …The others would laugh at Like [Zenebu's 10-year-old daughter] when she goes to school if she were not circumcised. It is a humiliation, not circumcising a daughter. It is terrible not to. …She [Like] keeps

> complaining that she is not circumcised. Like, herself, is complaining. She says, 'Many of my friends are circumcised and you did not circumcise me.'
>
> (Quoted in D'Aluisio and Mann 1996: 79–80)

When asked about her own circumcision Zenebu says she thinks it was done when she was a year and a half old. The operations are still done by women who specialise in the procedure in the traditional way: for a bowl of porridge, butter to oil their hair and the equivalent of US 32 cents. When asked about the pain and complications Zenebu responds that, although a powder from a private clinic (what she calls 'Western medicine') is used to help with the pain, women in fact do not suffer, rather it is men who suffer. Male circumcisions, including that of her son, are done at the private clinic but women's circumcisions may not be done there. Zenebu believes this is because the government will not allow it. When asked about whether there are health or other reasons for not allowing girls to be circumcised Zenebu's response is:

> In the clinic they complain about it. They say, 'You lose all this blood and it always ends up infected.' When a woman gives birth, the cervix will not relax sometimes, because of the infection. And they teach us that circumcised women can have problems in relations with men. …They never tell us the details.
>
> (Quoted in D'Aluisio and Mann 1996: 81)

Her husband kidnapped Zenebu at the age of 18 after which elders were sent to negotiate a dowry and organise a marriage ceremony. Kidnap, rape and early marriage of girls are common in Ethiopia, something the Family Guidance Association of Ethiopia is attempting to redress (BBC 2001). Zenebu herself knew nothing about her husband prior to her abduction, but now she says her parents and herself are happy 'because I have my own children. I have my own life. …It's better to get married than to stay at home with no children.' Getu, Zenebu's husband, would not like his own daughters to be kidnapped. Instead he would like them to get an education and to marry 'someone who has an office job'. His own actions he says were done out of ignorance. 'I am an illiterate person', he says (quoted in D'Aluisio and Mann 1996: 75). But, although their 12-year-old son Teshome is attending school, their daughter Like is not. Her mother says she needs her in the home and the family cannot afford her school fees (D'Aluisio and Mann 1996: 71).

Where cultural practices are deeply embedded in the fabric of daily life and act as powerful shaping forces in women's and men's lives, forces which cannot be readily or easily dismissed, it can be very difficult to engage in any kind of meaningful human rights dialogue. But the fact that a practice is sanctioned by culture should not in and of itself be used as an excuse to condone the reality of suffering and disempowerment that may result. But whether women themselves perceive such practices as sources of suffering and disempowerment may be very difficult to establish. For Zenebu circumcision or genital surgery is a source of cultural acceptability, even of pride in herself as a woman (but see Tefsay 1996). Many African

women argue that some forms of female genital surgeries are in fact empowering, defining their status as women within their communities as Isabelle Gunning has noted (1992: 215–216). This is so in spite of the fact that female genital surgeries, at least in their most extreme forms, are illegal in most African states (Female Genital Mutilation Education and Networking Project 2001; Rahman and Toubia 2000).

> [F]or the feminist concerned with genital surgeries one wants to do more than describe them accurately, one wants to evaluate, indeed, condemn. For as feminists, even if we do not abandon a paradigm of right versus wrong, we must develop a method of understanding culturally challenging practices, like female genital surgeries, that preserves a sense of respect and equality of various and different cultures. The focus needs to be on multicultural dialogue and a shared search for areas of overlap, shared concerns and values.
>
> (Gunning 1992: 191)

We can also easily forget that our own cultures are also powerful in shaping our views of femininity, particularly in relation to appearance and body size (Gunning 1992: 213–214). Cultural practices in relation to women's bodies in the West include dieting, fitness training and weight loss, massive expenditures of time and money in the fashion industries and cosmetic surgeries leading, sometimes, to illness and long-term suffering or even death. Those who believe that genital surgeries are only performed in Africa or other supposedly benighted parts of the developing world obviously do not read women's magazines. The May 1998 Australian edition of *Cosmopolitan* reveals the burgeoning appeal of 'genital makeovers at a glance'. This is in the 'Oh-My-God Sealed Section' of the magazine entitled 'Genital Makeovers: Plastic Surgery for Sexual Pleasure'. Explicit descriptions, photographs and even prices are given for operations such as liposuction to the pubic mound, hymen reconstruction, labioplasty (or the removal of 'excess skin from the inner vaginal lips … so they don't protrude past the outer lips of the vulva'), perineorrhaphy (repairs to tears usually occurring during childbirth) and clitoriplasty (or, as it is described, '[p]art of the clitoral hood is nipped away under general anaesthetic'). This last procedure is described as 'currently unavailable in Australia' (Wilson and Wright 1998; see also Fraser 1995; RANZCOG 1999). The procedures of labioplasty and clitoriplasty are remarkably similar to clitoridectomies and labial incisions commonly performed elsewhere in the world and frequently condemned by feminists and human rights activists (Charlesworth and Chinkin 2000: 225–229).

Female genital surgeries are often cited as among the most difficult of examples of human rights in conflict with cultural practices. The World Health Organisation refused to investigate this issue on cultural grounds for many years (United Nations 1996). It was eventually investigated by the UN Subcommission on Prevention of Discrimination and Protection of Minorities (now the Subcommission on the Promotion and Protection of Human Rights) (Brennan 1989). The Declaration on the Elimination of Violence against Women (1993) defines violence to include 'traditional practices harmful to women' such as female genital mutilation, which

position is reiterated in the Beijing Platform for Action (Beijing 1995). Women's roles in the representation and reproduction of cultural practices make them extremely vulnerable to arguments that place culture over women's rights (Rao 1995: 167–174). Men's rights are rarely seen as being so clearly in conflict with cultural or religious differences. At the very least, a serious analysis of the role of gender in conjunction with other differences must be taken into account (Engle 1992; Gunning 1992; Obiora 1997). But even here the answers can be very difficult. Can one simply say that Zenebu cannot really be happy, or if she is then it must be due to ignorance or a failure to recognise a more enlightened view? Zenebu is aware of the concepts of equality and women's rights but rejects them as irrelevant to her own life and happiness. Is this simply evidence of 'false consciousness' or the internalisation of patriarchy at so deep a level that any authentic appraisal of her experience has become impossible? Even if this is true, according to Drusilla Cornell, we must still accord such women respect within human rights 'as possessors of their own imaginary domain' (Cornell 1998: 169).

These problems lie deeper than any simplistic application of human rights standards or arguments based on cultural relativism (but see Gifford 1994). Constructive change for Zenebu and her daughters requires the reduction of poverty, increased opportunities for education and work and, above all, recognition of the value of the work that these women already do (Taylor 1994: 25). Choices for women like Zenebu need to be expanded, but respect for the choices they ultimately make is also necessary. Zenebu says that in her country when a girl is born 'people do not celebrate like they do with a boy'. She recognises that women do not enjoy the same respect as men do. That seems to be the core of the problem – inequality, not of opportunity or even of result, but inequality of respect – a difference in the joy and celebration felt on bringing a new life into the world on the basis of whether the child is a boy or a girl.

The role of colonialism in introducing new cultural forms and expectations or in shaping or reshaping indigenous patterns of belief and behaviour cannot be ignored. Female genital surgeries have, at least in Africa, a very close connection to the politics of colonial morality. In British dependencies, such as in Sudan and Kenya, legislated prohibition of long-standing cultural practices deemed barbaric by colonial standards was common (Brennan 1989; Obiora 1997). Part of the anti-colonial struggle has included the reinstatement or revival of outlawed practices in order to rediscover and maintain the uniqueness of African, and other, cultural values (Cornell 1998: 156; Kenyatta 1965). In this battle women become the bearers of religious and community values in the fight against colonising practices, while frequently being given little real voice or opportunity to choose for themselves what they want. In some cases these revived practices are quite different from what they were in pre-colonial times. Male and female circumcisions were, and often still are, part of initiation and religious ceremonies leading to the full integration of a child into adulthood. In Kenya among the Gikuyu and the Masai circumcision is done to cement the bonds among children of the same age group, creating lifelong generational ties of kinship and friendship as close as, or closer than, blood family ties (Kenyatta 1965).

Always there must be attention paid to the particular and the local. Broad generalisations about cultural relativism or abstract discussions of universality are often unhelpful in creating genuine understanding of how individual human beings and human cultures work. Indeed the more generalised and abstract the discussion the greater the likelihood of ignorance and arrogance disguised as knowledge. Even Drusilla Cornell falls into this trap as she moves away from a postmodern attention to the particular and attempts to traverse the terrain of universal human rights. She describes Iranian women as crushed by being forced to wear the veil, or as the victims of brutal persecution (Cornell 1998: 156). Such a depiction ignores the active participation of women in the Iranian Revolution of 1979 and the acceptance of the veil by many as a reinstatement of Islamic femininity (Afkhami 1995; Afshari 1994; Ahmed 1993). This is not to deny the severity of penalties for those women who do not conform or the existence of strong differences of opinion among Iranian and other Muslim women on this very contentious issue (Moghissi 1999). Cornell's sweeping denunciation makes it more difficult actually to see the intensity of this debate in all its complexity. It is true that women in many cultures are forced to extraordinary lengths of courage often expressed through silence and hidden resistance to maintain their own 'imaginary domains'. However, the veil can actually assist Islamic women in this silent resistance by providing them with a shield behind which they can hide their presence from the gaze of the male eye (Abu-Odeh 1992; Afshari 1994), an option Western women have rejected. It is at least arguable, within an Islamic feminist tradition, that the adoption of head coverings or even the full veil enhances respect for women by decentring their sexuality as a focus of attention. The veil emphasises the differences of women and men without overtly sexualising them. For Western women, and for many others who prefer to face the world in open dialogue or defiance, the veil becomes a symbol of intolerable oppression and a denial of women's rights to participate fully in society on the same basis as men. In this perspective women are perceived as being fundamentally the same as men while leaving exposed female bodies that concentrate attention on sexual difference.

A parallel between debates over female genital surgeries and the oppression of feminine cultural expression more generally can be drawn with other efforts to eradicate traditional practices. These include indigenous ceremonies, languages and culture in the interests of what may be perceived by governments, both colonial and post-colonial, as higher and more humane forms of civilised conduct. Examples from North America are the banning of Sun (Thirst) Dance ceremonies and the Potlatch. The Potlatch, incorporating a range of ceremonies and laws practised by many indigenous peoples of the Pacific Northwest, was banned by the Canadian government in 1885 under amendments to the Indian Act 1876. Other ceremonies of religious, economic, political or cultural significance, including the Sun (Thirst) Dance of the Plains Indians, were banned with further amendments to the Indian Act passed in 1895 (Pettipas 1994: 3). These bans were not lifted until significant reforms to the Indian Act were passed in 1951 (Pettipas 1994: 209). The Sun (Thirst) Dance ceremony, like female genital surgeries, usually involves phys-

ical suffering, including flesh piercing and tearing. It may be of some significance that this is a ceremony usually reserved for men, although women also participate in differing ways depending on the particular group. Other ceremonies involving physical mutilation are rarely discussed as part of human rights. Arguments over practices of genital surgery inevitably focus on women and girls, yet some forms of male genital surgeries can also be quite extreme, going well beyond the removal of the foreskin in circumcisions practised by Jews, Muslims and as a medical procedure. Male genital mutilation is rarely cited in the literature on genital surgeries as a human rights issue (see Greer 1999: 94-96). It can be argued that the extreme revulsion that many feminists and human rights activists in the West feel towards female genital surgeries is a reflection of *Western* cultural preoccupations with sexuality and sexual freedom, especially that of 'exotic' women (Engle 1992). The debate may in fact be more revealing of Euro-American cultural difference and racial or sexual *taboos* than it is about African cultures. Cultural difference can be used as a screen, or as a bone of contention, depending on both gender and race. In fact the difficulties lie much deeper than this. Colonialism, the especially difficult position of women within both colonised and colonising cultures and their role in carrying the burden of post-colonial cultural revival are almost always major complicating factors.

The secret life of fairy tales

One important aspect of cultural difference that has received almost no attention in discussions of the application of international human rights is the difference between primarily literate and primarily oral cultures. That European Christians, along with Jews and Muslims, can be seen as 'peoples of the book' indicates the strong influence of written texts in their history. Literacy as a component of civilised life can be a powerful part of the colonising process (Mignolo 1995) as well as a force of liberation from poverty and oppressive social structures. Human rights are themselves contained in more or less 'sacred' texts, such as the Universal Declaration, which itself has a near biblical authority for many human rights activists and commentators (Buckingham 1999). This has an effect on how we define 'humanness' and the nature and content of human rights in international and national law. Those people, especially indigenous peoples, who are not dependent on written texts for their religious, legal or cultural authority structures may appear less civilised, less fully human, than those who do. Members of oral cultures in particular face a hard struggle to have their individual and cultural identities accepted as valid by literate invaders or missionaries.

This struggle has roots in Europe itself and can be seen from a gendered perspective. European oral cultures and communities based on speech seem to have been relegated to the care of women within the private sphere of the family and the home. As a matter of actual day-to-day practice women still seem to have the primary role in providing for the care and teaching of traditional or religious beliefs, relationship building, sharing and the provision of basic needs for their children. Pre-modern oral cultures of Western and Central Europe

seem to have been delegated in a truncated and attenuated form to the care and guardianship of women and children at the same time as men were taking on an increasingly dominant role in a more and more sharply segregated public sphere. The imposition of the burden of cultural difference on women may be intrinsic to the development of the modern state, beginning in Europe itself but continuing in the decolonisation process outside of Europe.

Some evidence for this can be found in the diminution of pre-Christian pagan history and European tribal knowledge into fairy tales, old wives' tales, 'folklore', 'myths', nursery rhymes, romances and the romanticised basis for literature and high art as in Tolkien's sagas or Wagner's operas (Bettelheim 1989; Tolkien 1989). This body of knowledge came to be seen as fit only for the consumption of women, children and the remnants of peasant cultures whose languages have been devastated or destroyed (Irish, Welsh, Cornish, Scots, Breton, Basque, Old English, Old Norse) by the process of 'Europeanisation' described by Robert Bartlett (1993). The stories themselves have been domesticated, falsified and trivialised, or were made part of literate culture through the medium of 'high art' at that moment in history when 'art' became disconnected from the cultural milieu from which it stemmed (Eagleton 1990). These old stories have also been rewritten for the purpose of creating a romanticised basis for national identity (Bhabha 1990; Hobsbawm 1993). But the ancient oral traditions have mostly lost their legitimacy as a source of knowledge in a European culture taken over by literate rationality. This pre-Christian tribal body of wisdom continues to lurk in the margins of the domestic sphere and the fringes of mainstream European society or perhaps in a European collective unconscious as Jung maintained (Jung 1993). In his essay 'On Fairy-Stories', Tolkien (1989) argues that fairy tales are much more important than their modern degraded status suggests. His classic trilogy, *The Lord of the Rings*, is arguably one long elaborate experiment in taking 'fairy tales' and European mythology seriously. This may explain its deep resonance for many readers of Western European descent.

This loss and shadowy afterlife of dream, nightmare, witchcraft and fairy tale came about as European men divested themselves of their communal pasts and took up the challenge, as individuals, of nation building, capitalism, work, politics, international relations, law making, economic activity and public life. Modern Europe, built on the capital resources generated by colonialism, invented the public sphere of the newly emergent bourgeois European Man. The purging of the 'Other', so important to the colonial enterprise, had already been accomplished in Europe by the eighteenth century with the Christian expulsion of the old pagan gods and stories and their replacement by secular Enlightenment. Indigenous Europe still exists in the darkness of old fears and hidden desires – the world of the witch, the 'wild child', the dark bogeyman, the cannibalistic giant, the 'golom' or Gollum (Warner 1998). It is also very important to remember that indigenous peoples also still live in Europe itself, in particular the Sami people of Scandinavia and Finland. They have fought hard to retain their cultural traditions and languages in an overwhelmingly

'Europeanised' world (Finnish Sami Parliament 1997). It is too easy to assume that the indigenousness of Europe is purely a matter of old history and lingering folklore. Real people still retain their indigenous cultures in the broad daylight of modern Europe itself.

The Enlightenment utterly rejected this older form of knowledge based on the particularities of place and vision, dismissing it as irrational superstition. The hidden world of women and children, indigenous peoples, peasants, outcasts, Jews, gypsies and strangers is also a world of hidden sexual desire, terror and enchantment. European theory from the eighteenth century onwards embraced the light of reason and the sweep of Universal Truth. The Enlightenment dismissed the ancient wisdom of its own European roots while hiding it in the domestic world of the family and village, the forest and the borders of the known universe 'where there be dragons'. This world of enchantment was at first pushed to the peripheries of the Known World until the colonial enterprise gradually pushed back these Eurocentric boundaries. Now it has been relegated to the genre of fantasy literature such as Tolkien's *The Lord of the Rings*, modern renewals of the Arthurian legends, and their myriad imitators. Perhaps most importantly this irrational world has re-emerged within the domain of science itself in the world of science fiction – UFOs, alien abductions, *The X-Files*, *Star Wars* (but not *Star Trek*, which pursues an Enlightenment ideal of science, rationality and secular liberalism). These patterns are repeating themselves in emergent political economies all over the world, as in Ethiopia and Kenya mentioned above. The old gods are not so easily purged.

The modern public arena was, and is, almost completely dominated by the written or printed word. In Europe's confrontation with the indigenous peoples within its own borders, then of the Americas and the rest of the world, this reliance on the written over the spoken word helped to bury the 'Otherness' of cultures under the objective analytical purview of the written word (Derrida 1978). This process of deculturation began in Europe itself through the colonising influences of Judaeo-Christianity and Graeco-Latin classicism, particularly during the period of 'Europeanisation' between the tenth and fourteenth centuries (R. Bartlett 1993). During this process women, children, Roma people, Jews and the illiterate poor gradually became the repositories of the oral, the hidden, the secret and the marginal, either in the home or within the village or neighbourhood. The presence of the oral never disappeared but became hidden in the margins, the 'trace' lingering in the interstices of Enlightenment dualism.

Classicism and Christianity are in fact products of the eastern Mediterranean and are both quite alien to Central, Western and Northern Europe. Until AD 1000 or later most of Europe was still largely Slavic, Germanic and Celtic speaking with tribal cultures based on oral histories and polytheistic or animist 'pagan' religions. It was not until the fourteenth century that the last pagan kingdom in Europe (Lithuania) finally succumbed to the Christianising forces of Poland and Prussia. There *was* a history of contact with the Roman Empire up until the fifth century but this incursion left much of Europe still tribal or overlaid with a thin veneer of classical culture, language,

literacy and early Christianity. Pre-Medieval Europe was in fact 'indigenous' in ways similar to cultures found outside Europe. From the retreat of Rome to the entrenchment of the Roman Church in the tenth and eleventh centuries, Europe is usually described as being in the 'Dark Ages'. This term reflects not only the lack of written documents recording the history of this time but also our fear and contempt of our non-literate (and therefore non-historical) past.

The extension of the Roman Empire opened up parts of Europe to Mediterranean classical influence, eventually including Christianity. But for much of Europe not bordering on the Mediterranean the rediscovery of secular classicism and humanism in the fifteenth century was not a 'renaissance' in the sense of a rebirth but an almost wholly new phenomenon. For most women and children, and for peasant survivors of the European transition from an oral to a written culture, this 'renaissance' did not mean liberation or a quickening of the human mind and spirit. Rather it was an invitation to harassment on grounds of witchcraft and attachment to the Devil, or to dispossession and extermination in the enclosure and privatisation of communally owned lands. This harassment accompanied deforestation, drainage of marshes and control of hunting through laws relating to poaching and the general denaturing of the European landscape (Schama 1996). Peasants, hunter–gatherers, fisher-folk, pastoralists and horticulturists in the forests and on the steppes, mountain valleys and fjords of Central, Western and Northern Europe were, like all children and much of the remaining female population, constrained to the strictures of an increasingly ruthless variety of patriarchy. Colonialism was not confined to overseas territories even at the height of the early colonial era. This version of patriarchy was resolutely literate.

During the seventeenth and eighteenth centuries the oral became synonymous with the primitive, the secret and, by an association of opposites characteristic of dualistic thinking, the body. Speech necessarily involves connection between human beings in some proximity to each other even if it is only the proximity of the voice. Unlike writing, which relies on a visual symbolic script segregated from living human contact, oral communication (at least prior to modern telecommunications) necessarily involves close contact with another person. The oral is also the repository of the secret or the hidden because it leaves no permanent record in the 'outside' world but relies on memory for its retention. Human memory is usually characterised by literate cultures as unreliable, partly because writing allows for the atrophy of memory skills ensuring that literate individuals 'forget' more easily than do those people who use only spoken words. Or, to put it another way, memory becomes something external rather than internal, frozen in written form rather than entrusted to the guardianship of living libraries. This allows for a lessening of memory skills on an individual level and the possibility of cultural amnesia on the communal level. When memory (and history) are reliant on fragile external records they are susceptible to destruction or loss. Oral cultures are, contrary to what most of us in the literate world believe, actually much better at preserving memory and history. But it was and is the relationship of oral cultures with the pre-modern or the pre-historic

(quite literally) that allows for the schism between modern literate European Man and his primordial indigenous past including its base of knowledge and thought patterns in the oral.

Speech also allows for the expression of the emotional or the spiritual in a very different way from the detached medium of writing. Literacy is the quintessentially appropriate vehicle for secular philosophies of rationality based on the primacy of the mind divorced from the emotional or the physical. The culture of the Enlightenment out of which human rights developed is not only a culture based on the primacy of the rational but one which was necessarily literate *in opposition to* the oral cultures it submerged and denied. The dichotomies of Enlightenment thinking, leading to such contradictions as exhibited by a Thomas Jefferson or an Immanuel Kant, are partly explained by this submergence and denial. Christianisation had of course long since declared war on the oral world of the pagan and the heretic. But it was not until the eighteenth and nineteenth centuries that something like general literacy and the full triumph of the rational written basis for human subjectivity flourished. Jews, Christians and Muslims had been 'peoples of the book' for centuries before Thomas Jefferson crystallised in writing the ideals of humanist and Enlightenment thinking in the form of civil and political rights. But it was not until the end of the eighteenth century that a democratisation of literacy began to make possible the triumph of the literate over the oral.

Part of the process of 'Europeanisation' was the transformation of oral pagan cultures to cultures that, if not literate, were at least subservient to a written code of law and religion, i.e. Christianity. The conflict between Christianity and Islam was and still is a conflict between two literate cultures over the hearts and minds of the populations of the Old World. Once it became possible with the development of printing to extend the teachings of literacy to all, then it became possible to extend the test for political participation and civil independence to all based on rationality and understanding of the written word. Human rights are not only things we can claim, or possess, or even own – they are things we can *read*. For Thomas Jefferson the most damning comment on Africans, so he believed, was their lack of imagination, their failure of eloquence, their inability to learn. To him the Indian had the preliminary (if primitive) capacity for rational thought, making him (not her) inherently superior to blacks although still inferior to the white man (Jefferson 1782: 237–243). In the United States Indian children were taken from their homes in order to learn how to read and write in English so that they could be assimilated into modern American society. The children of slaves were prohibited from being taught to read at all.

The spoken word and the printed text

When the written word is controlled by a small elite, i.e. when it is still in manuscript, censorship is a relatively simple matter and can be controlled through fairly straightforward methods such as banning authors and burning texts (or burning authors and banning texts), and maintaining strict controls

over entrance to the ranks of the literate. Oral cultures, which would include the vast majority of the population, can continue to exist with dominant structures in some sort of mutually symbiotic relationship of authority, subservience and subversion. But printing changes this picture dramatically. On the one hand it makes the revolution of mass literacy possible, therefore presenting authorities with the nightmare of real democratic involvement in political life hitherto controlled by the literate elite. On the other hand it more clearly separates the writer (or author) from readers and the topics of writing – the 'written-to' and the 'written-about' – through greater fixation of texts. All forms of communication become dominated by the written word. This both increases the possibilities for objectification and analysis of passive objects (the 'written-about') and presupposes an increased passivity on the part of the 'written-to' or reader.

The printing press was introduced into Europe, probably from China, around 1440 in either Germany or the Netherlands (Braudel 1981: 399):

> The noble art of print was first invented at Mainz in Germany. It came to us in the Year of our Lord 1440 and from then until 1450 the art and all that is connected with it was being continually improved. …Although the art was discovered in Mainz, as we have said, the first trials *(vyrbyldung)* were carried out in Holland in a Donatus printed there *(gedruckt syn)* before that time. The commencement of the art dates from these books.
>
> (*Cologne Chronicle*, 1499, quoted in Febvre and Martin 1984: 53)

By the beginning of the colonial enterprise the printing press was being used on a massive scale, not only by private printers and entrepreneurs, but also by new and centralised monarchies. By 1476 the Spanish monarchy was using the printing press to an enormous extent. England's Henry VIII printed hundreds of new statutes during the early sixteenth century (Fernándes-Armesto 1995: 152–154). During the early years of the printing industry in Europe the division between the public sphere and private life sharpened. Deep divisions were created between public authority, private activities within the marketplace, and the sheltered environment of the home or family, although the state retained a major role in mercantilist activity until late in the eighteenth century.

For women the oral and written word became increasingly sequestered in the private sphere of family and home as the printed word became a powerful force both for and against the centralising tendencies of the state within the public sphere. As middle-class men gained a legitimate foothold in the world of politics and business the distinction between public and private, or between the printed word and the hand-written or oral, deepened. Where writing and printing penetrated the domestic realm they tended to devolve on women and girls as part of the ideological apparatus that helped to construct the closed sphere of the home and family through the romantic novel (Woolf 1979). The novel (with a 'love story' as a ubiquitous component, the inevitable wedding and 'they lived happily

ever after' as the equally ubiquitous conclusion) was closely connected to the development of literate culture in Europe from the eighteenth century onwards and was clearly aimed at a female audience (Figes 1982). Ironically, at least half of all novelists in England until the middle of the nineteenth century appear to have been women (Tuchman 1989: 45–64; S. Wright 1994). Women and children became further immersed in the private realm and access outwards through education, publication or any other means became more difficult. The novel, for example, or small printings of poems, essays or journals became increasingly dominated by male authors and institutions as the nineteenth century progressed, co-opted by the public world of political expression, institutionalised religion, universities, corporate publishers and 'high' or serious art (Tuchman 1989; S. Wright 1994). This was partly a result of the capture and control of printing by governmental and entrepreneurial forces inimical to real democracy. Even as literacy spread to hitherto non-literate peoples, including women, and the public world became more accessible to marginalised groups, it had become so dominated by the model of literate subjectivity that inclusion into this world was still denied to anyone who could not mimic this way of being human. Thus it can be argued that the public sphere of politics, law, international relations and economics is *inherently* literate. Modern forms of these structures, including the sharp division between public and private, fundamentally rely for their development and perpetuation on technologies of printing introduced into Europe in the fifteenth century. This has a profound effect on the nature of humanity to which rights can attach.

The development of the literate subject

The individual subject of Western liberal democracy and human rights is and was *from the beginning* a literate subject. The printed word not only communicated the idea of individuality and rights but also took from the structures and effects of printing as a medium of communication the very formation and definition of who the appropriate subject of political and economic rights might be. It is not only the communication of ideas through mass printing which is important, but the actual construction of a type of humanness based on practices involved in writing, publishing and reading. Literacy becomes a mark of humanness, of full capacity to participate in the public realm. Illiteracy, conversely, becomes a sign of lack or inferiority, the sign of someone who is not capable of fully participating in public life. As the eighteenth-century historian Edward Gibbon wrote, 'the use of letters is the principal circumstance that distinguishes a civilized people from a herd of savages incapable of knowledge or reflection' (quoted in Gana 1995: 114). Thus, while human rights thinking was borrowed from indigenous sources, its fixation in literate forms (Bills of Rights, the Universal Declaration and other constitutional and international human rights instruments) allows historians and theorists of human rights to distance themselves from these sources. The literate expression of rights has resulted in the burial and disappearance of their roots in the oral cultures of indigenous peoples, slaves and women.

Women and many men were seen up until at least the nineteenth century and in some cases much later as inherently incapable of ever achieving a true civilised standard of literacy. Or, where they clearly were eager and able to learn, they were perceived as dangerous. Literacy was a politically charged subject and the teaching of reading and writing to the poor, to girls and women, to slaves in the southern United States, to indigenous and other colonised peoples was often either considered unnecessary, or circumscribed or prohibited altogether. Derogatory, often viciously hostile, comments on the education of women and girls were repeated endlessly in tracts and publications from the sixteenth century onwards (as in the rather mild example from Adam Smith's *Wealth of Nations* quoted in Chapter 2). European girls and women even in the middle and upper classes had enormous difficulties in receiving any kind of education. For Mary Wollstonecraft at the end of the eighteenth century education was the key to the emancipation of women (1792). Young women were barred from most senior schools, universities and professional training until the end of the nineteenth century. The frequency and highly charged nature of early comments on female education, especially literacy, indicates its ideological importance in Europe and elsewhere. Wealthier families could provide private tuition for their daughters but poor or non-European women were largely consigned to illiteracy or very basic levels of reading skills (not usually including the ability to write) until well into the nineteenth and twentieth centuries.

There were also restrictions on the teaching of reading and writing to indigenous peoples in colonised territories. Traditional or previously existing educational systems, both oral and literate, were either denigrated or destroyed. The European instruction of colonised peoples that did exist was normally confined to missionary activity and concentrated on Christian religious training, the suppression of indigenous languages and the acquisition of basic skills relevant to the menial labour which people were expected to provide as adults. The removal of indigenous children from their families and their confinement to schools, homes and foster care for the purpose of acquiring basic literacy skills in a European language was common in North America, Australia and New Zealand until the second half of the twentieth century (Australia HREOC Report 1997; Canada Royal Commission on Aboriginal Peoples 1996; Henderson 1995; Simon 1998; Smith 1999). Literacy in English, French or another European language became itself a form of oppression and colonisation even though the literacy levels taught were never very high. This process was not confined to settler societies with indigenous populations but was a common experience for colonised peoples all over the world:

> [O]ne of the most humiliating experiences was to be caught speaking Gikuyu in the vicinity of the school. The culprit was given corporal punishment – three to five strokes of the cane on the bare buttocks – or was made to carry a metal plate around the neck with inscriptions such as I AM STUPID or I AM A DONKEY.
>
> (Kenyan author Kgugi wa Thiong'o, quoted in Crystal 2000: 84–85)

Literacy in a single national language was also enforced in Europe itself as demonstrated by the denigration of Welsh and Irish (Crystal 2000: 85). For African slaves in the United States the teaching of reading and writing even for the limited purpose of passing on Christian instruction or the acquisition of basic skills was absolutely prohibited in Virginia, North Carolina, South Carolina and Georgia until the abolition of slavery in 1863. Persons, either black or white, who attempted to teach literacy skills to slaves could be subject to severe penalties including imprisonment, flogging or hanging. The education of African–American children improved somewhat under emancipation, but education in basic literacy skills remained extremely difficult until well into the twentieth century. Indeed it is still difficult. Other states had laws prohibiting the teaching of reading or writing to slaves in schools or groups but would allow the teaching of individuals (Kolchin 1993: 128–129, 141–142).

The history of literacy is therefore complex. Literacy as the principal goal of education was and is a vehicle of liberation eagerly sought and frequently denied to children and adults all over the world. This has led to the recognition of a right to education as a fundamental international human right (Universal Declaration, Art. 26 and the ICESCR, Art. 13; see also African Charter, Art. 17; Children's Convention, Arts 28 and 29; ILO Convention 169, Part VI; UNESCO Convention 1960; Women's Convention, Art. 10). The acquisition of literacy skills is frequently cited as a principal means of escaping from poverty, political oppression and other forms of abuse, particularly for women and girls (Bellamy 1999). School premises can actually become a place of physical protection for girls, allowing them to choose for themselves a life either within or against the dictates of their families and communities.

For example, Naataosim Mako and Jedida Nkadoyo are young Masai girls in Kenya. Residence at the African Inland Church Girls Primary Boarding School in southern Kenya actually protects them from being kidnapped and sold into marriage. Naataosim's father sold her into marriage when she was 9 to his 30-year-old friend for ten cows, four goats, 200 quarts (225 litres) of home-brewed beer, 6 lbs (2.7 kg) of sugar and a sack of rice – a small fortune for a bride-price (Fisher 1999a). Somehow both girls ended up in this school surrounded by a chain-link fence topped by barbed wire, not to keep out thieves but to keep out their fathers. Protestant missionaries founded the school in 1959 as a refuge for Masai girls while their families followed herds of cattle from one grazing ground to another. The Headmistress, Priscilla Nangurai, has been accused of being on 'a crusade to destroy Masai culture', a charge that she denies:

> I think there are more problems than successes. They [Masai families] feel that when a girl goes to school she gets spoiled because she gets to a point where she is equal to the men. She's not supposed to be equal. She's not supposed to make her own decisions. Most men are afraid of that, of their not getting married at all. To them that is like you are an outcast. A woman should get married. She should have children.
>
> (Quoted in Fisher 1999a)

Although Mrs Nangurai abhors the practice of genital surgery she says she does not try to stop it. Most of the girls at the school have had some form of the procedure done to them. 'We are telling them to at least do it on the holidays, so the girls can have some time to heal before they come back' (quoted in Fisher 1999a). Despite the reluctance of the Masai to send their daughters to school, the numbers have grown from 20 to 650, three-quarters of whom are Masai (Fisher 1999a).

The Masai have fought hard to protect their culture and traditions at the national level (in Kenya and Tanzania), regionally through the Organisation of African Unity and internationally (as in sending representatives to meetings of the UN Working Group on Indigenous Populations once a year in Geneva). Unlike the Gikuyu, the largest ethnic group in Kenya, they have resisted efforts at modernisation and have fought fiercely any encroachments onto their traditional lands by farmers and other developers. The education of Masai girls is seen by many to be a threat to the traditions and way of life of this indigenous people. The acquisition of education, including literacy skills, as well as the modern socialisation taught in a boarding school mean that these girls no longer fit comfortably within their traditional lives. The old ways of the Masai are perceived as under threat. How does one resolve these issues? For Naataosim and Jedida the school offers a different path from that of marriage and children, a path made possible by literacy. But what do the cumulative choices of girls like Naataosim and Jedida mean for Masai culture more generally? Which is more important – the opening of alternatives for young girls and women or the protection of an ancient culture?

The importance of these issues can be illustrated by another story, this time about a co-educational high school in Kenya populated mainly by Gikuyu students. Vivienne Beisel-Gayatri, at the time a young visiting teacher from Canada, began a discussion of circumcision in her class of teen-aged students. She recalls that the topic 'came up as part of a larger discussion on health and family planning – we were reading through the book *Where there is no Doctor*' (Beisel-Gayatri 2000). The girls were almost all vociferously opposed to the practice, 'defining their womanhood by their ability to bear children and saying that the coming of their monthly menstruation was enough to prove their womanhood' (Beisel-Gayatri 2000). The boys were all in support of female genital surgeries on cultural grounds

> entirely because their teenaged circumcision marked them as men. Without circumcision they remained *kihe* or child-like and less than a full human being. *Kihe* incidentally was the most derogatory thing you could call a man. It seemed that the word meaning 'uncircumcised boy' struck to the core of his being, his value, his sense of self-esteem and his identity.
>
> (Beisel-Gayatri 2000)

The debate became so heated that it resulted in physical fights in the schoolyard outside leading to a near-riot.

> The boys interpreted the girls' rejection of circumcision rights as being a rejection of their own masculinity (I think). The fight broke out because they were defending their manhood, they were less concerned about the girls being circumcised.
>
> (Beisel-Gayatri 2000)

The former teacher recalls that no further action was taken because 'no one wanted to talk about this with either students or teachers…it struck so close to everyone's identities as Gikuyu' (Beisel-Gayatri 2000). But the fact that such a discussion could occur at all is indicative of the immense influence literacy and education can have on gender roles and societal expectations.

Literacy in a foreign language may mean internalising one's own difference and subordination as an alien who has been colonised, an illiterate taught the trick of reading or writing, or a unique exception to an otherwise primitive or inferior group. On the other hand, literacy in an indigenous language can help instil cultural pride and preserve cultural traditions. There is a strong revival among many indigenous communities in Canada using literacy in their own language as a tool of creativity and education (Leavitt 1995). Similar revivals or support for bilingual and bicultural education for indigenous peoples are ongoing in Australia and New Zealand (ATSIC 1999; Battiste and Barman 1995; Smith 1999). The capacity for cultures to adapt is essential to their survival. Education, carefully geared towards respect for cultural difference and a balance between preservation and change, may be the decolonising vehicle these Masai and Gikuyu children represent. But the deep division between written and oral cultures must be acknowledged or our assumptions about the usefulness of education and the attainment of literacy skills may destroy more than they conserve. Modern human rights to education, freedom of expression, language and many other rights depend on this assumption of literacy or the need to acquire it. Thus the right to education is, at its most basic level, the right to become literate. At one level this is obviously crucially important. Literacy skills do spell the difference in economic improvement and political participation especially for girls and women. Literacy has become essential to achieving full rights of active citizenship in modern political structures or to succeeding within a global economy. But this is because our models of economics and politics are based on the literate male subject.

On an even deeper level the literate subject has become the model of all subjectivity. Those who do not or cannot imitate, or are prevented from imitating, this model of humanity are clearly seen as less fully individuated, less fully developed – less fully human. Even where these lesser humans do succeed in fulfilling the requirements of the model, they can be seen as dangerously subversive, ridiculous or as still somehow lacking. And of course by imitating the model of the literate male other identities based on different models of humanness are compromised or sacrificed. This is not only a matter of individual tragedy. These other models themselves cease to be 'human'. Instead the many diverse ways of being human become objects of scrutiny, surveillance,

disciplinary control or study as the 'Other'. Or, they become objects of scorn and abuse. Subjectivity, or the creation of human identity, cannot be seen as separate from the transformation of language in Europe from oral, to manuscript, to printing and its subsequent spread internationally through the instruments of colonialism and economic globalisation.

The nature of the literate subject

Arguments might be made which would deny the possibility of subjectivity at all given that its definition seems to rely on a dualistic antagonism with an 'Other' (or object) against which the subject is written and measured (Spivak 1994). As Derrida writes:

> In the spoken address, presence is at once promised and refused. The speech that Rousseau raised above writing is speech as it should be or rather as it *should have been*. …
>
> [I]n the *Confessions*, when Jean-Jacques tried to explain how he became a writer, he describes the passage to writing as the restoration, by a certain absence and by a sort of calculated effacement, of presence disappointed of itself in speech. To write is indeed the only way of keeping or recapturing speech since speech denies itself as it gives itself. Thus an *economy of signs* is organized.
>
> Let us note that the economy is perhaps indicated in the following: the operation that substitutes writing for speech also replaces presence by value: to the *I am* or to the *I am present* thus sacrificed, a *what* I am or a *what I am worth* is *preferred*. …I renounce my present life, my present and concrete existence in order to make myself known in the ideality of truth and value. A well-known schema. The battle by which I wish to raise myself above my life even while I retain it, in order to enjoy recognition, is in this case within myself, and writing is indeed the phenomenon of this battle.
>
> (Derrida 1974: 142)

Subjectivity becomes both a product of language (in a political and an economic sense) and an impossible fantasy that can never be realised because language itself resists or prevents the attainment of undiluted *presence* in the light of 'the ideality of truth and value'. Language irrevocably separates us from that which only language can express – Universal Truth (Boyne 1990). Writing and speech are not, however, the same as Derrida is careful to point out. Spoken language both invites the possibility of *presence* through the immediacy and personal presence of experience and interpretation, and then betrays it through its ephemeral nature.

This ignores, however, the human complexity of speech where it is part of an oral culture. Oral cultures are preserved through memory and constant retelling as a means of creating, not permanence or *presence*, but continuity, relationships, context, immediacy and personal responsibility. Storytellers, *griots* and members of the *Sande* described in Chapter 4 fulfil this function (Tobin

and Dobard 1999; see also Minh-ha 1989). Writing, according to Derrida, attempts to reconstruct the promise of *presence* contained in speech through the relative permanence of its utterance, but only at the cost of the living experience it attempts to reconstruct. Thus *presence* is replaced by the imposition of value or 'worth': what is valuable enough to be preserved; my own value as a writer; the value of particular signs over others; the value of the inscribed utterance over the rhetorical; and so on. What this may fail to capture is a very significant problem with written language. Writing does not simply attempt to reconstruct the promise of *presence*. It actually creates the desire for *presence* in the first place. This creates the dilemma of whether and how to preserve the oral through the medium of writing or other permanent form. The act of preservation, in order to satisfy this desire, immediately changes the living experiential culture into something that is no longer living and immediate but into something dead, preserved, appropriated, *owned*. The preservation of oral cultures is perceived by written cultures as a matter of importance – hence the resources granted to anthropological and ethnographic research. For people within oral cultures it is seen as a matter of practical and immediate urgency. But it is fraught with deep contradictions.

Although the destruction of oral cultures has been and still is great they can be surprisingly resilient and much more 'permanent' than their literate destroyers, or saviours, give them credit for (Battiste 2000; Mills 1994; Nabakov 1992; Rintoul 1993; Rutherford 1991; Smith 1999; Thornton 1987). In the West the perceived need to preserve the essence of oral cultures is based on the underlying perception that they are disappearing. Although this has indeed been the experience of indigenous peoples colonised by Europeans, a sense of responsibility on the part of anthropologists and ethnographers as representatives of the destroying culture is uneasily expressed at best (see Le Roy 1995). White anthropologists attempt to reconstruct and/or preserve what their own society is exterminating or has already exterminated. But the idea of destruction is itself very misleading. This idea is fuelled by another kind of desire. This is not just the desire for a connection with the *presence* of that 'spoken address', a *presence* which 'is at once promised and refused'. Nor is it only the desire to connect with the apparent capacity of oral cultures to provide in its most complex form that 'speech that Rousseau raised above writing…speech as it should be or rather as it *should have been*' (Derrida 1974). It is also a deep and often unexpressed (because inexpressible) desire that the real human holders of these cultures disappear. The 'presence' of indigenous cultures is an embarrassment to the coloniser. Survivors of the colonial holocaust constantly remind us of that holocaust. The ability to engage in the transcendent connection with *presence* requires that this terrible reality be denied or obliterated. Thus destruction feeds on denial and denial creates desire that in turn may lead to the apparent disappearance of cultures that have in fact survived.

An example of this process can be seen in the perception of the Aboriginal survivors of Tasmania. The accepted wisdom was, and is, that all Tasmanian Aborigines were in fact killed or died as a result of colonial intrusion by the

late nineteenth century. The last 'full-blood', a woman named Truganini, died in Hobart in 1876 (Ryan 1996: 1). Most Australians see this annihilation as a disgraceful chapter in their history. But what is so insidious about this belief, this 'fact', is that it denies the reality of the existence of Tasmanian Aboriginal survivors. They are either ignored entirely or designated as inauthentic because (as everyone knows) there are no Tasmanian Aboriginals.

Indigenous cultures are typically either denigrated or romanticised by their literate observers, often both at the same time. This romanticisation tends to grant to indigenous peoples a mystical wisdom and connection with the earth and the supernatural which the literate culture has already sacrificed in destroying its own oral cultural roots. But this romanticisation is always translated through the lens of a culture that must appropriate and/or destroy in order to maintain and expand its own dominant position as the superior culture. To be literate is to be in the position of the detached observer and preserver. It is in the nature of written language to create this form of subjectivity. When this is combined with an ideology of superiority, as most literate cultures have, then oral cultures are placed in a position of vulnerability, subordination, dissection and, eventually, destruction. So we have Canada's 'Imaginary Indian' in Daniel Francis's phrase (Francis 1992) or the Australian equivalent (Wright 1996) defining for Euro-American cultures what 'indigenous' or 'Aboriginal' might mean. The other manifestation of this is the celebration of 'The Way of the Earth' on the part of New Age spiritualists or white environmentalists (McLuhan 1994) that may either misappropriate or completely misinterpret indigenous law and culture for a popular audience (Ziff and Rao 1997). Whether through denigration or through romanticisation the humanity of indigenous peoples is almost completely disregarded. This is especially acute for indigenous women (Acoose 1995).

The real problem is that indigenous people are not seen as trustworthy guardians of wisdom because they are so different in European eyes. They are the 'Other'. The words 'speech as it *should have been*' in Derrida's phrase represents a chilling reality. It is not the desire for something transcendental or a yearning for the universal. Rather it is illustrative of the relationship between European literate cultures and the oral cultures of colonised peoples. This is frequently a relationship of destruction and dispossession in which responsibility is not made to lie with the heroic conqueror but with the fallen and treacherous primitive speaking words of unfulfilled promise (see Conrad 1902). Writing and especially the even more detached and impersonal medium of the printed word have helped to create a grand illusion, the illusion that only a certain type of human subject is sufficiently rational to 'really' understand and experience 'Universal Truth', or indeed to believe that such Truth exists at all. This subject is always literate and the heir to a culture that relies on literacy and the written or printed word for its legitimacy. For Rousseau, as paraphrased by Derrida, writing constitutes the subject as a matter of worth, the realm of 'truth and value'. But what is sacrificed is 'present and concrete existence', even life itself. The true 'self' or subject of Western thought is then in a constant state of desire

for a wholeness or recognition in the light of a *presence* which must always be self-defeating because it must also constantly deny its own immanent, transient, earth-bound existence within speech. Thus oral cultures are consistently devalued within literate cultures and eventually severely damaged or destroyed by the imposition of literate values. Speech is usually seen as less trustworthy than written evidence; experience to be valuable must be recorded; history does not become 'history' until human narrative is transformed from oral 'mythology' into written 'fact' and lived experience is transformed into detached experience that can be objectively analysed.

The Canadian Supreme Court case of *Delgamuukw v. British Columbia* (1997) provides an important example of the way in which respect for oral cultures within literate systems can give rise to serious problems (see also Persky 1998). In this case, on a point of constitutionally protected Aboriginal rights, there was a critical discussion on the way in which evidence should be heard in relation to the existence of Aboriginal title to traditional lands of indigenous peoples in British Columbia (Asch and Bell 1994). This was largely oral evidence given through stories and songs (much to the surprise of the trial judge) to prove the connection of the Gitksan and Wet'suwet'en peoples to 58,000 square kilometres of land in northern British Columbia. This evidence was based on the *adaawk* or sacred oral traditions of the seventy-one Gitksan Houses and *kungax* or spiritual songs, dances and performances of the Wet'suwet'en. The most important element of this evidence was a feast hall. 'This is where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands' (*Delgamuukw* 1997: 45–46). Chief Justice Lamer of the Supreme Court, while recognising the difficulties courts have dealing with oral testimony, held that it must be considered:

> This appeal requires us to…adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. …
>
> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.
>
> (*Delgamuukw* 1997: 75–76)

This relatively sympathetic judgment directed that the issues be tried again so that a better determination on the basis of the oral testimony could be reached. But the ultimate goal is still to 'adapt' the 'traditional laws of evidence' so that oral history 'can be accommodated and placed on an equal

footing with…historical documents'. The standard of what is meant by 'historical truth' means that any other kind of 'truth' will always struggle to be heard no matter how sympathetic a court may be. The problem is not just that courts are insensitive to the presentation of oral history (although the trial judge certainly appeared to be) but that the vision of truth represented by literate and oral cultures is so different (Fourmile 1989).

Derrida's attack on *presence* in Euro-American thought highlights and reflects a dominant vision in which anything other than whiteness or maleness is seen as threatening, divisive, alien. Within European cultures the desire for *presence* preserved in the written word relegates others, or the 'Other', into that which exists only to constitute itself – the Subject of discourse that dominates Western European thought and action. Just as this is the subjectivity of literacy, so it is also necessarily the subjectivity of whiteness and maleness. Writing and even more so printing not only impose a system of values, they necessitate the separation of writer and 'written-about' or writer and 'written-to'. Experience becomes objective reality that can be preserved, dissected, analysed, 'written-about' and, above all, controlled, owned, appropriated. The audience ceases to be an involved participant in the narrative experience but becomes a passive reader or 'written-to'. The writer achieves the status of truth-teller unchallenged by the invisible and no longer present truth-receiver and the 'Truth' becomes permanent, the object of analysis as either proven or unproven, i.e. 'not-True'. That truth must be capable of objective verifiability is at the core of most of our systems and structures of law, science, technology, logic, even art which has come to be judged by supposedly objective aesthetic standards. The world becomes permanently divided into subject and object, true and false, right and wrong, good and bad, superior and inferior. The medium of writing and, even more so, printing becomes the means by which subject and object are separated in a relationship of power – writer versus written-about or writer versus reader or written-to.

But the writer could not exist without at least something to write about and without at least a theoretical readership. Therefore the subject writer is constituted by the Otherness of the written-about and the written-to, but this constitution of the Subject presupposes the dominance of the writer or author over the writing or the written. The word 'author' describes not only a human creator in a particular medium, but the source of 'authority' and of 'authenticity' (Foucault 1984). The act of writing is also usually solitary. The Subject that validates itself through writing and its contrast with and difference from the 'Other' being written about or to is a subject necessarily alone. This subjectivity therefore not only depends on a schism between subject and object but is also necessarily an *individual* subject seemingly unconnected to the cultural milieu from which the very language it writes (speaks) comes. Thus writing not only attempts to achieve *presence* in the sense of making oneself 'known in the ideality of truth and value' but denies to itself the necessary function of language as the mediator of relationships and connection with or responsibility for the very reality that is being sought.

And so

> [w]hile Western men were carrying out their extraordinary conquest of much of the world, they were foisting off onto other groups the characteristics of evil. Thus most Western men were not forced to ask themselves: 'Is slavery immoral? Is it wrong to put women to death for witchcraft?'
>
> (Barstow 1995: 160–161)

Literacy, language and human rights

It is possible to argue of course that printing impelled a profound transformation *towards* the democratisation of power in relation to communication. Culture in Europe from 1450 onwards became literate not just for the powerful few in control of written language but potentially for everyone. This represents an extremely complex interchange between technology, literacy, political change, religious ferment and centralisation of political power during this period (Biller and Hudson 1996; Bourdieu 1993; Chartier 1989a; Eisenstein 1983; Febvre and Martin 1984; Luke 1989). Printing seems to have had a major influence on the spread of literacy expanding the numbers both of who could be an 'author' and who could read an author's words. The multiplicity of texts also vastly expanded the subject matter of communication, placing a huge new array of objects to-be-written-about within the hands of authors and readers. The struggle for control of the printed text involved censorship and the battle not only over rights regarding ownership and freedom of expression, but also over the nature of the very languages used. This struggle included continuing debates over the appropriate subject matter to be written-about, those who could qualify as 'authors' rather than mere scribblers or hacks, and what should and should not be read by various classes of readers.

Vernacular languages, in both their spoken and written forms, became standardised through the medium of printing. Modern European languages are now usually those derived from the dialects spoken in or near centres of governmental and commercial power, centres that were established by new and aggressive monarchies and the growing entrepreneurial classes of late medieval and early modern Europe. These centres were consolidated during the expansion of overseas colonisation until they became truly metropolitan. Thus today what is spoken is the English of commercial London and Westminster not of Chaucer or Shakespeare's Midlands, the French of Paris not of Gascony or Brittany, the Spanish of Castile not of Andalusia. The standardisation of Tuscan Italian (based in Florence and Milan) and Saxon German are exceptions which prove the rule of how powerful printing was and is as a medium of centralisation. Germany and Italy were not united into single political units until the mid-nineteenth century. The German and Italian languages developed along Saxon and Tuscan models in spite of this national fragmentation. Most modern types of print are derived from the major printing centres of Italy and Germany, including the use of pica, *italic* and **Gothic** as the standard form for most European

publications. In Germany this began with the influence of Luther's Bible and the original proliferation of printing presses in Saxony rather than from any centralised German authority (Braudel 1992). Printing also developed very early in Italy where manuscript production and the early use of paper facilitated its introduction. Tuscan Italy and Saxon Germany were both also major commercial centres from long before the development of printing, indicating that economic and cultural changes are closely related and may normally precede political centralisation.

As printing on the European model spread with the success of colonialism, this pattern has repeated itself globally. It is now accepted everywhere that literacy using a very few vernacular languages based on the dialects spoken originally in centres of political, commercial or, sometimes, religious power (as in the use of Arabic in Islamic countries) is, or should be, the norm. The UN recognises and uses six vernacular languages in its communications and translations: English, French, Russian, Spanish, Mandarin and Arabic. It is suggested that all save a small minority of vernacular languages are disappearing or will have disappeared by the end of the twenty-first century, although this dire picture may be another exaggerated projection of the 'disappearing Aboriginal' discussed above. There is no doubt, however, that the former colonial languages are continuing to expand such that English in particular is now becoming a kind of universal language. David Crystal estimates that there are probably about 6,000 languages currently spoken in the world (Crystal 2000: 11). Eight languages (Mandarin, Spanish, English, Bengali, Hindi, Portuguese, Russian and Japanese) are spoken by nearly half the world's population as a first language. Of the remaining languages 96 per cent are spoken by just 4 per cent of people (2000: 14–15). He also estimates that there are about fifty languages that are known to be spoken by just one person. Of these twenty-eight are Australian Aboriginal (2000: 15). When that speaker dies the language also dies. Sometimes where there have been efforts made to record the language it may be rescued. The Yugambeh language of the Gold Coast in Australia has been resurrected by a dedicated indigenous linguist from tape recordings made of the last known speaker (Jopson 2001). Rescue efforts seem to require recording or writing down what are usually oral languages (Crystal 2000: 139–141). What this process ignores are the larger social, economic and political structures that are responsible for the death of these languages and cultures. Recording simply duplicates the colonial process, while seeming to offer the only solution to colonial destruction. The paradox is excruciatingly painful for indigenous peoples.

The individual Subject, developed in a literate colonising culture, became the means by which European Man granted humanness to himself and denied it to others in the search for a *presence* he could and can never achieve. Subjectivity of this kind can never be an adequate foundation for a truly 'human' human rights. In so far as human rights depend on the projects of 'Humanism' and the Enlightenment grounded in classical and Christian literary sources and creating a particular type of subjectivity, they must necessarily involve a sacrifice of some part of what is human and cannot be accepted on their own terms as 'universal'.

The universality of human rights is therefore suspect not only because (as is frequently reiterated) it depends on a Euro-American model of human development, but because this model itself, through the logic of its own language, denies humanity to large numbers of the earth's humans (Benhabib 1992; Grosz 1989).

The individual Subject of Euro-American thinking is a person who is in fact *subject to* the cultural expectations bounded by the written text. This necessarily separates him or her from the physical presence of the 'Other'. It makes it easier to deny the humanity of other people, to believe that others exist only as a means of determining who the reading/writing Self is by delineating what he or she is not: 'I am rational, literate, educated and self-determining because I am *not* irrational, illiterate, uneducated and incapable of self-determination.' Children are not seen as fully human because they are not capable of rationality. The acquisition of literacy, education and the skills of rational adulthood are for European systems of thought the initiation into Subjecthood and human rights. Women, indigenous peoples and many others have always had difficulty placing themselves within human rights because of this emphasis on literate rationality within a narrow range of linguistic and cultural skills. I would suggest that the reasons for this lie not only in the lingering effects of racial, gender or age-based discrimination, colonialism and systems of patriarchy or ethnic superiority. It also has to do with the theoretical bases on which human rights rest. At a very fundamental level this has to include the use and expectations maintained by a particular type of language use. International human rights, despite their diverse origins, are now an expression of a literate culture maintained through the creation and interpretation of canonical texts such as the Universal Declaration. But the deep penetration of colonial languages, mental attitudes and expectations of what it is to be 'human' arising out of the use of written and printed language are problems which most human rights commentators have not yet begun to uncover. Culture as an aspect of human rights is therefore not confined to the exotic 'otherness' of cultural diversity whether praised as part of a tolerant multicultural society, or attacked as a threat to the universality of human rights. Culture is integral to the development of what we mean by 'humanness' and the rights of all humans. Taking culture seriously is indeed subversive of the universality of human rights. But not taking culture seriously is even more destructive of the rights of humans who do not fit our literate Euro-American citizen/soldier model of what a human being is – or who she or he might become.

6 Speaking truth to power

> If you can't say anything nice, don't say anything at all.
>
> (Thumper in Walt Disney's *Bambi*)

A history of printing and copyright

Looking at specific human rights or problems within human rights and how these relate to political, economic and cultural systems more generally can help in understanding how complex are the basic concepts underlying international human rights law. This is a question not only of the expansion of liberal democracy or 'civil society' but of the deep and continuing grip of colonial thinking on all systems currently in place, from the personal and local to the global. Decolonisation is a fundamental aspect of what human rights are about. This process, subsumed under the rubric of nation building from the early twentieth century to the end of the Cold War, is being further complicated by the expansion of Euro-American economic patterns and structures through economic globalisation (Stark 2000). Political battles are perceived through the lens of ethnic tribalism while the expansion of economic forces is carrying on colonial patterns of acquisition and control under different names and in different ways (Orford 1997; Otto 1996a). But to label economic globalisation as merely a new form of colonialism is probably too simple. The processes may in fact contain the possibility for the creation of global systems of legal protection incorporating human rights as genuinely universal, i.e. as applicable to everyone. For this to happen democratic participation, dialogue, respect, self-determination, attention to fundamental problems in the allocation of economic resources, and effective ways of reducing or eliminating violence must be developed (Sen 1999). The next four chapters look at some specific examples of human rights within this larger framework.

Freedom of expression is often described as a fundamental and quintessentially important human right essential to the creation and maintenance of democratic dialogue and decision making. But this human right in its present form may in fact create real problems within an expanding global civil society. The relationship between this most important of civil rights, economic considerations central to liberalised trade regimes, and revolutions in technological development and global communications need to be seriously examined. The

history of freedom of expression and its association with the protection of intellectual property is one place to start.

The first copyright regimes were developed in Europe during the nationalist and mercantilist revolutions of the sixteenth and seventeenth centuries (Patterson 1968). The economic rights that now dominate this area of law did not become important until the commercial development of printing in fifteenth-century Europe made the economic potential of cultural exploitation feasible (Wright 2001). Once established, printing presses expanded rapidly, altering the history of communication in the world. As Braudel says, 'it is hard to say whom the printing press really served. It expanded and invigorated everything' (1981: 401).

When we talk about the globalisation of international trade, technology transfer and telecommunications we are referring to models that were and remain Euro-American. China is generally acknowledged to be the first to use the three great inventions cited by Francis Bacon as the basis for modern European supremacy (the compass, printing press and gunpowder). Histories of the 'Rise of Europe' also generally assume that China failed to develop the full potential of these inventions. The colonial attitude was that this was because of innate qualities of Chinese backwardness and stultification (Adas 1989: 188–193). The quality of initiative necessary for true inventive genius leading to significant development was felt to be exclusive to only a few European men. This view related to Renaissance ideas about invention as 'the product of special creative genius that the majority of ordinary men did not possess' and that had hitherto been attributed only to God. Invention came to be seen as the 'essence of technical progress' and of civilisation more generally (Pacey 1992: 56–57). This 'essence of technical progress' was something that non-European men and all women were seen as lacking. Our systems of thought and action are still dominated by the assumption of superiority of European over non-European technology and communications as the driving force behind the 'Rise of the West' and its current ascendancy (Landes 1999; Mokyr 1990; Parker 1996).

The reality is that China did use printing and other technological inventions for commercial expansion and development long before Europe did and on a scale considerably exceeding that of Europe until well into the eighteenth century. This was accompanied by long-distance shipping, sophisticated business practices analogous to capitalist formations, the production and distribution of consumer goods for national and international trade, the use of paper money and credit (which rely on printing) and the control of the sea trade throughout East and Southeast Asia. By the late medieval period China's technological competence had far exceeded that of the Arab world which in turn had outstripped Europe for many centuries (Abu-Lughod 1989: 322–340). However, China went through a period of withdrawal during the Ming period beginning in the early fourteenth century. Overseas exploration and trade were curtailed and China became increasingly insular. As a result China did not become a major imperial power outside of Asia and Chinese patterns of printing, publication and dissemination of information have not become the model for modern structures. The Islamic world also rejected the technology of printing for most of

its history. Although the Ottoman Turks made effective use of gunpowder and artillery, the Islamic world generally was not interested in using the technological innovations of East Asia. These included printing, although not paper (Lewis 1995: 23). The reasons must be again highly speculative, but certainly relate to religious and cultural attitudes towards dissemination of information, uses of technology and commercialisation (Roper 1995: 209).

The new and aggressive monarchies of late medieval Europe quickly realised the importance of the use of printing to propagate political and religious ideologies, as well as the perceived need to censor seditious or heretical material. Although the significance of printing on political and economic changes in Europe is far from clear, there is good evidence to suggest that it did indeed provide a major impetus towards further technological and cultural production on a massive scale. It also appears to have contributed to the centralisation of power through cultural control, such as the standardisation of vernacular languages and the decline of Latin as discussed in Chapter 5. In addition it appears to have been significant in the spread of religious dissent and the formation of the Protestant Reformation (Chartier 1989a; Darnton and Roche 1989; Eisenstein 1983; Febvre and Martin 1984; Luke 1989). It was also essential in the development of modern political and judicial systems through the printing and publication of standardised legal codes and the recording of judicial decisions, necessary as stable foundations for both civil and common law systems, and (in the case of treaties) international law. Printing was a prerequisite for the formation of capitalism, particularly through the printing of paper money and notes of credit. Finally, the colonial enterprise could not have functioned without the availability of printing for administrative purposes including the spread of propaganda, religious tracts, commercial documents, military instruction manuals and orders, navigational charts, maps, tide tables, and treaties with 'the natives'. The maintenance of large empires, such as the Spanish and later the French and British, relied on the printed word to create cohesiveness, uniformity and relative stability over long distances and periods of time. It assisted in the continuation of loyalty and connection to the 'mother country' on the part of European soldiers, missionaries, traders and settlers. The possession of writing and, even more so, printing also allowed European colonisers to justify their actions through ideologies of technological and cultural superiority over the largely oral cultures they encountered (Adas 1989). Literacy in a European language was, and still is, seen as a sign of civilisation and progress.

During the early period of printing royal privileges were sold to selected printers or printing guilds who were granted exclusive rights to reproduce and distribute works in return for censoring those works (Patterson 1968). The European Renaissance depended on these developments, which in turn coincided with the colonial enterprise. It also coincided with the gradual deterioration of the position of European women within society as monarchs, fathers and husbands gained ground. 'Humanism' put European 'Man' at the centre of this new, mass-produced discourse, not humanity in general. Whether in the public sphere surrounding the Crown or in the private sphere of the family, patriarchal control became the focus around which political and economic development was stabilised and expanded.

The proprietary nature of copyright did not become the basis for literary protection in any coherent sense until the passage in England of the *Statute of Anne* in 1709/1710. The 'author' as an individual with some rights began to be seen as the principal subject of legal protection rather than copyright being exclusively vested in printers and publishers. This statute protected published literary works only; protection for artistic and other works followed over the course of the next two centuries. The *Statute of Anne* legitimised a Lockean philosophical position that the proprietary rights of authors should be protected. The Act provided for a limited copyright period for published literary works originally vesting in the author but assignable to any other person in a manner similar to other forms of property. The effect was to give authors a limited right to protect their economic interests while allowing for the assignment of exploitation rights to publishers (Berne Convention 1886; Rose 1993).

Freedom of expression and copyright

As copyright was developing as a means of protecting the economic rights of authors, freedom of expression was also coalescing into an important civil right. One of the most interesting examples of this right is contained in the American Convention Article 13. Unlike other international human rights treaties, Article 13(3) of the American Convention specifically prohibits restrictions on freedom of expression through indirect means such as the regulation (whether governmental or private) of newsprint, radio (but not television), broadcasting frequencies, or information technology more generally. This highlights the role of both public and private control and influence over the media in the dissemination of information and ideas. These controls can include not only laws in relation to media regulation, defamation, contempt of court, licensing, confidentiality or censorship more generally but also intellectual property, especially copyright.

Intellectual property is itself a human right and is recognised as such in the Universal Declaration Article 27 and in the ICESCR Article 15. Although the connection between freedom of expression and the legal protection of information through intellectual property has been recognised in the past, it is not usually understood how closely related the histories of these two areas are. The European 'invention' of the printing press in the mid-fifteenth century led to fundamental changes in the nature of cultural development in Europe and eventually, through colonisation, the whole world. Freedom of expression was not a real issue prior to this technological advance. Commercial interests in printing and publication developed, not just parallel to the efforts of centralising monarchies, but as directly involved participants in the censorship process. Without the monopolies granted by the Crown in European countries to companies or guilds of printers and booksellers, in return for censorship of texts, copyright as we know it would not have developed in the way that it did.

The history of copyright is a history of the expanding hegemony of the printed word. Patterns suitable to this form of expression and dissemination of knowledge have been grafted onto other creative traditions through the medium

of copyright protection even where these forms of expression are not suitable for copyright. The protection offered to creative endeavours, based on that originally designed for published literary works, has established a particular form of legal parameter around cultural production-serving interests other than those of the individual artist, the consuming public or the community. Rather it serves the interests of publishers, distributors, producers, marketers and advertisers working within the mainstream of corporate capitalism. Economic globalisation and the expansion of copyright under the Trade Related Aspects of Intellectual Property or TRIPS Agreement by the WTO in 1994 mean that this expansion is now dominant internationally. Legal protection of creative work as property also means that expression, information, knowledge, technology and culture generally are treated as commodities. This developed at precisely the time that the 'author' was elevated as a central focus around which property rights and control over expression and ideas could be contained (Eagleton 1990; Foucault 1984). Freedom of expression was the core human right to which the author, as an individual entity within the newly emerging nation-state and the colonial expansion of economic power, could look to for protection when the state attempted to encroach on his or her power to write or speak. But the author as an individual did not exist as a recognised or juridically significant figure until copyright made him so (Jaszi 1991). Freedom of expression protected speech and written expression in the public realm of political action on behalf of the literate citizen, at first overwhelmingly white and male, while copyright protected written expression in all its various forms in the private realm of commercial production and dissemination. Freedom of expression focuses on the individual author as citizen, while copyright focuses on the individual author as commodity producer, but neither category of individual could exist without the nation-state and its association with colonial economic expansion as the primary focus of allegiance and/or opposition. Freedom of expression imposes restrictions on the state's capacity to interfere in the expression of ideas, usually embodied in writing, while copyright is a property right granted by the state through legislation for a limited period of time, enabling the author to benefit commercially from his or her work. Without copyright to protect the expression of ideas and information in the marketplace, authorship would be much less significant and freedom of expression would not necessarily have developed as an individual right of citizenship.

The reality of copyright protection is that it defines and maintains commercial interests. Cultural production can be seen as just that, production of commodities for the marketplace, as in the poignant late-nineteenth-century novels of George Gissing, *New Grub Street* and *The Odd Women* (1891, 1893). The necessary result and overriding purpose of legal protection is the commodification of creative work and its appropriation through ownership by the corporate producers and marketers of modern 'culture'. What we as a community share as cultural artefacts are in fact commodities owned and controlled by others. Who owns Bambi, or his friend Thumper? The artistic imagery and familiar sayings from among Western culture's most cherished childhood icons are owned and controlled by Walt Disney Studios (Coombe 1991: 1854). Another

favourite Disney character, Donald Duck, was reproduced in a Chilean comic book highly critical of American involvement in the overthrow of the Allende regime in 1973. These reproductions were made without permission of the owner of copyright in those works, Walt Disney Inc. Importation of copies into the United States was prevented, and offending copies seized, as a result of the copyright infringement alleged by Walt Disney (Lawrence 1989). Copyright is rarely used so blatantly to limit freedom of expression in a political sense. The law of intellectual property plays a more important role in determining what and how works are distributed through laws relating to ownership and licensing. Cultural expression is shaped at least partly, if not wholly, by the nature of production and the ideological position of both the author and his or her work in the modern global economy. Political repression in the form of censorship becomes less obvious and is therefore more effective because it is indirect, hidden and self-imposed (Bettig and Schiller 1997; Coombe 1998; Herman and Chomsky 1988).

Copyright and the growth of Western liberalism

Copyright developed alongside human rights and individual liberties during the eighteenth and nineteenth centuries and the associated political and economic changes that elevated bourgeois patriarchal culture to the centre of political, economic and aesthetic ideology (Eagleton 1990). But the historical foundations of human rights, including the right to protection of copyright in natural rights theories of the seventeenth and eighteenth centuries with foundations laid by Locke and Kant, gave rise to differences in the formulation of rights (see Wright 2001). English law, based on the Lockean *Statute of Anne*, provided for economic protection and left human rights in the public realm of politics. A significant schism still exists in the common law world between the economic significance of intellectual property and the individual libertarian significance of freedom of expression. This has not always been so. Milton's *Areopagitica* (an oration addressed to Parliament in 1644) is often held up as a foundational document in the history of freedom of expression (Maxwell *et al* 1991: 39–42). And so it is. But it was also a response to the continuation of licensing in the printing industry by the Revolutionary Parliament after the apparent freeing of the press from the oppression of Crown privileges, one of the main bones of contention during the English Revolution. Licensing ensured the continuation of governmental control over expression through indirect means by granting permission to print to a restricted body of entrepreneurs, the Stationers' Company (the same group who had benefited under the Tudors and Stuarts), who thereby maintained their control over their 'copyrights'. Censorship and copyright continued to operate hand in hand, but now under the ultimate authority of Parliament and not the Crown. Milton notwithstanding, this system continued until the end of the century when the movement towards authors' rights led to Parliament's passage of the *Statute of Anne*.

In France, the decrees of Louis XVI in 1777 regulating the book trade were the result of efforts similar to Milton's in calling for restrictions on the power of the Crown to grant privileges to printers in return for censorship. These decrees were substantially reproduced in the Revolutionary Copyright Decrees of 1791 and 1793 (Stewart 1989: 374; Woodmansee and Jaszi 1994). Protection of authors' rights through copyright, moral rights (personal rights protecting the 'paternity' of a work and its integrity) and freedom of expression were perceived as inextricably linked but, following the English model, exploitation rights became separated from other aspects of the '*droit d'auteur*' (Darnton and Roche 1989). French law has always allowed for at least a partial incorporation of the romantic view of authorship within its law in that it was developed later than English law (see Bougeard 1991: 5–11). By the end of the eighteenth century romanticism as an aesthetic and political perspective had gained ground. The author as hero became part of the mythology of the citizen/soldier fighting for and gaining rights and freedoms against an oppressive and authoritarian government. English law remained significantly more pragmatic in its approach, although the two systems are no longer much different, such that English law, for example, now protects moral rights (Copyright, Design and Patents Act 1988 Chapter IV). The struggles for authorship, individual freedom and an independent press that raged throughout the seventeenth and eighteenth centuries relied on and influenced the battle over control of the publishing industry as a viable economic force (Rose 1993; Woodmansee and Jaszi 1994). The 'Battle of the Books', as it was called in Great Britain, was about control of textual dissemination both as a matter of commercial exploitation through copyright *and* as a matter of political comment and participation through freedom of expression. The close connection between property rights in material expression and personal rights to free expression remains today.

Freedom of expression attempts to balance the right to free opinion and speech on behalf of individuals on the basis of the need for rational discourse seen as necessary for effective democratic government to operate. Individual and social requirements are held together in apparent tension. The creativity of the individual author is how citizenship appears in the marketplace of literary production and expression. The economic and legal structures underlying the production and exploitation of expression in the marketplace make it difficult to see these structures as fundamental to the operation of freedom of expression as a civil or political right. The separation of the economic protection of expression through copyright from political protection through the right to freedom of expression reflects the deepening divide between the public and the private from the seventeenth century onwards. Freedom of expression operates in the public world of political debate, journalism and the role of the public intellectual (see Said 1996). Copyright represents the private rights of commercial protection and exploitation of the written word (and eventually other material forms of expression) in the marketplace. Neither freedom of expression nor copyright adequately protects the domestic world of women, children, servants, slaves and dependants (in Kant's definition of dependency). Indeed these legal regimes are

largely irrelevant to the forms of expression recognised as typical of the private sphere. Partly this was because the private world was still largely oral until relatively late in the modern period, as discussed in Chapter 5. More importantly this world was designated as the hidden world of emotion, nurturing, religion, family life and cultural values from which the public world of politics and the public/private world of economic achievement had largely divorced themselves by the late eighteenth century.

From the nineteenth century onwards colonialism spread copyright protection on the European model to the rest of the world. For example, the *Imperial Copyright Act* of 1911 explicitly extended British copyright law to its imperial possessions and became the basis of copyright law in most former English colonies and dominions including Canada, New Zealand, Australia and South Africa. Those engaged in struggles for democracy and decolonisation demanded the accompanying right of freedom of expression both in Europe and in the colonies. Limits on freedom of expression and political participation have led to serious legal and political conflicts in Europe and overseas throughout the last 200 years. Restrictions on the operation of the press were an important part of the maintenance of European colonial regimes. Battles over those restrictions often accompanied wider conflicts leading to political independence. Copyright and freedom of expression are the quintessential representations of the modern, public world of bourgeois expansion, male dominance and European colonial influence in the creation of political and economic systems in Europe and the colonies. These rights continue to be expressed in terms of individuality whether it is the journalist or intellectual 'speaking truth to power' (Said 1996 85–102) or the entrepreneurial author successfully establishing his or her presence in the marketplace of ideas. Indeed, they are one and the same. In the meantime the communal and social values for which these individual rights are characterised as protecting and enhancing recede into a shadowy hidden world of family, village, street, home, 'word of mouth' and private morality – the world of dependence and cultural difference.

Protecting the culture and knowledge of indigenous peoples: Australia

The internationalisation of intellectual property regimes under various conventions since the nineteenth century, particularly under the 1994 TRIPS Agreement administered by the WTO, can be seen as a continuation of this colonial expansion (Wright 1996). The dispossession and subordination of indigenous cultures has been at least partially accomplished through suppression of languages, exploitation of arts and crafts for the purpose of attracting tourist dollars, and the destruction or taking of local plant and animal stocks including human genetic material (Battiste and Henderson 2000; Posey and Dutfield 1996). This biological material can then be manipulated and appropriated by governmental and foreign biotechnological, pharmaceutical, chemical and agricultural corporate interests and protected by patent laws for the benefit of

non-indigenous owners (Dutfield 2000; Posey 1999). Meanwhile much of Aboriginal cultural heritage has been relegated to museums where it may be largely inaccessible to the people who in fact created it (Ziff and Rao 1997).

> Chikap explained that, along with her political battles for Ainu rights, the traditional *ikarakara* embroidery has become an expression of her Ainu identity. She first learned to embroider from her mother and later discovered that most of her people's *ikarakara* had been taken by 'Ainu specialists' and put in museums. To develop her skills, Chikap had to visit museums to look at Ainu embroidery in glass showcases. She said that 'exhibited in this way, the Ainu culture seemed to be something long past. As a living Ainu, I felt my ancestry, my roots, were like a dream.'
>
> (Davidson 1993: 129)

The UN has recognised the importance of indigenous knowledge and culture in a global setting. But the emphasis appears to be on the worth of this knowledge to the market economies of the world (United Nations 1992). The commercial value of these products and ideas may be too much for most nation-states to resist.

> The annual market value of pharmaceutical products derived from medicinal plants discovered by indigenous peoples exceeds $43 billion, but the profits are rarely shared with indigenous peoples. …The discovery by the nomadic Punans of Indonesia that the root of the *jileng* plant could be boiled and used as a cure for tuberculosis is being pursued in Britain and the United States for potential drug production. …Indeed, most of the 7000 natural compounds used in modern medicine have been employed by traditional healers for centuries, and 25 per cent of American prescription drugs contain active ingredients derived from plants.
>
> (United Nations 1992: 1)

In 1995, the Special Rapporteur on Indigenous Cultural Heritage, Mrs Erica-Irene Daes, tabled a set of guidelines for the protection of indigenous culture and knowledge. The Guidelines emphasise that the

> effective protection of the heritage of the indigenous peoples of the world benefits all humanity…[but that this protection must be]…based broadly on the principle of self-determination, which includes the right and the duty of indigenous peoples to develop their own cultures and knowledge systems…as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.
>
> (Heritage Guidelines 1995: Annex paras1–3)

These issues were reviewed in 1997 and most relevant UN bodies now support the Heritage Guidelines (UN Sub-Commission 1997). The Guidelines were

revised in June 2000 (UN Sub-Commission 2000). The importance of the TRIPS Agreement and its consolidation of intellectual property laws and dispute mechanisms under the WTO, and mechanisms that exist under the UN Biodiversity Convention 1992, have been highlighted as possible ways forward in protecting indigenous culture and knowledge (UN Sub-Commission 2000; see Fourmile-Marrie 2000). Article 8(j) of the Biodiversity Convention specifically requires the protection of indigenous knowledge 'relevant for the conservation and sustainable use of biological diversity'. There can be no doubt that this consistent attention by the UN and its organs is an important step forward for the recognition of indigenous cultures throughout the world. But in the developing world this expression of indigenous self-determination runs into immediate conflict with the goal of national development to which all countries wishing to join the club of developed nations within the WTO and other economic structures are dedicated. The protection under the Biodiversity Convention for indigenous peoples was contentious and resulted in a compromise requiring that such protection be 'subject to…national legislation' (Article 8(j)).

Even in Australia, a developed nation by global standards, Aboriginal people have enormous difficulties protecting their cultural and intellectual property. Inappropriate exploitation is rampant (Mansell 1997). The making and selling of Aboriginal art and culture is now a multimillion-dollar industry in which individual artist's works are displayed in major collections and museums both in and outside Australia and Aboriginal cultural sites and artefacts attract millions of dollars in revenue. Aboriginal people themselves are very well aware of how much they contribute to the Australian national identity and economy and how little credit or reward they receive (Wright 1996).

> What immediately comes to mind when you have to select a gift for someone overseas? What is distinctively Australian besides kangaroos, koalas, frill-necked lizards and Akubra hats? 'The Dreamtime', 'walkabout', 'traditional', 'tribal' and 'primitive' boomerangs, bark paintings and totemic designs on coffee mugs, stationery and linen – of course. Symbols of Aboriginal culture and heritage, randomly selected, superficially treated as *objets d'art* and 'Australiana', are promoted as expressions of Australia's national identity.
>
> (Koorie Cultural Heritage Trust 1991: 48)

The export of Aboriginal cultural artefacts is now an important part of the Australian economy. Not only traditional bark paintings, boomerangs and didgeridoos are sold in increasing numbers, but Aboriginal music, dance, body painting, rock art, 'bush knowledge', food or 'bush tucker', living styles and cultural artefacts generally are presented as an essential and constituent element in the merchandising of Australia. The 'Dreamtime' not only has become an element both of white Australian myth making and nation building but is also used as a very successful marketing ploy (Wright 1996). The words 'Dreamtime' or 'Dreaming' are used widely in Australia to designate Aboriginal art and

culture (Keneally *et al.* 1987; Sutton 1988). Aboriginal images appear in everything from mainstream films and automobile commercials to tourist paraphernalia of all kinds. They were an important element in the Sydney 2000 Olympic Opening and Closing Ceremonies, on this occasion with the full and enthusiastic support of different Aboriginal and non-Aboriginal groups around the country. The ubiquity of Aboriginal imagery in advertising geared towards overseas visitors is only slightly more obvious than the invisibility of Aboriginal people in 'mainstream' marketing to Australians.

In 1981 and 1989 the Australian government commissioned studies to examine in some detail the situation of Aboriginal arts and crafts (Australia 1981, 1989). The 1989 Report found that, at least up until the end of the 1980s, indigenous producers of Aboriginal art were receiving less than one-half of the retail value of their work. This figure is probably too generous in that the Report only investigated a relatively limited range of artists, i.e. 'successful' artists who sell their works through recognised outlets (Australia 1989; S. Wright 1994). The production of arts and crafts, as well as the income from tourism around significant Aboriginal sites, now provide many indigenous communities with a valuable source of cash income (Golvan 1989). But, as has been pointed out by Stephen Gray, the ignorance of the wider community about indigenous peoples' art and culture has led 'to the exploitation of Aboriginal artists, to the marketing of traditional (if occasionally altered) designs in non-traditional or inappropriate contexts, and to outright forgeries' (Gray 1993).

In 1994 a new government discussion paper was released which, although not containing any empirical information, did review some of the problems in the area (Australia 1994). Since then an Inter-Departmental Committee on Indigenous Arts and Cultural Expression has been set up to investigate the issues raised in the discussion paper. In 1996 the Aboriginal and Torres Strait Islander Commission (ATSIC) set up an Indigenous Reference Group which, in conjunction with the Australian Institute of Aboriginal and Torres Strait Islander Studies, is co-ordinating a longer-term project to develop reforms in this area (Janke 1999). The discussion paper *Our Culture – Our Future* that was produced as a result of this project has made a major contribution to discussion of these issues in Australia and internationally. In particular it has placed these issues in the wider context of Aboriginal land rights, native title, national reconciliation and economic disparities more generally (Janke 1999).

In Australia copyright and the law of confidentiality have been used with some success in protecting Aboriginal artists from the theft and exploitation of their art and knowledge without their permission (Janke 1999). But judicial reasoning even by sympathetic courts has highlighted the difficulties in balancing the rights of individual artists and the communities from whom the right and obligation to produce their art comes. Johnny Bulun Bulun, a very senior and well-known artist of the Yolnga people of Northeast Arnhem Land in northern Australia, has been particularly assertive in demanding recognition of his rights as an artist and his obligations to his community in accordance with the laws of that community. He and Terry Yumbulul, also of Northeast Arnhem Land,

came up against the intense individuality embedded in the law of copyright and the extreme difficulty even sympathetic courts have in surmounting this individualism in order to grant communal rights (*Bulun Bulun* 1998; *Yumbulul* 1991). In neither case could the problems that inappropriate exploitation of their artwork creates for their kinship groups and communities be adequately recognised, although Judge Von Doussa of the Australian Federal Court was able to resolve some of these problems in the 'Carpets' case (*Milpurrurru* 1994).

In this case several well-known Australian Aboriginal artists discovered that their work had been reproduced on carpets made in Vietnam and imported into Australia by an Australian company. All the works reproduced were already displayed in museums and galleries or reproduced in art books with the permission of the artists and their communities. But reproduction for commercial gain had never been envisioned. Labels on the carpets clearly described them as 'authentic' and done with the permission of the artists. This was completely untrue. The artists, and the Public Trustee of the Northern Territory acting on behalf of deceased artists' estates, sued for copyright infringement and won. In the damages settlement Judge Von Doussa ordered both general and punitive damages on the basis of the egregiousness of the abuse and the emotional and social harm to the artists and their communities. In an unusual move he made a global award to all the artists. The division of the award was to be divided up among the eight artists and their families according to their own communal laws and requirements. This allowed for some compensation for the communal interests damaged by the use of the works. To date, however, no damages have been paid as the corporate defendant declared bankruptcy. The individual defendant has never admitted that taking these works without permission was illegal or wrong because of the perception that the works are 'traditional', not individual creations, and therefore part of the common heritage of anyone who wants to use them. Because they do not appear to fit within the Euro-Australian definition of individual creativity, many Australians, and other non-indigenous admirers of these magnificent works of art, have difficulty understanding that copyright can indeed apply to protect the individual artists. But even where copyright has been successfully applied it does not provide for the full range of protection that indigenous artists and their communities require.

The oral and the visual

In addition to the political and economic effects of communication through the printed word, and its protection through copyright and freedom of expression, there are also effects of another kind. Printing tends to universalise ideas, forms of expression and stances towards authority. 'Universality' as a concept, as well as 'individuality', owes much to the individuating of texts through the formation of authorship and the universalisation of ideas through the widespread dissemination of identical texts in standardised languages. Recent studies have identified the importance of discussing the 'print-object' of literature as an artefact of social and cultural significance. What indeed is 'a book' and why is it important?

The impact of the medium of expression has long been recognised as crucial to the way in which people interact with each other and even think (Donatelli and Winthrop-Young 1995). The difficulty with most of this work is that it has been done from the perspective of the literate culture, indeed the print culture, of Euro-American anthropology, history, cultural or communications studies.

> In *Orality and Literacy* Walter J. Ong identifies the media of voice and writing as belonging to different cognitive domains. According to Ong, the ability to preserve information in a written record leads to qualitatively different mental and psychological processes, and to a higher level of social and cultural organization.
>
> (Donatelli and Winthrop-Young 1995: xiv)

This thinking replicates Enlightenment ideas of universal truth and value exported to the rest of the world through the enterprise of colonial expansion. The ease with which superiority is still accepted within Euro-American thought reveals the pervasive dominance of colonising attitudes, so intense and widespread that no modern text seems to be free of them regardless of the good faith and diligence of the author. In the work of Elizabeth Eisenstein, perhaps the leading historian of printing and social change in Europe, print culture is clearly privileged over the oral (Eisenstein 1983). This in turn goes back to the oppressive dualism of Euro-American cultures. This dualism is itself partly a product of writing and printing. The very act of viewing cultural production and communication in dualistic or binary terms is a continuation of the problem one is discussing (Donatelli and Winthrop-Young 1995: xiv).

It needs to be emphasised that there is no precise line between cultures that are oral and those that are literate. All cultures employ visual symbolism as forms of communication whether it be through the use of two- or three-dimensional forms of art, hieroglyphic or syllabic scripts (as with Mandarin and Japanese), phonetic alphabets, or other symbols (such as in mathematics, musical notation, etc.). The Aboriginal sand paintings of central Australia are in fact maps used to convey information about the land, and the beautifully beaded wampum belts of the Iroquois and other indigenous peoples of North America can be treaties or binding agreements between nations. All cultures also read if one includes as 'reading' the visual interpretation of visual symbols of all kinds including facial expressions and body language, even the land itself. Because literacy as a sign of competence in a particular form of symbolic expression known as writing tends to be concentrated in the hands of the dominant elite, 'literacy' tends to be defined by that elite in terms of that dominance, often without any 'bad' or overtly racist intent. Thus literacy from a Euro-American perspective means writing and reading a phonetic or visually symbolic script in a standardised vernacular language, usually (but not always) European. Printing tends to fix this definition in even more rigid terms through the paramountcy of the economics and politics of printing as both a technology and a commercial enterprise. The laws of intellectual property, especially copyright, have further privileged this

form of communication above all others. This dominance is increasing as intellectual property laws are entrenched in international law under trade agreements such as TRIPS.

Conversely, literate cultures also include the oral, although often in hidden or subversive ways. Oral cultures survive printing with great difficulty as literacy on the elitist model becomes democratised and universalised. But even in cultures as completely dominated by the printed word as modern cultures are, the oral still exists. The printed word will always take precedence where there is any conflict and the oral is usually treated as illegitimate, trivial or as an accessory to the printed word (as in face-to-face conversation, gossip, jokes, stories, oral instruction, etc.). But even where societies are dominated by writing and printing the oral will frequently exist as a mirror or adjunct or in some cases as an antithesis to the written word. It has great difficulty existing independently as a legitimate means of communication. But it never entirely disappears. Where the oral is perceived as subversive or incorrect then there are frequently concerted efforts to stamp it out, even to the point of eradicating whole language groups. This has been the experience of many indigenous peoples as well as the experience of oral cultures in Europe itself.

As part of the communications revolution writers such as Marshall McLuhan have prophesied a return to the oral (McLuhan 1962, 1964; McLuhan and Powers 1992). Radio, sound recordings, and even video technologies such as television and film rely heavily on the oral. Telephone and wireless cellular telephone communication have also signalled a revival of the significance of the spoken over the written word. The cables that make wired telephone communication possible on a global basis are also now the basis for the Internet, a form of global communication utterly unlike anything else. Copper and fibre-optic wiring is now being quickly overtaken by 'broadband' co-axial cable (currently carrying cable television to subscribers) and satellite connections. The Internet, organised through 'search engines' on the World Wide Web, makes many aspects of oral communication readily available through aural programs easily downloadable into most home computers. Thus a significant threat to the recording and film industries is the free availability of 'CD'-quality sound recordings and 'DVD'-quality films which can be easily copied from the Internet completely bypassing normal distribution routes. The production and publication of music and film dominated by a few corporate players and hitherto protected by copyright is seriously under threat as the twenty-first century begins (see *A&M Records v. Napster* 2000). The twentieth century can then arguably be seen as a temporary return to the dominance of orality over writing leading to visions of a 'global village' that have been only partially realised.

International human rights are themselves at least partly a product of this communications revolution. Although they exist in the form of written texts given the stature of binding norms of a universal nature, the enormous increase in human rights thinking and awareness owes much to global telecommunications. The invention of cheap video recorders and the handheld video camera means that no government can utterly quell the sounds and images of brutality that may exist within their borders. These sounds and images can now be easily

distributed to the world 'live' or virtually simultaneously with the occurrence of events, as well as forming the basis of documentary films and news clips alerting the world to human rights abuses of all kinds. This film technology supplements already powerful oral communication via radio. The overseas BBC service began as an instrument of British imperialism. It became from the 1960s onwards a source of reliable information about the world beyond the control of authoritarian regimes (see BBC 2001). Radio Australia, as an arm of the Australian Broadcasting Corporation, performs a similar function on a smaller scale in the Asia–Pacific region even after severe cuts imposed by the Australian government in 1996 and 1997 (see Radio Australia 2001). Radio and television communications have become crucial in binding together large and disparate nation-states such as Australia and Canada. So powerful have the modern telecommunications media become that taking over the local broadcasting station, and the airport, is often a first priority of *coups d'états* and military takeovers. During the Kosovo bombing campaign in 1999 television stations in Belgrade were targeted and destroyed, resulting in high civilian casualties and temporarily knocking out television services to Serbians. It was argued that these apparent civilian targets were in fact of military consequence as a means of crippling the Yugoslav government's capacity to broadcast propaganda to its population.

During the last decade of the twentieth century the power of 'the media' to galvanise world opinion became dramatically apparent. Almost always breaches of human rights were at the centre of these sounds and images. The Gulf War in Iraq and Kuwait became the first carefully controlled 'media war' (Baudrillard 1995; Kellner 1992). Lessons about the leaking of information to a gullible public learned during the Vietnam War were remembered, and media journalists were kept firmly under the control of the Allied command. The human rights of innocent Kuwaitis were highlighted for European and North American consumption (Kellner 1992; Taylor 1998). At the end of the decade the Kosovo bombing campaign was largely justified by the television images of Kosovar Albanian refugees flooding across the borders of Yugoslavia. Parallels were drawn to the long lines of refugees and the boxcars of the Holocaust and the Second World War. These images are themselves ingrained in our imaginations through films such as *Schindler's List* and television programmes such as the 1978 mini-series *Holocaust* (Junker 2001). NGOs and European journalists interviewing distraught refugees catalogued many human rights abuses. British Prime Minister Tony Blair talked about 'compassionate bombing'. The human rights of 'innocent civilians' (many of whom later indulged in the most horrific reprisals against their equally 'innocent' Serbian neighbours after returning to Kosovo) became the catalyst for the century's last European conflict (Hammond and Herman 2000). Meanwhile the war in Central Africa, far away from the prying eyes of Western journalists, pursued its relentlessly destructive course over control of gold, copper and diamond mines from the killing fields of Rwanda and the former Zaire to Sierra Leone and Angola.

From this it would appear that what in fact is happening is not so much a re-entrenchment of the oral, but rather a return to the entrenchment of the visual.

The invention of the telephone and of telecommunications allowing for direct speech over long distances did briefly resurrect the importance of orality in European cultures. But this has now been largely subsumed into the resurgence of the visual. This is mainly through the primacy of European languages, especially English, as the written and printed medium of expression all over the world. This primacy is a direct and indisputable consequence of colonialism and economic globalisation. Television, although not reliant on print, still insists on the fixation of communication in a visual form. Speakers of other languages must largely conduct communication on the Internet in English. In addition, much of communication is now done through audio-visual means in which the visual (through film, video, computer screen display, printed copies) is significantly more important than the oral. The Internet, and access to it provided by the World Wide Web, has re-entrenched the importance of writing and printing. Use of the Internet relies on literacy and is making the publication and distribution of the written word, especially the printed English word, overwhelmingly ubiquitous. This resurgence of visual communication and the primacy of English represent a massive cultural revolution of which the outcome is as yet undetermined. The regulation of this revolution is itself an aspect of economic globalisation in which issues of cultural diversity, sovereignty and trade liberalisation are in acute competition (Rothwell 1999; Tawfik 2000).

For human rights the Internet has become a principal medium of communication, information, advocacy, networking and support. NGOs, individuals, international organisations (such as the UN) and even governments rely on the Internet to print and distribute information about human rights and humanitarian concerns that are readily accessible to anyone with a computer, a modem and a telephone connection. E-mail 'bulletin boards' and 'list-serves' provide an immediate, efficient and cheap form of communication on a personal basis that can become the foundation for global networks of consciousness raising and politicisation of issues that would previously have been extremely difficult to organise. Activists on behalf of the human rights and self-determination of East Timorese people were among the first to take advantage of e-mail and Internet communications. They are now essential tools in all human rights discourse, and are reshaping the way we think about human rights at every level.

The primacy of the visual and individualism

The primacy of the visual, in particular the written and printed word, not only tends to create a certain type of human identity or subjectivity but also tends to valorise the individual as writer/author/subject. The objects of communication, the 'written-to' and the 'written-about', are passive. Individuality within knowledge creation and dissemination has become entrenched with the technology of printing and the establishment of the publishing industry. This has accompanied, and indeed I would argue was a direct cause of, the valorisation of individuality in political and economic terms more generally in Europe from the seventeenth century onwards. This notion of individuality, and the quality or

standard of humanness which is associated with it, could not exist in cultures which rely largely on speech rather than writing, or indeed on manuscript rather than printing. Freedom of expression is in many ways the quintessential human right and is rightly given precedence within Western discourse as a result. But this is so only because of the specific content of Western societies as the domain of the literate individual, a situation that has developed only very recently.

Of course 'individuality' in the sense of each human personality being unique is not peculiar to Euro-American cultures. There are also important print-based cultures such as China's that do not privilege the individual. Individuality in the sense of uniqueness giving rise to personal rights and responsibilities is familiar to many oral cultures. Indeed, as argued in Chapter 3, some of our notions of individual rights and power sharing as expressed through these rights are borrowed from indigenous sources. But when this sense of personal uniqueness and responsibility is filtered through the experience of isolation and authority belonging to the author typical of the print culture of Europe (but not of China), 'individuality' in our modern sense develops. The individual within many indigenous oral cultures is not radically contrasted with the group. Rather the individual is seen as unique precisely *because* of his or her relationship to a group, family, tribe, landscape, spirit world. But within Euro-American definitions of the individual we are no longer talking about individuality in the basic sense of human uniqueness arising out of one's relationships with and responsibilities to other humans (or other living creatures, the land, spirits, the world). Rather we are talking about a set of power relationships in which the 'individual' plays a primary role within the dominant paradigm of the state and associated capitalist economic structures. This role *depends* on the individual having been disengaged from his or her collective identity in order to create the singularity of national vision required by the modern state and its productive forces within capitalism. This type of 'individual' cannot exist outside of a print-based culture.

I am not suggesting that there is something essential about printing or writing or oral cultures that determines a particular attitude towards human subjectivity. It is, however, undeniable that different modes of communication have a powerful influence in terms of human psychology, human relationships and, ultimately, the political, religious, legal and socio-economic systems within which humans live. It is arguable that language and the means of communication are the primary determinants of *any* social or cultural formation. Human rights are as much affected by the form of communication within which they developed, and are typically expressed, as is any other social structure. International human rights developed out of a particular set of historical conditions. The printed word played, and still plays, an enormously significant role in their creation, delineation, acceptance and implementation. The very core of human rights as individual rights, and their antithesis to group rights, is part of this history. It is important to realise that our definitions of human rights and who best reflects these rights are largely determined by the dominance of printing and the written word. Not only freedom of expression, but all human rights are shaped by the nature of individuality and the type of subjectivity on which that individuality depends.

Printing and universality

Printing also creates the conditions for universality in the sense of universally recognised standards of human entitlement and behaviour. Printing allows for the wide circulation of fixed texts in standardised languages in which particular ideas may appear to be, and may be accepted as, universal simply on the basis of wide and repeated distribution. In time certain ideas may become received as 'givens'. Universality in this sense may mean no more than widespread repetition of familiar concepts. These concepts (such as individuality) are accepted as paradigmatic and are seldom questioned simply because to do so looks strange, unfamiliar. If you say 'individual rights are universal' often enough in widely published printed documents then it becomes very difficult to say otherwise, particularly when larger fields of political, economic and cultural power depend on the acceptance of the concept.

But universality means more than simply repetition and familiarity. The concept of 'universality' itself also depends on a particular culturally produced idea about subjectivity and the relationship between writer and written-about or written-to. Where communication begins in isolation, and where the author as the creator of knowledge is privileged, the particularities of difference disappear.

> In Western philosophy, when knowledge or theory comprehends the other, then the alterity of the latter vanishes as it becomes part of the same. This 'ontological imperialism', Levinas argues, goes back at least to Socrates but can be found as recently as Heidegger. In all cases the other is neutralized as a means of encompassing it; ontology amounts to a philosophy of power, an egotism in which the relation with the other is accomplished through its assimilation into the self. Its political implications are clear enough: 'Heidegger, with the whole of Western history, takes the relation with the Other as enacted in the destiny of sedentary peoples, the possessors and builders of the earth. Possession is preeminently the form in which the other becomes the same, by becoming mine.'
>
> (Levinas, quoted by Young 1990: 13–14)

'Sedentary peoples, the possessors and builders of the earth' might include all indigenous peoples, peasants, traditional cultures, women, children, non-Europeans. This 'relation with the Other' is a fundamentally colonising attitude. Current ideas about universality, so important to the international law of human rights, depend on a subjectivity that is individualistic, egotistical and proprietary. The 'Other' not only disappears, it becomes appropriated and assimilated into the ego of the subject Self. Thus the words 'intellectual property' precisely define the meaning of the universal Subject of international human rights. This Subject is the owner of meaning fixed through property relations with others, either the same as him, or possessed

by him. Copyright is at least as significant as freedom of expression in determining the flow of information, ideas and creativity. Both insist on the primacy of individual rights. 'Universality' proposes that everyone sees cultural creation in this way and must search for legal remedies within this paradigm. The example of indigenous peoples and intellectual property rights indicates that this is a false picture.

The individual as author appears to control the medium of expression both politically through freedom of expression and economically through the legal discourse of copyright, creating material forms of expression, works, the world and ultimately him- or herself. We talk about individual citizens being the 'authors of their own destiny'. In addition the 'written-about' becomes the object to be dissected and the 'written-to' becomes the passive recipient of truth, or 'the Truth'. Because the existence of the Other is presupposed as assimilable by and therefore appropriated to the Author, only one 'Truth' can exist – unless it is disproven and replaced by a competing theory operating within the same paradigm by the same or another author. 'Truth' must therefore be universal, i.e. there must be an absence of otherness or difference that can exist independently. Indeed the possibility of difference disappears (at least in theory) and the reality of difference is seen as threatening and discordant, or is explained away as imaginary, inauthentic, not genuine, not true. For human rights as they are currently defined in universalist terms cultural or other differences must always be a problem and will always result in discomfort and denial. The notion of the universal is therefore deontological, i.e. it denies the 'beingness' of others. This seems to be a very suspect concept to apply to human rights which presumably have as their primary aim respect for the integrity of the 'being' of all humans, unless of course we assume that all humans are essentially the same. Where difficult differences do appear they are perceived as contrary to human rights or, in a legal sense, as infringements. Alterity, defined as a relationship between different 'others' as one of equality and mutual respect (Benhabib 1992), becomes impossible not just as a political or economic choice but as part of the nature of Being, the ontology of the individual author/citizen.

To put it in simple terms – writing and printing allow authors to communicate their thoughts without ever actually seeing or hearing or touching 'the Other' to whom or about whom a text is addressed. As I write this sentence I do not know to whom I am writing – you the reader are unknown to me. In oral cultures communication is usually 'face to face'. If you and I were speaking to one another we could not avoid each other's presence, our difference or sameness. As Levinas has pointed out, in oral cultures the 'strangeness' or 'otherness' of the stranger can never be ignored because he or she is *right here* (Levinas 1969). Writing and printing allow, indeed create, the illusion of singularity and therefore of universality. Difference ceases to be important because *it isn't right here in front of you demanding your attention*. I as the author can create whatever imaginary audience I choose. Its human content is irrelevant and can be easily abstracted into a universal sameness that of

course agrees with everything I write! Such solitude and singularity also allows for the detachment of intellect in the absence of emotional engagement, again because *the stranger isn't right here looking threatening, or strange, or friendly, or alien, or (perhaps) surprisingly human*. Thus the separation between mind and body, rationality and emotion becomes possible partly as a result of the detached medium of thought and communication expressed through writing and, even more so, printing. Universality within human rights depends upon and is a product of a certain type of individuality.

Writing, by relegating authors to solitary creation, *predisposes* communication towards a relationship of power in which universality itself is culturally produced but is never perceived as such. The particular disappears into the ego of the One, whether this One is an individual author/citizen/soldier, or the 'meta-narrative' of Western culture itself. Thus 'culture' is never a problem from a Euro-American perspective *for itself* as 'difference' always resides elsewhere. Euro-American perspectives do not see themselves as having any 'culture' in the sense of the local or particular. Rather they represent the universal through the repetition of the familiar, allowable through the dominating institutions set up under colonialism, and perpetuated through continuing inequalities of power. Ultimately this universality is part of the very nature of subjectivity developed within the colonising print cultures of European societies since the mid-fifteenth century. The fact that this culture became democratised in the late eighteenth and nineteenth centuries can be said to have exacerbated this tendency by giving it an even greater appearance of universal acceptance within and outside Europe. As the European colonial venture expanded to include the whole of the world's peoples this concept of universality was itself universalised. Thus the universality we have now can act as a form of totalitarianism in which the alterity of the Other ceases to exist directly as a result of the imbalance of power within the mode of communication used and spread by colonialism.

This leads us to an inevitable and deeply troubling conclusion. If international human rights are to continue to have universal relevance then it is necessary to give up the Euro-American meaning of universality in order to find some other basis for standard setting and implementation. This does indeed mean that we must always acknowledge and respect the particularities of local difference. This does not, however, mean abandoning the search for or the establishment of common standards of human behaviour. It may mean trying to find the basis for common understandings between real human beings through dialogue. It may also mean applying standards for human behaviour that actively work *against* European dominance, something which will make many proponents of 'universal' human rights very uncomfortable. But there is no comfort here for non-European *or* European attackers and abusers of human rights. We do not abandon human rights by embedding them in culture. We in fact increase accountability and responsibility for human rights abuses and the genuinely revolutionary potential that they promise.

'They who resist'

> 'To say that the other can remain absolutely other…is to say that history itself…cannot claim to totalise the same and the other. …It is not I who resist the system, as Kierkegaard thought; it is the other.'
>
> (Levinas, as quoted by Young 1990: 15)

International human rights should be about the creation of international legal structures that have as their highest goal respect for the 'being of otherness', however strange, exotic or 'different' it may seem. This 'being of otherness' is not a recipe for cultural domination or the privileging of individual excesses. It does not excuse the 'otherness' of tyrants, murderers and hate-mongers. It necessarily incorporates the interrelationship between groups and individuals and the interaction of rights and responsibilities. It posits a basic ethical stance: that of respect for the stranger, the 'other', even the enemy.

Individualistic human rights can appear to those left behind within dominant political and economic systems as those rights and obligations that exist between strangers in societies in which strangers are feared (Strickland 1997). They seem to be based on an assumption of scarcity, of competitiveness, of threat. It is startling how fearful our 'free' and supposedly democratic societies have become. Most of our relationships are not usually based on trust, but rather on expediency or propinquity, or an escape from crushing loneliness most of us are not even aware we feel. Family connection and neighbourliness have become increasingly difficult in our transitory urbanised societies. Respect has been increasingly replaced by bullying. It is a bleak vision most of us would prefer to ignore. Respect for strangers, on the other hand, is quite common in indigenous cultures. It is based on an assumption of generosity even in the face of extreme poverty and is usually carefully governed by formal rules and rituals of etiquette and hospitality.

It also seems to be a common characteristic of many societies to see at least some 'others', not as neutral strangers to be treated with respect, but rather as traditional enemies to whom no humanity can be attributed. A belief in universal human rights looks very attractive when placed beside the tribal demonising of some humans as perpetual 'enemies' or non-humans. These apparently ancient feuds are not, however, always all that ancient. Muslims and Christians in the former Yugoslavia, Hutus and Tutsis in Central Africa, even Arabs and Jews in Palestine lived alongside one another in peace for many years before the savagery of more recent times. Ancient hatreds can also disappear and the enemy can become a friend and ally, or at least a stranger who is no longer feared. The nation-states of the United Kingdom and Ireland now work together in willing co-operation with each other in order to resolve the last pockets of communal tensions in Northern Ireland. Former deadly enemies, France and Germany, are now the joint architects of a united Europe. Japan has put much of its ancient enmities behind it and is now a respected economic and political powerhouse in Asia. Indigenous groups in North America and elsewhere have learned to set aside old differences in the face of a common crisis.

Respect for the stranger, even for the enemy, relies on a basic respect for the Self. This respect is not that of an alienated individual living out the illusion of solitary power, nor is it as a member of a community built on the exclusion of outsiders. Respect can be seen as essential to widening circles of human relationship. It proposes that rights belong even to those who do not resemble us, who are not the same and who do not wish to become so. Thus the real subject of human rights is not the dominant Subject of the Rational White European Man (in Blaut's phrase) but rather the 'people without history' – those Others whose stories have been totalised or 'universalised' out of existence; whose identity has been subsumed into the project of colonialism; whose difference has been eliminated through appropriation and assimilation; whose future is threatened by the juggernaut of economic globalisation (Harawira 1999).

Freedom of expression is often held up as a pre-eminent civil and political right. But it must be seen in the context of social and cultural pressures within which it operates. Media ownership and the influence of commercial interests in the dissemination of knowledge and expression are now recognised as significant factors in protecting freedom of expression in democratic societies. Less frequently acknowledged is the role that education plays in accessing information and creating the capacity to use knowledge in an effective way. Much of the debate surrounding the Internet seems to assume that literacy, let alone familiarity with computers, is a 'given'. What is frequently forgotten is that most people do not have the electricity necessary to run a computer or to access any form of modern technology, nor are they literate in a 'computer-friendly' language such as English. The majority of people on this planet today have never used a telephone, let alone 'surfed the Web' (Annan 2000). To talk about freedom of expression in this context is something fundamentally different from the debates we are used to in the developed world.

Freedom of expression is not something which can be possessed or 'owned' but is rather a process of communication in which an ethical redistribution of power is necessary before real 'freedom' of the wide variety of human 'expression' will be possible. Issues that are crucial relate to the conservation and rehabilitation of indigenous languages; the restoration of respect for oral narratives; an understanding of the need for listening as well as speaking; respect for practices of participation in communication rather than just the authoring of texts and competition over authenticity of voice; the need to move away from monolingualism of language, culture, thought and being itself; a primary emphasis on education appropriate to the particular cultural environment in which it occurs; and a revaluation of the meaning of respect in human discourse. Recasting discussions over freedom of expression in this way looks strange but this is because human rights are so deeply imbued with Enlightenment values, notions of individualism and the values of a print-based culture that it is extremely difficult to see what else 'expression' might mean. Freedom of expression is indeed the quintessential human right but in a form much wider than is usually acknowledged. If we cannot revise our thinking about how real dialogue can be achieved, reimagining other aspects of human rights will remain extremely difficult.

7 Emerging images

Mon pays,
ce n'est pas un pays,
c'est l'hiver.

(Gilles Vigneault)

Self-determination of indigenous peoples

The universalising characteristics of Enlightenment thinking deeply affect the content of international law and human rights. Part of this 'monoculturalism' is expressed in the apparent dichotomy between individual and collective or peoples' rights. Freedom of expression and copyright are both normally seen as human rights or legal rights to property that belong to individuals, not groups. The relationship between expression and culture is rarely emphasised. But a tendency towards monoculturalism, and its expression in nationalism, seems to be expanding into a dominant characteristic of modern nation building going beyond its roots in colonialism. Can individual human rights and collective rights such as self-determination work together? As Schachter points out: 'Why should not both the interests of the individual and of the collectivities be protected by rights?' (1991: 233). But where there is perceived to be a conflict the requirements of one or the other will generally win out. In Western liberal discourse it is the individual who is privileged. In societies where the community is given greater priority, the requirements of the collective may well override individual claims to rights.

The most significant and best elaborated of a 'peoples'' right is the right to self-determination. The right to control of natural resources, the right to development, and cultural rights more generally can be seen as related to the more fundamental right of a group to determine for itself its own destiny in political, economic and cultural terms. The importance of cultural difference and the protection of diversity are of primary importance to the existence of a right of self-determination. Intellectual and cultural property rights are becoming more and more central in the debate over this pre-eminent collective right. For indigenous peoples or members of ethnic minorities, protection of culture, knowledge and creativity are central concerns. The volatile nature of ethnic conflict since the end of the Cold War may have less to do with age-old confrontations between different cultural or

religious groups, and much more to do with a desire for control over identity against the overriding claims of state, corporate and global forces (Orford 1997). The relationships between self-determination, nationhood, cultural diversity, economic globalisation and human rights are in constant tension.

Political status appears to be the most important aspect of the right to self-determination in Common Article 1 of the ICCPR and the ICESCR (see also *Namibia (South West Africa) Case* 1971; *South West Africa Case* 1966; UN Declaration 1960; UN Declaration 1970; *Western Sahara Case* 1975). A 'people' is a group which has both an objectively distinct identity of an ethnic, linguistic, national, cultural or other similar type, and which subjectively perceives itself to be distinct (Crawford 1988). An example of the difficulties that arise in defining what is meant by self-determination can be illustrated by looking at this principle in relation to indigenous peoples (Barsh 1993, 1994). A definition of 'tribal peoples' and 'indigenous peoples' is contained in ILO Convention No. 169, Article 1:

1. This Convention applies to:
   (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

In the 1994 Draft Declaration on the Rights of Indigenous Peoples self-determination is specifically guaranteed under Article 3, which says:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Erica-Irene Daes, the former Chairperson and Rapporteur of the UN Working Group on Indigenous Populations, further articulated what self-determination might mean for indigenous peoples.

> [T]he right of self-determination of indigenous peoples should ordinarily be interpreted as their right to negotiate freely their status and representation in the State in which they live. This might best be described as a kind of 'belated

> State-building', through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed and just terms, after many years of isolation and exclusion. This does not mean the assimilation of indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.
>
> (Daes 1993)

Prior to 1996 Australia took one of the most interesting and constructive positions on the issue of self-determination. Its position was that 'self-determination should embrace not only "external" self-determination but also "internal" self-determination'. This right could then include a continuing right of self-government but would not include a right of secession or separation, which would be contrary (in Australia's view) to the principle of territorial integrity. Self-determination for indigenous peoples within a state such as Australia could then take the form of 'federation, self-government, devolution, decentralisation and other governmental mechanisms for self-determination' (Tomkinson 1994). This approach seemed to be in accord with the interpretation of both the UN Working Group on Indigenous Populations and the pragmatic view of most indigenous groups around the world, including the majority of indigenous peoples in Australia. Unfortunately a change of government in 1996 meant that Australia significantly retreated from this position, leaving a large gap in national support for indigenous interests at the international level. Without the support of nation-states, indigenous peoples have extreme difficulty in international law in pursuing their claims except to a limited extent as individuals or through NGOs (see Barsh 1994; Charlesworth and Chinkin 2000: Chapters 3 and 4; Chinkin 1993; Crawford 1988; Franck 1995; Kingsbury 1992). Very few nation-states have proven willing to act on behalf of indigenous peoples at the international level. Developing countries have often been the most intransigent in refusing to recognise indigenous rights, fearing increased instability within new nation-states and the division of limited national resources among too many stakeholders. For indigenous peoples the definition of 'peoples' and the right of self-determination are not straightforward (Iorns 1992). International law has been extremely reluctant to recognise that indigenous groups are in fact 'peoples' rather than mere 'populations' of unrelated individuals. Early efforts towards recognising human rights for indigenous peoples were based on a political and civil rights model of individual protection that was expressly assimilationist in character and interpretation (ILO Convention 107).

Indigenous peoples usually live in externally independent states for whom decolonisation in the purely political sense has already occurred, or in states who do not see themselves as having ever been colonised. For example, Canada was granted some measure of internal sovereignty through the confederation of Upper and Lower Canada (Ontario and Quebec), Nova Scotia and New Brunswick in the British North America Act of 1867. Australia was created as a single federal nation-state, the Commonwealth of Australia, out of the internally self-governing colonies of New South Wales, Victoria, Queensland, Tasmania, South Australia and Western Australia in 1901. Both countries

achieved real independence sometime during the twentieth century, although it is arguable that neither has fully completed this process as both still recognise the British monarch as their head of state. Indigenous peoples argue that both countries are still in a state of colonialism in that they continue to stand as colonial powers in relation to their Aboriginal populations and apply European-based laws to non-European indigenous groups (Henderson 1994; *Mabo*1992; Otto 1995; Pearson 1993). Scandinavia and Finland were never colonised in the classic sense (although both Norway and Finland experienced periods of rule by Sweden and Russia). Sweden and Denmark were, and in the case of Denmark still are, minor European colonial powers overseas. Sweden, Norway, Finland and Denmark still have substantial indigenous populations; the Sami people and the Inuit peoples of Greenland to whom they arguably stand in a relationship of colonialism. A third example from the developing world, Indonesia, achieved independence from the Netherlands in 1949. Its invasion and occupation of East Timor (a colony of Portugal) in 1975/1976 was condemned by most nations in the world as a denial of the right to self-determination of the East Timorese people (*East Timor Case* 1995). A change of government in Indonesia led to a 'Popular Consultation' process on greater autonomy or independence for East Timor. The East Timorese voted overwhelmingly for independence, but achieving the reality of that status has proved enormously difficult. While Indonesia has severed its ties with East Timor it still has difficulty acknowledging that non-Javanese and non-Muslim populations in Sumatra, Borneo, Sulawesi, West Papua, the Moluccas and elsewhere may see themselves as subject to a process of colonisation through the implementation of a policy of transmigration. This policy involved the movement of populations from one part of the archipelago to another. But this relationship of colonialism is never straightforward. The Batak people of Sumatra may feel themselves to be genuinely 'Indonesian' in a way that the Dayak people of Kalimantan or the indigenous peoples of West Papua do not. The government of Abdurahhman Wahid indicated in 1999 that the resolution of regional differences, including ethnic and indigenous claims to greater autonomy, must be high on the agenda of reform for a genuinely post-colonial Indonesia, but this has not produced any substantial results so far.

Self-determination for indigenous peoples need not lead to independence and classic definitions of self-determination may not be appropriate. The contentiousness of their status as 'peoples' entitled to the right of self-determination is obvious upon looking again at Article 1 of ILO Convention No. 169:

> 3. The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples is no more than a restatement of the right of self-determination that already exists under Common Article 1 of the Covenants. And yet this declaration has given rise to

considerable trepidation on the part of many states concerned about territorial integrity, allocation of resources and cultural issues within the nation-state (Aboriginal Nations 1995; United Nations Human Rights Commission 1999).

Self-determination has in the past been confined to a process in which colonial, non-self-governing or trust territories, seen as having a distinct identity separate from the metropolitan or colonial power administering the territory, become independent nation-states or associated with a nation-state (UN Declaration 1960). The right of self-determination of peoples within the new collective entity usually comes to an end once independence has been achieved (Crawford 1988). Territorial integrity is fiercely protected such that secession has not been recognised in the past as a legitimate exercise of the right of self-determination (UN Declaration 1970; see also Duursma 1996). The legal position may have changed in the 1990s as a result of the break-up of the Soviet Union and Yugoslavia and the separations of Eritrea from Ethiopia and East Timor from Indonesia (Koskenniemi 1994). The assumption within existing definitions of self-determination is that this is primarily a political right involving rational choices over sovereignty, independence, association with other states in the international arena, control over economic and material resources, and cultural development. The right is exercised by distinct groups of people as 'peoples' and recognises the importance of democratic processes of choice. These democratic processes must be based on universal adult suffrage of a population that is fully 'informed' 'with full knowledge' and able to make an 'impartial' decision (UN Declaration 1960). Freedom of expression traditionally defined becomes of major importance. Where necessary the UN will supervise this process. But political choices have not been translated into full self-determination for the majority of the world's peoples even within its current definition (Cassen and Associates 1986; Davidson 1993; Seabrook 1993; Shiva 1989; World Bank 1994).

East Timor

The practical implications of this legal perspective are reflected in the UN mandate in East Timor (1999 UNSC Res. 1272). The Security Council exercised its power under Chapter VII of the UN Charter to ensure the gradual reconstruction of East Timor from a devastated province of Indonesia to full political and economic independence. The UN INTERFET force, led by Australia, had already moved into East Timor (with the reluctant permission of the Indonesian government) after it became clear that the Indonesian Army was unable or unwilling to fulfil its obligations under the 5 May 1999 Agreement (1999 UNSC Res. 1264; 1999 Agreement). The clear expression of a desire for independence represented by the Popular Consultation of 30 August 1999 is an important legal foundation for the existence of a right of self-determination for the East Timorese people. The Indonesian Peoples' Consultative Assembly accepted the result of the referendum on 19 October 1999. The unusually tough mandate of the UN Transitional Administration in East Timor (UNTAET) allows for the assertion of control by UN peacekeepers beyond what is normally allowable to missions under Chapter VI.

Section 3 of Security Council Resolution 1272 calls for up to 8,950 international troops, up to 1,640 police officers, as many as 200 military observers and an undetermined number of civilian administrators. NGOs also play a significant role, as do other national and international agencies including financial organisations such as the IMF, the World Bank and the Asian Development Bank (s. 5). The mandate of UNTAET is as follows (s. 2):

(a) To provide security and maintain law and order throughout the territory of East Timor;
(b) To establish an effective administration;
(c) To assist in the development of civil and social services;
(d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance;
(e) To support capacity-building for self-government;
(f) To assist in the establishment of conditions for sustainable development.

The transition to independence is being supervised by a Special Representative of the Secretary-General who acts as a Transitional Administrator 'responsible for all aspects of the United Nations work in East Timor and [who] will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones' (s. 6). Although the Resolution stresses co-operation and consultation with the East Timorese people, plenary power remains with the UN Administrator until his mandate is revised or the UN withdraws. There is a call to develop 'local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of…administrative and public service functions' (s. 8). A trust fund has been established by the Secretary-General to provide financial assistance for the 'rehabilitation of essential infrastructure, including the building of basic institutions, the functioning of public services and utilities, and the salaries of local civil servants' (s. 13). Personnel working in East Timor are required to have basic training in 'international humanitarian, human rights and refugee law, including child and gender-related provisions, negotiation and communication skills, cultural awareness and civilian-military coordination' (s. 15). There is also a call for co-operation with investigations of human rights abuses in the territory, although a specific reference to an Inquiry of the UN Human Rights Commission in East Timor was deleted to ward off a potential veto by China. Since then a special Serious Crimes Unit of the Dili District Court has been established and is pursuing individual prosecutions. In June 2001 the National Council of East Timor agreed that an International War Crimes Tribunal on East Timor should be set up, in addition to a national Truth and Reconciliation Commission (Dodd 2001a).

Security Council Resolution 1272 represents the largest presence of peacekeepers and personnel and the strongest commitment to the full realisation of the right of self-determination that the UN had undertaken prior to its mission in Sierra Leone which followed immediately afterwards. But what will eventually be achieved? It is already clear (as is apparent in the UN mission to Kosovo) that the bureaucracy of the UN and the career-oriented goals of individual overseas

employees can lead to problems. These include slow progress on reform and rebuilding, severe differences in living standards between local and foreign populations, an artificial economy that probably cannot survive the exodus of foreign UN and NGO personnel, local jobs being done by foreign 'experts', cultural insensitivity, resentment and disappointment. Multinational peacekeeping forces can be unwieldy with complex command structures, lack of clarity on legitimate action and poor equipment, as has been most clearly demonstrated in Sierra Leone. This can lead to further violence such as the ongoing terrorism and violence in Kosovo, 'gang' fighting and violent demonstrations in East Timor itself, and the deterioration into chaos that has plagued the mission in Sierra Leone. In early May 2000 nearly 500 UN troops in Sierra Leone were taken hostage and UN civilian personnel were mostly evacuated. The UN presence was supplemented by the armed presence of the former colonial power – Great Britain. This can hardly be described as a successful transformation from colonialism to modern nationhood and does not bode well for other ambitious UN missions, including in East Timor.

There is a great deal about self-determination that is unclear. East Timor may represent a relatively straightforward example of political and economic development clearly desired by a majority of the population, confined within specific territorial boundaries, and representing a reasonably cohesive cultural group. Even in the case of East Timor, however, boundaries with Indonesian West Timor remain doubtful and the division of oil resources in the international waters of the Timor Gap between East Timor, Australia and Indonesia has proved contentious. Cultural cohesion, particularly in relation to language, may yet be difficult to maintain. But what does international law say in the case of more than one people occupying the same territory, especially where there is a serious dispute over political control, as in Kosovo, Northern Ireland or Quebec? What of nationalist claims of peoples who traverse existing national boundaries, such as the Kurds in the Middle East whose community straddles the borders of Turkey, Iraq, Iran, Syria and Armenia, or Albanians who allege claims over land in Serbia, Kosovo and Macedonia as well as Albania? What if existing models of sovereignty are inappropriate or unacceptable to the peoples in question, as with many Aboriginal groups? Is secession an acceptable means of exercising a right of self-determination, as with the former republics of the Soviet Union, Yugoslavia, Eritrea or East Timor? Self-determination in international law is still deeply attached to territorial claims and defining precise boundaries, both geographic and cultural, as the deadly border war between Ethiopia and Eritrea demonstrates. Territory 'has co-opted our spatial imaginations' for centuries such that rethinking self-determination detached from geography is extremely difficult (Murphy 1996).

What is a 'people'? Group identity, like individual identity (and partly as a result of the atomistic definitions of individuality we find underlying most human rights), can be extremely difficult to articulate. Who defines what a 'people' is even if we confine this process to self-identification? Where we are talking about the transmission of cultural values women often have a very high impact on self-definition through their roles as caregivers, nurturers and teachers. This role is rarely recognised, however, and when the process is trans-

lated into the political realm their contribution may disappear altogether (Charlesworth and Chinkin 2000: 151–164). There may also be deep differences within communities between supporters of more 'traditional' values and those who wish to adopt a more 'modern' approach. This difference may be one of age or social class within the group and may translate into serious political divergence, making the process of self-determination very difficult. Differences along gender, linguistic, age and cultural lines, between rural and urban areas, and between returning refugees and the local population, are already creating tensions in East Timor. There is still the possibility for serious violence as pro-Indonesian militia groups remain outside the majority process and as the gap between relatively wealthy foreigners, more affluent East Timorese, and the large number of unemployed poor widens.

Early in 2001 a date was set for national elections in East Timor – 30 August 2001 – the second anniversary of the Popular Consultation. Electoral law requires that women must be put forward in at least 30 per cent of 'winnable' seats. It was hoped that this would result in the election of at least twenty female representatives in a national assembly of eighty-eight members. The assembly is designed to endorse a constitution after substantial consultation with East Timorese from all walks of life. At the time of writing, 15 December 2001 is when the new constitution should come into effect and the new nation-state of East Timor is created (Dodd 2001).

Canada and Quebec

The right of self-determination in international law is not confined to the developing world or to new nation-states emerging from bitter colonial struggles. Perhaps self-determination can be seen at its most ambiguous and least tractable within the Canadian context. The Canadian debate over unity has proven to be, ironically, deeply divisive. On the one hand there exists a Québecois nationalism that is itself divided and confused, proposing first an ethnic nationalism that can be contrasted with 'English-Canadianism' and a territorial nationalism based on statehood within the existing boundaries of the province of Quebec. On 30 October 1995 nearly 95 per cent of the eligible voters of Quebec went to the polls to decide whether or not their government should begin negotiating separation from the Canadian Confederation. The vote split almost exactly down the middle with 50.6 per cent of the electorate voting *non* and the other 49.4 per cent voting *oui*. The deep divisions within Quebec and Canada became obvious and the country as a whole held its breath for a few hours as its destiny seemed to teeter fearfully in the balance.

Quebec perceives itself as the Other to English-Canada's One – a view with strong historical justification. By contrasting anglophone and francophone in a dichotomy of difference, both French and English Canadians necessarily perceive themselves as one or the other with the 'Other' or '*l'autre*', providing the antithesis and concrete object against which the subjective 'I am' or '*je suis*' can be measured. Canadian history is usually portrayed as frozen around the division of the Canadian colonies into the dominant English and the conquered French,

beginning with the defeat of General Montcalm on the Plains of Abraham in 1759 and continuing up to the formation of the Dominion of Canada in 1867. Quebec, through a long history of perceiving itself as the subservient half of this dichotomy, has developed a strong sense of ethnic identity revolving around its difference, a difference it believes English-Canada will never truly accommodate. Some Québecois seem to believe that English-Canada would have no objective existence without the contrast with French-Canada. English-Canadians reflect this perception by seeing Quebec as essential to Canadian territorial and cultural integrity in the country's relationship with the United States. English-Canadians perceive Quebec's relative indifference to cultural assimilation by American culture, seen as inevitable if Quebec separates from Canada, as suicidal not only for the Frenchness of Quebec but also for the distinct Englishness of the rest of Canada. English-Canadians cannot understand why Quebec is not grateful for the relatively secure shelter that the Canadian Confederation offers for the perpetuation of the French language and culture within Quebec and Canada. On the other hand Québecois see themselves as threatened by a renewed wave of English domination for which English-Canada, not the United States, is largely responsible. Neither of these 'two solitudes' (MacLennon 1993) can actually admit to understanding the bare outlines let alone the nuances of their respective insecurities. The long argument of Canadian history indicates that there is in fact a profound connection between the two perspectives.

English-Canada seems to identify itself on the basis of individual rights and liberties with a strong sense of loyalty to region, particularly outside of Ontario. When Quebec looks to English-Canada it sees Ontario, forgetting that the west, the north and the Atlantic region have quite different attitudes towards nationalism and human rights. Several different but related paradigms of nationhood are contrasted, none of which will acknowledge the legitimacy of the others. The basic mistake is the portrayal of Canada as bifurcated on linguistic lines, a mistake that Canadians of all regions and heritage seem unable to reach beyond. This bifurcation may have been a necessary step in the transformation of Quebec into an equal partner with the other provinces, but part of its lasting heritage is a polarisation of the two linguistic groups accompanied by massive resentment on both sides. In Quebec this resentment is directed against the diminution of protection for the French language, guaranteed under Confederation, by the imposition of bilingualism. In English-Canada bilingualism is seen as an expensive and unnecessary appeasement of Quebec's nationalist ambitions.

Canada is an interesting example of the fraught relationship between the state, self-determination, cultural diversity and individual rights. What is the nature of *Canadian* subjectivity or identity? What is the 'Self' to be determined within the discourse of the human right of self-determination for Canada? To hold together such a large, thinly populated and diverse nation the federal government has taken a major role in providing the network of relationships and social cohesion around which nationalism in Canada has developed since 1945 (Webber 1994). Canada is intensely regional partly due to the federal nature of its Constitution in which large powers are granted to the provinces (Canadian Constitution Act

1867, ss. 91 and 92). The federal government has taken on the principal responsibility for creating a sense of Canadian identity by developing nation-wide policies relating to social security and the balancing of resources across the country through revenue raising and distribution schemes (Cowen and Shenton 1996: Chapter 4). The creation and maintenance of the Canadian Broadcasting Corporation (English) and Radio-Canada (French) is also part of this unifying nationalist mission. The implementation of bilingualism and biculturalism across the country in the 1960s by the federal government was designed to make English and French feel 'at home' anywhere in Canada. The state's capacity, through fiscal policy and direct government intervention to redistribute the national wealth, has become an ingrained if fragile part of 'Canadianness' which does seem to be accepted by a majority of the population of both official languages.

Since the 1970s the capacity of both federal and provincial governments to manage fiscal arrangements has significantly declined as Canada has become a part of the new global economic order in which individualism, deregulation and free trade are the orthodox positions. Canadian nationalism is much more significantly threatened by its participation in the North American Free Trade Agreement (NAFTA 1992) and the WTO than by internal divisions over language and culture. Indeed, these divisions seem to be exacerbated by Canada's international economic responsibilities. Attempts to reform the Constitution better to reflect linguistic and regional aspirations during the early 1990s served only to inflame divisions just as the federal government lost much of its power to provide cohesiveness in any direct way. The creation of the individual Canadian citizen and the nation known as Canada has been largely dependent on the Canadian government's ability to balance the centrifugal forces pulling at the edges of the country. Many Canadians see 'individualism' as antithetical to this balance, emphasising as it does fragmentation and differences over a sense of national unity through community. Canadian nationalism has never really stabilised, partly because of the ethnic and regional diversity that characterises the country, but also because of a very Canadian rejection of the more rampant trappings of national identity at least until recently. Flag waving, anthem singing and oaths of allegiance used to be seen as jingoistically 'American', but the branding of 'Canadianness' with the distinctive red-on-white Maple Leaf is now much more common. It is significant that open displays of Canadian nationalism, such as flag waving, are now becoming more visible as the traditional social forces of Canadian nationalism, generated by state policy, are losing ground in the face of trade, fiscal and monetary globalisation. For most Canadians (with some significant exceptions in the western provinces) direct government intervention by the state is accepted as an axiomatic element of national unity whether of Canada as a whole, or of Quebec (through the provincial government) as a separate entity. 'Canada' as a *nation* is largely an artificial creation of the state. Canadian citizenship is based on a strong sense of public service and obedience to public authorities. The sense of national and individual identity that is thus created is quintessentially 'modern' or perhaps even postmodern. It is not, however, post-colonial (Henderson 1994).

Quebec incontrovertibly has a right to self-determination in international law but what this right consists of and how it may be exercised is very unclear. The Supreme Court of Canada has provided some clarification in a decision that may have considerable significance outside Canada. Canadian federalism, embodying principles of democratic choice,

> dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.
>
> (*Re Secession of Quebec* 1998: para. 88)

This clear desire may be expressed in a referendum. The Court recognised that 'self-determination is now so widely recognized in international conventions that the principle has acquired a status [as]…a general principle of international law' (1998: para. 114). However, the Court accepted the position in international law that secession has not normally been recognised as a valid exercise of this right. This is made clear in General Assembly Resolution 2625(XXV) Declaration on Principles of International Law Concerning Friendly Relations between States (1970) which says:

> Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The Supreme Court held that Canada does not contravene these principles of equal rights and representation in its relations with the people of Quebec. Québecois and French-Canadian leaders have a major voice within the federal government, linguistic rights are entrenched in the Canadian Constitution and steps have been taken to allow Quebec significant levels of autonomy within Confederation. Quebec cannot therefore argue that it has a unilateral right of secession under international law (see also Clarity Act 2000).

Language and indigenous rights in Canada

Canadian indigenous groups have recently obtained a greater hearing for their needs and aspirations within Canada (Bell 1998). For these peoples individual rights are deeply controversial, both undercutting the collective nature of group identity while allowing for some positive change and growth for at least some individuals within the group. As has been said:

> Aboriginal leaders…have expressed reservations about the application of the Charter [of Rights and Freedoms] to Aboriginal governments. The reasons are twofold. First, the Charter was developed without the involvement or consent of Aboriginal peoples and does not accord with Aboriginal culture, values and traditions. Second, the Charter calls for an adversarial approach to the resolution of rights conflicts before Canadian courts and there is a concern that this confrontational mode will undermine Aboriginal approaches to conflict resolution. On the other side of the issue, Aboriginal women's organisations, such as the Native Women's Association of Canada, have insisted that the Charter apply to all Aboriginal governments to ensure that human rights standards are respected.
>
> (Hogg and Turpel 1995: 213)

In discussions of nationalism and self-determination in Canada, human rights for indigenous groups both as 'peoples' and as 'individuals' cannot be ignored (see Macklem 2001). This is particularly so given the deep conflict between Quebec and native groups within the province over issues of sovereignty and political choice. The James Bay Cree and other indigenous peoples have made it clear that they will not allow Quebec separation to remove them from Canada, and that they will fight for control over their own territory in the north if necessary. For the First Nations of Canada a quite different vision of subjectivity exists, one that cannot be accommodated within the dichotomised vision of Canada as two, and only two, linguistic and cultural groups (see Smith 1998). The Aboriginal perspective does not appear to correspond to the nationalist alternatives proposed by either side of the sovereignty debate over Quebec. Indigenous peoples in Canada have a much stronger case than Quebec that the Canadian government does not 'represent the whole people belonging to the territory without distinction as to race, creed or colour' (UN Declaration 1970). The Canadian Supreme Court declined to comment on the rights of Aboriginal peoples in the event of the secession of Quebec (*Re Secession of Quebec* 1998).

To understand an indigenous perspective on self-determination it is essential to see that individual and group rights are not separate and in conflict with one another (see also Durie 1998; Yunupingu 1997). Individuality depends on group belonging. But personal identity is also important, involving a sense of separateness and uniqueness. Subjectivities that allow for a blending or movement of the nature of 'humanness' between group identity and a sense of singularity or personal uniqueness are much better at capturing the psychological reality of 'being human'. This is as true for groups as it is for single human beings. However, although a blending or movement between identities may have an attractive postmodern ring to it, it may again ignore the realities of power, usually the result of colonisation, which make this boundarilessness a target of appropriation and assimilation. Within the Canadian context the will to colonise is still present in the hysterical refusal to recognise Quebec as

distinct by some English-speaking people. It also exists in the denunciation of *les autres* or different ethnic groups within Quebec by some sovereigntists as the main barrier to achieving self-determination. Above all it exists in the Euro-Canadian will to colonise and control indigenous peoples. When Canadians and Québecois are secure enough to recognise the right of self-determination for First Nations then they will have travelled a long way down the road towards real self-determination for themselves.

> Canada is an image that hasn't emerged yet. Because this country hasn't recognised its First Nations, its whole foundation is shaky. If Canada is to emerge as a nation with cultural identity and purpose we have to accept First Nations' art and what it has to tell us about the spirit and the land.
>
> (Jensen 1992: 20)

Colonialism can take very brutal forms of dispossession and destruction or it can work in less obvious ways. The totalising influence of colonialism can be seen within the debate over language rights in Canada. Bilingualism presents indigenous people in Canada with a serious problem. Patricia Monture-Angus, when she was on the editorial board of the *Canadian Journal of Women and the Law* and was responsible for overseeing the publication of the 1993 issue on racism, was confronted with the absence of even one Aboriginal woman's voice writing in the French language. Her solution was to submit a French translation of her own article '*Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Ya-Gah*' (which had been published in an earlier volume of the journal) to be included in this issue (Monture 1986). But this immediately raised several major dilemmas that are inherent to the problem of language use in Canada for Aboriginal peoples. She writes:

> My views on language are also important to understanding why I have agreed to let this article be published. Debates about bilingualism most often focus on what language is spoken, English or French. Language is also much more than the technical recognition of what language comes out of my mouth when I speak. It is through language that culture is transmitted. I have come to this understanding by recognizing what it is that I have lost by not being able to speak Mohawk fluently.
>
> Any debate on language, when it rests on a definition of bilingualism as the ability to speak both English and French, overlooks the Aboriginal experience. The bilingualism debate rests on the shadow of the myth of Canada's two founding nations. For an Aboriginal person, any requirement that we be bilingual is in effect a requirement that we be trilingual. Whether or not an Aboriginal person speaks their Aboriginal language fluently, that Aboriginal language is *always* their first language. The English and French languages can never be more than a second language. Both languages are the languages of the colonizers. It is essential that we stop constructing a

> dichotomy of language where English is dominant, and only French-language speakers are recognized as oppressed.
>
> (Monture-Okanee 1993: 121–122)

For indigenous peoples it is not only their land, environment and their lives that are lost to colonial penetration but their cultural existence as distinct peoples. One of the principal means through which this form of colonisation takes place is through language (Battiste 2000; Battiste and Barman 1995; Battiste and Henderson 2000; Smith 1999). For the Aboriginal peoples of Canada, Australia, the United States, New Zealand and many other countries children were taken away from their families and placed in residential schools or foster homes mainly as a means of assimilating them to the dominant European settler society as discussed in Chapter 5. Punishing children for using their own languages was part of this assimilationist policy. Children were forced to learn English (or French, or Spanish, or Portuguese) in order to remove their capacity to relate to, be a part of, their families and communities. Dispossession of language seems less violent than removal or killing, but it has in fact given rise to enormous suffering.

Dispossession and colonialism may then work in both openly brutal and insidious ways. The open brutality cannot be ignored. Egregious breaches of human rights are part of this brutality. But more subtle forms of colonialism also involve breaches of human rights less easily identified. Very often this kind of colonialism may disguise itself behind benign-sounding labels such as modernisation, economic development, self-determination or even human rights. We have already looked at the devastating effect that literate patterns can have on oral cultures. For indigenous peoples this disruption can extend to the obliteration of whole language groups. Once the language is lost much of the cultural uniqueness of a people is also lost. Cultural artefacts may be looted and knowledge appropriated with impunity, reducing living cultures to museum displays. The survivors of such devastation may be able to experience their identity only through the glass of a display case or in the distorted images presented through the commercial media. In previous chapters the link between literacy, freedom of expression and the development of intellectual property laws was highlighted. For indigenous peoples these linkages present a particularly acute problem. Access to information, scientific research and development, cultural exchange and commercial freedom, all sometimes described in the language of human rights, can give rise to enormous problems for indigenous peoples closely linked to the long-term colonial project of dispossession and destruction. These issues are of course not confined to Canada, Quebec and the indigenous peoples of the northern half of North America. They take on acute and often violent forms in many parts of the world. Human rights now involve intense debates over cultural identity and cultural misappropriation, freedom of expression, education, cultural heritage and control of knowledge with connections to other areas of legal concern including environmental issues and intellectual property. The right to self-determination is at the core of these problems for indigenous peoples and ethnic minorities in international law.

Indigenous peoples in Asia

In the drive towards external colonisation Europeans were ostensibly searching for direct paths to 'the Indies'. There they expected to find rich complex civilisations with which they could deal (or which they could plunder) more or less as they were used to doing closer to home. In fact what they found in Asia were civilisations which saw and treated Europeans as quite inferior. In the 'New World' on their way to the 'Orient' Europeans also found an amazing range of peoples of vastly differing cultures, some of whom as hunter–gatherers and horticulturalists looked strange and 'primitive' or 'simple' to European eyes. What Europeans did not expect to find, and what the dominant cultures of Asia are generally still very reluctant to acknowledge, are tribal cultures of 'primitives' in Asia itself.

It is probably not well recognised that indigenous peoples make up a significant part of the populations of nearly all countries in the Asia–Pacific region. The Aboriginal peoples of Australia and the Maoris of New Zealand are well known, but they are by no means alone. In North Asia 44 per cent of the population in the autonomous regions of China and 10 per cent of Siberian Russia are indigenous. Only 1 per cent of Japan is considered to belong to an 'ethnic minority' (Miller 1993: 114). In China there are 7.5 million Miao, only one of many indigenous groups or ethnic minorities on the Chinese mainland. Members of the Miao community are also significant in Thailand and Laos where they are known as the Hmong. Like many indigenous groups these people are not confined to a single country. Also like many indigenous peoples in the region it is difficult to define whether they are indigenous or 'ethnic minorities'. In China the Miao are classified as one of the many non-Han 'nationalities' (Diamond 1995). The ethnic pluralism of many of these groups, including the Miao, can also pose a problem for definitional purposes. In China these groups are called *minzu*, but what this term means precisely is a matter of debate (Diamond 1995).

An ethnic minority usually has a related nationality outside the country (such as Chinese or Indian minorities in much of Southeast Asia and the Pacific) to which members of the group can turn for support and possibly also asylum in case of repressive policies in the country of emigration. Indigenous peoples, although they may straddle borders, do not usually have an identifiable nationality protected by a nation-state (although some groups like Tibetans may be capable of achieving this status). Many indigenous peoples are or were nomadic and have special problems as a result, particularly in relation to land-use and nationality (Miller 1993: 144). By relegating indigenous groups to the category of 'ethnic minority', as is the case in Japan and China, cultural heritage, human rights and rights to land can be easily undermined. Self-determination also becomes extremely difficult to define or realise.

As late as 1993 a translation of a major work by the eminent French historian Fernand Braudel (first published in France in 1963) could leave untouched the following passage about Asia *as it still exists*:

> Huge areas of the Far East remain wild or primitive. …Regularly, where intensive cultivation succeeds, civilized people in the Far East occupy only small areas. The rest – especially mountains, isolated regions and certain islands – becomes the refuge of primitive peoples and cultures. …This itinerant [slash and burn] agriculture (known as *ladang* in Malay…) is a primeval affair, practically without domesticated animals. It sustains a thousand different peoples, all extremely primitive. They are ill-adapted, obviously, to the present day: but they survive in isolated areas. The West, by contrast, assimilated its own primitive peoples very early on. …No such process took place in the Far East.
>
> (1993: 163)

Braudel describes several incidents where 'primitive tribes' were responsible for massacres or 'certain death' (1993: 163). It is obvious that this French historian is drawing a line between civilised 'Orientals' (Said 1985) and even more primitive peoples, the latter being the indigenous or Aboriginal inhabitants of the Far East. That this attitude of subordination and domination of indigenous peoples by both Western and Asian modernisers is still very much a factor can be illustrated by several examples, of which the following three are only a small part of the story.

As a result of massive industrial development, deforestation and mineral extraction much of Russia's tundra and taiga are being destroyed. Among the people affected by this are the Udegeh people of eastern Siberia.

> For more than seven hundred years, they have shared the Sikhotealin Mountains with Siberian tigers, whom they regard with a reverence that borders on worship. …However only eighty or so tigers and barely two thousand Udegeh people are left in the region, all threatened with extinction by the South Korean conglomerate Hyundai, which intends to log the hunting grounds they share. When they heard that logging was to begin, six Udegeh hunters used a good part of their savings to charter a helicopter so they could fly to the hunting grounds and guard the trees with their rifles. Said one, 'The logging will destroy our livelihood and culture.' In response to their gesture, twelve Cossack soldiers from Vladivostok flew in to 'defend the border'. The trees were logged.
>
> (Davidson 1993: 112)

Until the 1950s the indigenous peoples of the Soviet Union were relatively well protected, partly by the immense distances in their Arctic and Siberian territories but also as a result of Soviet communist policy. As a legacy of Lenin the self-determination of indigenous peoples and ethnic minorities was recognised to some extent, giving ideological support for protection of the Udegeh and other Siberian and Arctic peoples' separate identities. Two indigenous groups in the Russian Federation have retained their own autonomous republics, the Komi and the Yakut. There are also twenty-six officially recognised 'Small Peoples' in

the north and Far East of which the Udegeh are one. These peoples have preferential rights to free education, quotas on subsistence hunting and fishing, special medical benefits and their own 'autonomous' areas or regions (Dahl 1995: 79–81). These rights have been downgraded since the 1930s when they were first established. However, even where indigenous peoples have their own autonomous republic or region they rarely control affairs within these regions as intense migration has generally overrun the local populations. As in Canada or Indonesia a serious problem is demographic change involving the immigration of non-indigenous groups such as ethnic Russians, Ukrainians and Armenians into supposedly 'autonomous' indigenous regions. Local peoples have effectively lost control of their land and culture to the immigrants (Dahl 1995: 81–83).

Beginning with the collapse of communism in the East and the gradual crumbling of the Soviet Empire from 1989 to 1991 the desperate plight of many Russian indigenous peoples has begun to emerge. There appears to be a huge discrepancy between official pronouncements and actual conditions. Oil development has driven many indigenous peoples into abject poverty. Alcoholism is an acute problem. With the harshest of climatic conditions, housing is often of the poorest quality. Health conditions are extremely poor (Dahl 1995: 90–91). The chief culprit is seen to be uncontrolled industrial expansion as with

> the exploitation of the gas deposits in the central part of the Yamal Peninsula and the construction of the Turukhansk hydro-electric dam in the territory of the Evenky people. Both of these were stopped on official instructions as threatening the culture of the indigenous population and their use of the environment [as of 1989].
>
> (Quoted in Dahl 1995: 91)

Since 1990 indigenous peoples have begun to meet to discuss their common problems. They have persistently insisted that Russia ratify ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, so far without success. But there are huge problems in organisation, including the vast distances involved, lack of resources, lack of communication and problems over what is meant by 'autonomy' within autonomous regions. As industrialisation and development increases aggressive policies of assimilation and dispossession continue similar to those which have already been experienced by indigenous peoples in the Americas, Australasia and elsewhere (Davidson 1993). This pressure is unlikely to decrease given Russia's desire to become a part of the new global market economy. The relaxation of Cold War tensions has meant that it is now possible for Russian indigenous peoples to revive contacts with their fellow tribespeople and relations outside of Russia in Alaska, the far north of Canada, Finland and Scandinavia. But this greater openness to the outside world may prove as much of a curse as a blessing for the Aboriginal peoples of the Russian Far East. There has been some progress at least for the Udegeh people. In a unique example of the Russian judicial system supporting the rights of indigenous peoples the Udegeh succeeded in stopping, at least temporarily, the forestry

project in their homeland in the Bikin River Valley north of Vladivostock (Dahl 1995: 100).

In Japan the Ainu people have lived for centuries on the northern island of Hokkaido. Since Japan began an aggressive campaign of modernisation after the 1868 Meiji imperial restoration, immigration by ethnic Japanese to Hokkaido massively increased. Assimilationist policies similar to those of Canada, the United States, Australia, New Zealand, Russia and Indonesia were implemented, particularly with the Hokkaido Former Aborigine Protection Act of 1899 (Davidson 1993: 128). Hokkaido itself was officially incorporated into the Japanese nation in 1868 without consultation with the Ainu (Sjöberg 1995: 375). The Protection Act was not repealed until nearly a hundred years later despite repeated Ainu requests. There are about 25,000 Ainu left today plus perhaps 100,000 more if Japanese are counted who acknowledge a portion of Ainu ancestry. Less than a hundred still speak the Ainu language and most of these are 65 or older (Davidson 1993: 125). The Ainu people are caught in the tug of war between Japan and Russia over claims by both countries to the Kuril Islands where the Ainu people originally lived. Japan claims these islands from Russia but still refuses to recognise indigenous land rights there or elsewhere in Japan. According to one past Japanese official speaking to the UN:

> 'Ethnic minorities, as defined in this covenant [the UN Covenant on Civil and Political Rights], do not exist in Japan.' In 1986, Japanese Prime Minister Nakasone reaffirmed this policy: 'Japan is a nation of homogeneous people.' Then, in December 1991, the Japanese government finally admitted that the Ainu existed as an ethnic minority. But it still refused to acknowledge the fact that they are indigenous.
>
> (Davidson 1993: 130)

Relations between Japan and the Ainu existed for centuries before official assimilationist policies were adopted in the nineteenth century. The Ainu appeared to accept their absorption into the nation of Japan as *nihonjin*, or Japanese, despite their different ethnic origin. This position has changed in recent years as the Ainu have begun to insist on their status as culturally distinct. This creates unique problems for the Ainu as

> Japanese national identity presupposes a political symbiosis between the concept of state and the concept of nation. Its practice is notably political, since it is dictated by the highest authority. Japanese nationalism, *Koka-Shugi*, as the name indicates, is closely tied to the concept of the state, *Koka*, and the sign for *koka* denotes both nation and state. The guidelines made up by the state classify the *Wajin* [the dominant ethnic group of Japan] with respect to their function in a hierarchical system, originally referred to as the *Si-nou-kou-shou* system, dividing the people of *Wajin* descent into four social strata. The ideology of the system connects to the concept of *giri*, which literally means 'burden', a sense of moral obligation

> to one's superior. The system leaves no room for social mobility nor does it allow people outside the mainstream (that is, Japan's minority groups) to enter it.
>
> (Sjöberg 1995: 379)

The Ainu have therefore adopted a double identity as both Ainu and as *nihonjin*. But the Japanese government's insistence that Ainu identity is merely 'folklore' creates unique problems for this indigenous group, one that is unlikely to be resolved in the near future.

In the East Malaysian state of Sarawak the problem is unrestrained logging. Most of the profits are siphoned off to American, European and Japanese corporations although the Chief Minister (and Minister of Forestry) Taib Mahmud and his family have also profited enormously. The native Penan people, and other Iban and Dayak tribespeople, have not. Streams and rivers are being polluted and the rainforest, traditional source of indigenous livelihood, is being systematically destroyed. Mrs Rafidah Aziz, Malaysia's Minister of International Trade and Industry, has reacted strongly to suggestions that Malaysia's policies in its Borneo states is in fact genocidal:

> We'd like to take them [the Penan] out of the jungle. Give them a decent modern living. …It has nothing to do with logging, actually. It's got to do with the existence of what was originally six thousand members of the Penan tribe who were for a long time living in the tropical forests of Sarawak. …Now at this point there are about three hundred odd of these Penan still resisting to come out of the jungle. …I mean we're talking about 1992. We're talking about the twenty-first century. We cannot afford to have some of our population still hunting monkeys. …The Europeans in England are saying that this woman [a Penan woman on a British television program reacting with dismay over the loss of wildlife in the forest] is being deprived of a decent livelihood. I mean, she talks about children going to shoot monkeys. We're talking about children using computers. …People still shooting monkeys. Big deal! Some people actually believe this is the way these people should live. No schools. No nothing. Let them go walking around in a loin cloth. …We have this [fascination for] exotic tribal life. Therefore don't touch this and don't touch their cultural heritage, their burial grounds, and so on. And therefore stop logging. That is sick.
>
> (Quoted in Davidson 1993: 136–137)

One Penan woman has responded to these sorts of arguments:

> It is not true that we don't want progress. …We want schools and clinics. But give us our customary rights to the land first. Stop logging, and then we can decide on development at our own pace.
>
> (Quoted in Davidson 1993: 136)

The indigenous peoples of Sarawak are protected under the Constitution of Malaysia as are indigenous peoples in other parts of the country. But the meaning of indigenous is particularly problematic in Malaysia. The indigenous peoples of West or Peninsular Malaysia are known generally as *orang asli* ('original people') who constitute about 1 per cent of the total population. They are distinct from the majority Malay Muslim population who are also protected as 'indigenous' or what is known as *bumiputra* ('sons of the soil') under the Constitution (Howell 1995; King 1995). The *orang asli* are referred to as 'Aboriginal' without diversification into tribes or groups. By contrast, although tribal groupings are scheduled differentiating the indigenous peoples of Borneo, Malay and non-Malay 'natives of Borneo' are not clearly differentiated in the Constitution. The consequence has been the gradual erosion of tribal rights in East Malaysia and the creation of serious tensions between Malay and non-Malay populations. Malays tend to be immigrants to East Malaysia and have brought major changes in the form of cash-crop plantations, forestry, road and dam building, and urbanisation. As a result the native Iban, Penan and Dayak populations have been pushed to the margins of Malaysian society, largely losing control of their forest homes and being moved out of their traditional long-house villages. These same groups straddle the border with Indonesian Borneo in the state of Kalimantan where similar problems are developing, exacerbated by massive transmigration from elsewhere in the archipelago. In Indonesian Kalimantan this has resulted in hundreds of deaths since 1998. How does one define rights to self-determination for the nation-state of Malaysia or for the indigenous peoples of Malaysian or Indonesian Borneo? The economic and political battle in Malaysia has been compounded by the legal definition of 'indigenous' in Malaysia for the benefit of the *bumiputra* Malay majority.

The search for national identity, self-determination and development in Asia

Self-determination in Asia, as in Africa and elsewhere since 1945, has generally meant the creation of new nation-states or the modern development of very old national and state structures within the post-war world community, including the UN and other international structures and organisations. Self-determination is increasingly based on monocultural ideas about national identity founded on cultural or religious differences between states with an emphasis on the central importance of often authoritarian state structures. This move away from multiculturalism or pluralism is evident in post-Cold-War India but has also played an extremely significant role in the development of China, Japan and other states in Asia. Ideological doctrines or adherence to democratic values seem to make little difference to this increasing tendency towards cultural homogenisation. Cultural distinctiveness on national lines, as in both India and China, is often portrayed as expressly antithetical to 'Western' values including human rights values. The recognition of civil and

political rights is often perceived as in conflict with more fundamental goals of nation building and economic development in Asia. The debate over 'cultural relativism' in Asia must be seen against this larger cultural shift. In particular the right of self-determination is not extended to groups within state boundaries.

Nationalism takes a variety of forms in Asia, very little of which provides any recognition of or protection for indigenous peoples. In the case of tribal peoples this problem is particularly acute (Bodley 1990: 3–4). India has been, until recently, dominated by a synthesis of Asian (mainly Hindu) and Western liberal democratic ideals taken from its British colonial past. The search for identity by Indian elite males is played out at both the personal and the national level (Roland 1988: 21–23). In China, the old Soviet Union, Laos, Vietnam and some states in southern India some variation of communism formed the basis for a revolutionary nationalism from the writings of Lenin and Mao to Ho Chi Minh. This form of nationalism allowed some breathing room for indigenous perspectives, at least in official government policy if not in practice. Thus China, the old Soviet Union and Vietnam have or had less overtly genocidal policies towards cultural minorities (with some major exceptions, such as Tibet). But the overarching ideal of equality and the paramountcy of the state under all these systems, whether communist or (as in India) based on Western liberal democratic ideas, mean that the standard of the dominant majority elite tends to overrule minority rights. This is especially so where indigenous peoples are seen as standing in the way of progress or majority nationalist agendas. So, speaking from a liberal Hindu perspective, Jawaharlal Nehru could write in the early years of Indian independence:

> Yet the spirit of the age will triumph. In India, at any rate, we must aim at equality. That does not and cannot mean that everybody is physically or intellectually or spiritually equal or can be made so. But it does mean equal opportunities for all and no political, economic, or social barrier in the way of any individual or group. It means a faith in humanity and a belief that there is no race or group that cannot advance and make good in its own way, given the chance to do so. It means a realization of the fact that the backwardness or degradation of any group is not due to inherent failings in it but principally to lack of opportunities and long suppression by other groups. It should mean an understanding of the modern world wherein real progress and advance, whether national or international, have become very much a joint affair and a backward group pulls back others. Therefore not only must equal opportunities be given to all, but special opportunities for educational, economic, and cultural growth must be given to backward groups so as to enable them to catch up to those who are ahead of them. Any such attempt to open the doors of opportunity to all in India will release enormous energy and ability and transform the country with amazing speed.
>
> (Nehru 1995: 251–252)

The increasing tendency towards emphasising cultural or religious rather than ideological differences as the source of 'Asianness' is proving even less sympathetic to the rights of indigenous peoples or ethnic minorities in most Asian nation-states. For example, the rise of supposedly 'fundamentalist' Hindu political power in India presents itself as in conflict with other versions of Indian nationalism and seems to reject the idea of liberal democratic pluralism that characterised post-colonial Indian society until the 1990s. In China communist ideology is less important as a framework for Chinese statehood than the resurgence in pride in ancient Chinese cultural values. This cultural dominance is in many ways antithetical to Maoist Chinese political beliefs. 'Confucianism' is frequently portrayed as a genuinely Asian way of achieving modernisation and development in those countries with a majority Chinese population, such as Singapore, whereas different versions of Islam are enjoying a major renaissance from Iran to Indonesia.

The resurgence of Islam, however, is frequently perceived as threatening to state structures and may create serious tensions between the demands of the 'nation' and the 'state'. One of the principal sources of conflict between the Indonesian central government and the northern part of Sumatra is the central importance of Islam to the Acehnese people and the apparent desire of at least some Acehnese to establish an Islamic state in Aceh. This conflict exists despite the fact that 90 per cent of *all* Indonesians are Muslim. There is a serious concern throughout the region that Indonesia may fracture into its many constituent parts if a solution to the problem of cultural diversity within a single nation-state is not resolved. Indonesia is certainly not alone in dealing with a resurgent Islam. Malaysia and the Philippines both have long histories of cultural and religious differences that have periodically appeared in the form of Islamic revivalism. Both countries also have significant indigenous populations who are distinct from both Malay and Filipino majorities whether Christian or Muslim, as does Indonesia. All states in Southeast Asia also have substantial Chinese and Indian communities. Monoculturalism is proving increasingly difficult to maintain in these nation-states.

Indonesia has attempted to deal with cultural, religious and linguistic diversity since its independence in 1949 by introducing a national language (*bahasa Indonesia*, a form of Malay) and a state ideology. *Pancasila* has been summarised as 'belief in one God; just and civilised humanity; unity of the nation; democracy; and social justice' (Turner 1992: 84–85). But for many peripheral island groups in Indonesia *Pancasila* has meant severe oppression, including the denial of the validity of indigenous religious beliefs. This is one major reason why Christianity has proved so attractive to many indigenous peoples and ethnic minorities in Indonesia. Christianity, as a monotheistic religious belief, is compatible with *Panacasila* but maintains distinctiveness in comparison with the majority Javanese religious belief in Islam. Hinduism in Bali has also managed to conform to the notion of 'belief in one God' despite the polytheism typical of Hinduism in India. Severe tensions between Christian native communities and largely Muslim and Javanese transmigrant

groups in Sulawesi, the Moluccas, Kalimantan and West Papua have resulted in thousands of deaths since the fall of Suharto in 1998. Violence and killings in Aceh are less the manifestation of interethnic rivalry played out in the form of religious confrontations than they are expressions of competing versions of Islam, Indonesian or Acehnese self-determination and control over land and natural resources.

We have all seen the tourist brochures, the colourful pictures of exotic cultural life in Bali and elsewhere in Indonesia, the promise of a novel escape from the routine of daily life:

> 'The Great Escape. Bali and Indonesia have something to suit every traveller. Play tennis, take a dip in one of the pools, or sit back and enjoy the Balinese Cultural Night at the moonlit open-air stage,' reads a travel brochure. 'Cruise remote waters to the fabled Spice Islands,' suggests another tour operator. …
>
> But beyond the Spice Island romance lies another Indonesia.
>
> 'We feel despair,' says one village woman of the government's actions against her people. 'They have ruined the land and everything on it, the ancient forest which was so vast. For us older people, our time is already up. But we have to think of our children and grandchildren – where are they going to find food? Where are they going to live?'
>
> (Quoted in Davidson 1993: 171)

Bali has been developed as a prime tourist destination for Europeans, Americans, Australians and wealthy Asians. The indigenous people of Bali, because they have an intensive rice-based agricultural society similar to Java and because their version of Hinduism can be made to conform to *Pancasila*, have escaped the worst of abuses. However:

> To tell the truth, the Balinese authorities did not actually have any say in the decision of the central government to trade in their island's charms in order to refill the state's coffers; nor had they been consulted. …Behind a façade of official assent, the plan advocated by French consultants, finalized by World Bank experts, and imposed by Jakarta technocrats gave rise to undisguised criticism in Bali. For its Balinese detractors, the master plan might be a plan for the development of tourism, but it clearly was not a plan for the development of Bali.
>
> (Picard 1995: 51)

The bleakly ironic reality is that, at the same time as Indonesia was marketing its indigenous cultures as tourist attractions, it was destroying these peoples as distinct cultural identities through a process of 'Javanisation', imposition of *bahasa*, insistence on monotheistic religious beliefs and outright genocide. The effects of these policies are particularly acute in West Papua (Irian Jaya), Sumatra (Aceh), Kalimantan, Sulawesi, the Moluccas and in Java itself. This

process may have slowed or even halted for some peoples as a result of the severe economic downturn in Indonesia after late 1997 and the democratic reforms of 1998 and 1999. But negotiations over limited autonomy for Aceh or other regions, even independence for East Timor, have yet to produce clear limits on basic human rights abuses or assimilationist policies justified in the past on the basis of the greater national good.

Nationalism can be based on a contrast with the Other, or it can incorporate the exotic into the national identity exploiting differences as a short-term avenue to hard currency dollars through tourism and indigenous production of arts and crafts, or by gaining access to indigenous knowledge taken as part of the 'common heritage' of the nation. Natural wealth and resources often lie in areas traditionally occupied by indigenous peoples (Bodley 1990). The indigenous contribution to national identity and development through creation of art or sharing of knowledge is rarely adequately recognised or rewarded. Resettlement and land expropriation are major problems as is environmental despoliation by plantation, mining and forestry companies usually with the full co-operation of government authorities. Indeed, the developers and government officials at the highest levels are often the same people. 'Crony capitalism', now identified as a major cause of the economic crash in Indonesia and elsewhere in Asia, is based on an essentially colonialist agenda in which indigenous peoples, women, children and the poor are generally the victims (Wright 2000). Where indigenous peoples have objected to development, resettlement or the taking of their knowledge without their consent (as in Sarawak, much of non-Javanese Indonesia, parts of China, Bangladesh, Burma and elsewhere) they are often subjected to brutal human rights abuses up to and including genocide.

The paradox of culture and human rights

The Udegeh, the Ainu, the Penan, and the various indigenous peoples of Indonesia have experienced, and are continuing to experience, more or less brutal aspects of colonialism. In particular the Penan and other forest peoples of Southeast Asia are facing what can only be described as genocide within the definition recognised by international law (Genocide Convention 1948, Art. 2). But these peoples are also being subjected to more subtle forms of assimilation and destruction. Genocide need not include a single murder. Assimilationist policies, cultural appropriation and the destruction of languages can be just as effective in destroying the identity of indigenous peoples. More subtle forms of cultural destruction inevitably accompany the dispossession of land resources. For indigenous peoples questions of language, cultural difference and even supposedly 'universal' standards of individual human rights can create enormous problems. Despite this many indigenous groups are attempting to return to their cultural identity in what amounts to a genuine cultural renaissance. This is true in Canada, Australia, New Zealand, Russia, Japan and even Indonesia despite massive problems.

Self-determination is that most contentious field in which much of human rights discourse is actually played out. In Canada this involves a long and troubling dialogue between rival groups who have shared the northern half of the North American continent for at least five centuries. There is no indication that this dialogue, often extremely rancorous, is going to end. Desires on the part of many groups to resolve the debate over Canadian constitutional arrangements are not going to be satisfied. For Canada, despite the certainty Canadians may say they desire, this long debate is the foundation for self-determination for the nation-state as a whole. The relationship between different groups within the state will always involve negotiations over power sharing whether it be in relation to land, to water, to the sea, to natural resources, to communications, to language, to culture, to economic development or to national identity. The fact that the discussion has mostly been conducted without large-scale violence is one of the most remarkable aspects of statehood in Canada. But it has not all been peaceful, and there is every reason to worry that violence may reoccur as individuals from indigenous groups across the country become increasingly frustrated with majoritarian refusals to negotiate land and cultural rights in good faith. Newer groups, such as migrant communities who have been left out of the dominant Canadian debates, may refuse to play by the rules of polite engagement that have been part of the myth of Canadian identity for many years. A resurgent Québecois nationalism will also certainly cause problems in the future.

In Indonesia the problem of cultural difference has resulted in massive violence. In the course of Indonesia's history millions of Indonesians have died in the attempt to enforce unity on this most disparate and chaotic of nation-states. It may be that Indonesia simply cannot survive as a single nation-state, and perhaps it should not. Much of it has been 'added on' since 1949, including West Papua, the Moluccas and Sulawesi. East Timor was the latest addition and is the first to be set adrift. Javanese imperialism, or the creation of an artificial *bahasa* identity and the imposition of a national ideology in the form of the *Pancasila*, may simply be insufficient to hold the country together. Although transmigration is no longer government policy, indigenous peoples and ethnic minorities throughout the archipelago are responding with violence to the effects of the long-term incursion of Javanese or other groups into the 'Outer Islands'. Between 1998 and 2001 thousands of people, mainly Madurese islanders, have been killed in Kalimantan by Dayak tribespeople no longer willing to give up their land and culture to the national objective (Walker 2001). It is also possible that some elements in the military and police are using ethnic conflict as a means of destabilising the central government (Jenkins 2001). Increased autonomy seems to be fuelling violence in Kalimantan and other parts of Indonesia, but in western Sumatra it appears to be helping create a peaceful resurgence of indigenous land ownership and dispute resolution for the benefit of many formerly dispossessed people (Tedjasukmana/Payakumbuh 2001). The difference seems to be that there was relatively little transmigration into western Sumatra from other parts of Indonesia.

The cultural renaissance resulting from decolonisation is the new face of self-determination in international law. Old definitions of self-determination focusing on ethnic separation and tight territorial boundaries are becoming increasingly outdated. The most interesting and innovative ideas about self-determination are currently being developed by indigenous peoples (Battiste 2000; Smith 1999). Theoretical discussions of subjectivity, identity, individuality and universalism may seem remote and disconnected from harsh realities. But these debates do reveal why human rights themselves can spell terrible trouble for indigenous peoples. The effects of human rights, intellectual property, modernisation and self-determination based on supposedly 'universal' ideas of individuality and nationality can result in the death of indigenous communities. This is not a recent phenomenon. It is the experience of colonisation for too many people. And yet, international human rights discourse can also provide a mechanism for anti-colonial struggles and the protection of indigenous rights, as the UN Working Group on Indigenous Populations would surely support. Nowhere is the paradox of human rights, culture and individualism so explicit as it is with the rights of indigenous peoples.

8 The death of the hero

> The Universe sent darkness to our humble home,
> which is gone now. The letter, and every single book,
> and dear things: they all burned like Rome.
> But it is just an image! Have a look…
>
> (Ferida Durakovic)

War, peace and human rights

An examination of conflicts, former conflicts and emergencies around the world indicates that there is a close if complex relationship between the protection of human rights, the levels of violence and oppression within societies, their political and economic stability, and war. Human rights abuses in Indonesia committed by both government forces and gangs of paramilitary thugs have been linked to factionalism within the military, a serious lack of central authority and decades of authoritarianism, corruption and transmigration. The result has been a series of uprisings and disturbances involving indigenous peoples and ethnic minorities as both victims and perpetrators leading to fearful levels of violence in the archipelago's outer islands (Murdoch 2001a).

Human rights were identified during the Second World War as one means of achieving post-war reconstruction and preventing violence. The connection between respect for human rights and the prevention of war is referred to in both the Preambles of the UN Charter and the Universal Declaration. Human rights are specifically referred to in the Preamble to the European Convention as the 'foundation of justice and peace in the world' and the formation of unity between states as based on 'effective political democracy'. Societies emerging from colonialism, political repression or war and who are also dealing with long-term socio-economic problems have frequently experienced extreme levels of violence that may be very difficult to contain or remedy, as in many parts of Africa or in our recurring examples of Indonesia and East Timor. Euro-American thinking frequently forgets the levels of violence prevalent in Europe itself through centuries of continental conflicts and ongoing colonial violence overseas. This violence strongly determined the drafting of unified European institutions such as the European Convention and its implementation mechanisms.

The African Charter's references to the relationship between human rights and freedom from violence are more equivocal. A primary purpose of human rights is stated in the Preamble as connected to

> the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination.

The right of self-determination is specifically guaranteed under Article 20 of the Charter. This right is described as a 'right to existence' that is 'unquestionable and inalienable'. In Article 20(2) '[c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community'. Newly emergent African and other nations have refused to reject violence as one such means. Anti-colonial struggles are frequently violent and the use of armed force in achieving political self-determination can be justified under international law (Charlesworth and Chinkin 2000: 263–268). In addition, Article 20(3) grants to all peoples 'the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural' (see also UN Declaration 1970). Decolonisation as an aspect of the right to self-determination may be extremely violent. In addition existing models of the nation-state are fundamentally based on notions of sovereignty that are hierarchical, oppressive and rely on the means to enforce state demands despite claims to protection of individual rights, as discussed in Chapter 4. This means that adoption of modern nation-state models can themselves engender further oppression, corruption and violence (Okafor 2000; Otto 1996a).

Economic and social redistribution through industrialisation and globalisation can also create conditions conducive to violence. The globalisation of a Euro-American economic model may have created conditions of peace and prosperity for Western Europe and its former white settler colonies such as the United States, Canada and Australia, but it has not necessarily resulted in such benefits for the rest of the world (Chowdhry 1995; Cowen and Shenton 1996; Escobar 1995; Rajagopal 2000; Seabrook 1993; Wright 2000). The effects of unrestrained trade liberalisation have given rise to serious levels of violence from the wars over resource industries in Liberia, Sierra Leone, the Congo and Angola (diamonds, gold, copper) to the infliction of intolerable working conditions on people in factories throughout the developing world. The fragmentation and civil war in Yugoslavia can be directly traced to severe economic policies imposed by the IMF and other international economic institutions in the 1980s (Orford 1997). Expropriation of land for the development of cash-crop agriculture has increased the flow of people into urban centres, disrupting traditional economic patterns, community life and political stability, leading to high levels of state-sanctioned violence, crime, family violence, workplace harassment, assaults and killings (Waring 1996).

In an attempt to resolve deep-rooted conflicts that have resulted in violence 'Truth and Reconciliation Commissions' have been set up in a number of countries coming out of long periods of oppressive rule, war or in the case of South Africa entrenched apartheid. The Commission in South Africa does not charge or try offenders for human rights abuses. Rather amnesty from criminal prosecution is exchanged for full disclosure by perpetrators of apartheid-related abuses. Perhaps even more importantly the stories of the victims are heard and recorded. One of the purposes of the Commission is to ensure that South Africa's past cannot later be denied or buried. History itself, or 'Truth' in the form of a permanent record, then becomes an essential element of the human rights process (Lyster 1999; Sangster 1999). History is never just history. But this process is always agonising (Krof 1998). The public telling and recording of oral testimony can itself seem like a further violation.

> Archbishop Desmond Tutu set aside a 'crying room' when he opened hearings of South Africa's Truth and Reconciliation Commission. …It is a busy place. …Many of the witnesses break down before they can finish their testimony. The commissioners themselves are often in tears. Why are they putting themselves through all this?…[T]he deeper answer is a belief in the curative power of truth. …'Until we know what crimes were committed against innocent people,' says Mr. Mandela, 'there will never be reconciliation.'
>
> (Gee 1996)

One of the reasons for the establishment of the International Tribunals on War Crimes in the Former Yugoslavia and Rwanda was to provide a response to 'reports of mass killings and the continuance of the practice of "ethnic cleansing" ' that were themselves 'a threat to international peace and security'. It was hoped that the establishment of a tribunal with the power to prosecute offenders would 'contribute to the restoration and maintenance of peace' in ex-Yugoslavia (1993 UNSC Res. 808; Akhavan 1993; Minow 1998). There are counter-arguments, however, that uncovering crimes of former enemies or, even more so, punishing war criminals may have the effect of further aggravating tensions between ethnic groups. This is apparent in the case of Bosnian Serbs from which group the vast majority of the accused before the Yugoslavian Tribunal have come (Akhavan 1993: 281). 'Internal atrocities' committed during war or armed insurrection are increasingly being recognised as 'international crimes and thus as matters of major international concern' (Meron 1995: 576; see also Glover 2001). The expansion of what can be considered as serious infringements of human rights that might justify international criminal prosecution is one consequence of the conflicts in Yugoslavia and Rwanda.

For women the story of identifying and condemning perpetrators of human rights abuse is, as might be expected, more complex (Askin 1997; Charlesworth and Chinkin 2000: 308–337; Chinkin 1993a, 1994; Gardam 1992, 1993, 1997; Meron 1993). Recognition of the sexual assault of women as an international crime was not clear until the Bosnian conflict brought such abuses to the attention

of the world (Chinkin 1994). Sexual assault and enforced prostitution of women has been a common feature of war, as in the example of Japan's exploitation of 'comfort women' during the Second World War (Hicks 1997). Crimes against humanity now clearly include sexual assault and rape (1993 ICTY; 1994 ICTR; Charlesworth and Chinkin 2000: 319–321; *Kunarac, Kovac and Vukovic* 2001; Mann 2001; Rome Statute 1998; *Tadic* 1997), as do war crimes and grave breaches of the Geneva Conventions (*Furundzija* 1998). The Rwandan Tribunal has found that genocide can also include the systemic and intentional use of rape as a means of ethnic destruction (*Akayesu* 1998; Charlesworth and Chinkin 2000: 317–319; Viseur-Sellers 1997). This is largely thanks to the testimony of witnesses and the persistence of Judge Pillay, the only female member of the Tribunal at the time of the *Akayesu* decision (Charlesworth and Chinkin 2000: 312, 323). Christine Chinkin expresses some reservations, however, about the role of international tribunals in identifying and prosecuting rapists. Highly emotional responses to 'internal atrocities' committed during wartime should not hide the continuance of human rights abuses against women in times of peace and within the domestic jurisdictions of accusers as well as the accused (Chinkin 1994: 340–341).

> The focus of the Tribunal is on punishing wrongdoers, not on providing compensation and support to those who have suffered the harms [of rape and sexual abuse]. …The traditional exclusion of women from decision-making with respect to the use of force must not be here continued.
>
> (337–338)

In all cultures women as well as men have a complex relationship to war, not only as victims of violence but also as supporters and fighters in the struggle their group or nation might be waging. In addition women have often played a major role in pacifist movements and the struggle for peace and disarmament (Bunch 1990; Chinkin 1993a, 1993b; Gardam 1993, 1993a; Morgan 1989; Peterson and Runyan 1993; Tickner 1993). Chinkin cites several examples of international recognition of the connection between human rights and peace including UN Security Council resolutions relating to threats to peace in Southern Rhodesia (now Zimbabwe), Somalia and Iraq (Chinkin 1994; see also United Nations 1992a). In a Report of the United Nations High Commissioner for Human Rights it was pointed out that

> Close cooperation between the High Commissioner and the special procedures, treaty bodies, relevant agencies and programmes, and non-governmental organizations can be a most useful tool both in providing early warning of potential emergencies and in mitigating or avoiding such disasters.
>
> (United Nations Human Rights Commission 1995: para. 25)

The High Commissioner gave the example of the UN human rights presence set up in Burundi in 1994. This may have had the effect of preventing a repeat of

the Rwandan catastrophe in this neighbouring country. The UN presence has not prevented the occurrence of torture and killing on a less egregious scale, however, nor did a significant UN presence in Rwanda prior to 1994 prevent the deaths of nearly a million people in the space of a few months (Eller 1999: Chapter 5; Gourevitch 1999; Howland 1999; Jones 1999; UN Rwanda Inquiry 1999).

The connection between human rights and war was graphically demonstrated at the end of the twentieth century by the continuation of the Balkans conflict in Kosovo. The principal purpose of the aerial bombardment by a combined NATO force was stated to be the withdrawal of Yugoslav forces from Kosovo and the prevention of gross breaches of human rights and humanitarian law, including genocide, reiterated by Ambassador and Deputy Secretary-General of NATO Mr Sergio Balanzino (1999). Although the principle of humanitarian intervention was never pleaded as such it is clear that NATO leaders justified their actions on humanitarian grounds (Knox 1999). British Prime Minister Tony Blair talked about 'compassionate bombing' and President Clinton repeatedly referred to Serbian 'atrocities' as the impetus for the attack against the sovereign state of Yugoslavia. NATO's actions were taken against strong representations by Russia and China that the bombing was illegal under international law, a position given considerable weight by the absence of any prior clear UN Security Council resolution on the use of force as required under Chapter VII of the UN Charter. Such a resolution was impossible given the veto power held by these two states. The bombing of Yugoslavia was the first use of force by NATO in an international, or indeed any, conflict in Europe. It is clear that international law has taken a profound turn in a new direction, one in which the question of human rights has become paramount (Annan 1999; Cassese 1999; Simma 1999; Steiner and Alston 2000: 653–662).

Human rights analysts have never been able to explain adequately the existence of violence on an individual or a mass scale. Human rights largely focus on abuses committed by states against individuals in times of peace. Humanitarian law is concerned with the commission of breaches of international law mainly against non-combatants during times of war. It is as if human rights and war are somehow so incompatible as to defy analysis or critical thought. So deep has this schism become that many human rights and peace activists could describe the NATO engagement in Kosovo as necessary despite clear evidence from within a week of the action that 'ethnic cleansing' of Albanian Kosovars had increased dramatically under the cover of the bombing. President Vaclav Havel of the Czech Republic in a speech to the Canadian Parliament described the bombing as 'probably the first war ever fought that is not being fought in the name of interests but in the name of certain principles and values' (quoted in G. Gibson 1999). The engagement created an enormous refugee problem. Mass murder of Albanian men by the Serbian Army, police and 'special' forces appears to have been committed while the bombing went on. There was and is no evidence that this violence would have occurred on this scale in the absence of NATO's action or that other more peaceful solutions might not have been effective. It also ignores the activities of the Kosovar Liberation Army (KLA) in the murder and terrorisa-

tion of Serbs in the province, activities which have increased since the bombing stopped. Commentators on the bombing have begun to reassess the effectiveness of existing international institutions and even the nature of state sovereignty in international law (Blokker 2000; Ignatieff 1999; Reisman 2000).

What might characterise the struggles and conflicts of the late twentieth century are not their difference or increased intensity, but their similarity to the colonial wars of the last 500 years. The decolonisation process, often fought in the name of human rights, bears a remarkable resemblance to wars fought wherever Europeans came into contact with indigenous or non-European populations. The First and Second World Wars were massively more destructive than earlier European conflicts but the global nature of the bloodshed and the alignment of European nation-states and their colonial offshoots as allies or enemies were not new. Perhaps the deepest and most troubling contradiction contained within human rights is not their antithesis to the logic of war and violence, but their close association with this logic. How can we adequately understand human rights, or the possibility for their transformative effect on human behaviour, if we do not acknowledge and examine their relationship with war and violence?

What is war?

At the beginning of the twenty-first century bloody wars, internal conflicts and infringement of human rights continue on every inhabited continent. There are in fact relatively few places that are not directly or indirectly involved in some form of armed conflict as I write, including Europe, North America and Australia who generally characterise themselves as peaceful. An example of this is the continued military action against Iraq by American and British forces. Many states also find it easy to forget the wealth generated by an arms industry largely produced by 'peaceful' First World countries including the United Kingdom, the United States, France, Australia and Sweden. From the cataclysm of the Second World War galvanising the inclusion of human rights as a central plank of post-war international law, to hundreds of violent armed resistance wars and anti-colonial struggles fought from prior to 1945 on, the history of human rights has never been separate from armed conflict. Violence seems to have been the defining characteristic of the twentieth century (Glover 2001). Guerrilla insurgencies waged by minority groups against intolerant majorities; smaller-scale terrorist movements and the use of force by small left- and right-wing factions in Europe itself; and the violent nature of many so-called 'peaceful' societies perpetuate the use of violence to resolve disputes into our own century. This includes the high level of deaths particularly by and of young males in modern urban and rural environments. Interstate and multistate wars did not disappear after the Second World War, but have continued with unabated ferocity in Africa, Latin America, the Middle East and Asia. While human rights were developing as a fundamental part of international law, global society remained intensely violent, arguably more so than at any other period of human history outside the First and Second World Wars.

What do the words 'peace' and 'war' actually mean? It would appear that 'peace' remains largely undefined in international law. At best it appears to mean only an 'absence of war'. This might suggest that international law is based on the idea that war is normal, i.e. that the usual practice of states in resolving their differences begins with their capacity at least to threaten the use of force and ends with the actual use of force with distressing frequency. This corresponds with the close association between state sovereignty and force outlined in Chapter 4. Article 2 was an attempt by the drafters of the UN Charter to redirect this focus towards the peaceful settlement of disputes given prominence in Article 1(1) as the primary purpose of the UN Organisation. Chapters VI, VII and VIII provide the UN with the legal means to enforce peace through collective measures, regional arrangements or force if necessary, all to be overseen by the Security Council. Article 51, allowing states an individual or collective right of self-defence, is the only provision justifying armed conflict not otherwise authorised by the UN (Charlesworth and Chinkin 2000: 260). One of the great tragedies of the UN, as has been frequently noted, is its failure to achieve its peaceful aims or to carry out enforcement measures effectively, something that has been dramatically demonstrated from Somalia to Kosovo.

Peace as an 'absence of war' is a curiously empty concept lacking substance or positive impact and requiring a commitment by peace supporters to a largely negative value, unlike war that inspires tremendous passion and attention to a rich and detailed history of description and definition (Kaiser 1990; Keegan 1993; O'Connell 1995). It might be argued that the concept of peace is gendered as feminine, retaining a quality of emptiness associated with femaleness, whereas the 'masculine' concept of war is replete with meaning. This may be associated with concepts of statehood in which gender is a significant hidden component (Brown 1995; Charlesworth and Chinkin 2000: 137–139; Knop 1993). Or, as Anne Orford has suggested,

> [t]he characterisation of [humanitarian] intervention as active and productive, and non-intervention as inactive and negative, appears to inform the popular response that we should do something to address the suffering and despair in Bosnia, Somalia, or Rwanda, rather than doing nothing.
>
> (1997: 449)

This in turn resonates with the older colonial mission of salvation identified by Antony Anghie and Dianne Otto as a principal justification for European expansion (Anghie 1996; Otto 1999). Orford suggests that this nostalgia for the role of 'saviour' is behind much Euro-American commentary on the use of human rights abuse as a justification for the use of force: '[j]ustifications for military and monetary intervention draw strongly upon these stories of those who cannot govern themselves, who beseech dominance' (1997: 483).

Despite this fuller resonance, however, what we mean by 'war' is also curiously difficult to define. War does not necessarily have the same effect on individuals as other instances of violence and suffering but it is often difficult to

articulate the difference. On a superficial level it is of course true that war, terrorism, torture, rape and other forms of assault all cause massive suffering and injustice. But war would appear to be qualitatively different in that the context in which the violence occurs means that suffering is viewed as inevitable or necessary or even worthy by both belligerents and sufferers alike. Some forms of war are very difficult to distinguish from some other types of aggression, such as terrorism, that may look like and be justified by the participants as guerrilla warfare in the cause of national liberation. Methods of waging war also include forms of violence that occur in other situations, such as the infliction of intolerable living conditions on populations. Starvation is frequently used as a weapon of war. Where it is, as in Sudan or Somalia, it is not necessarily perceived in the same way as starvation resulting from some other cause, often also 'man-made'. Starvation of civilian populations is clearly an infraction of the laws of war (1977 Protocol I to the Geneva Conventions 1949, Art. 54) and may even be a 'grave breach' of Geneva Convention IV, Article 147 or a war crime (1993 ICTY, Arts 2 and 3; Rome Statute 1998, Art. 8.2.b.xxv), genocide (Genocide Convention, Art. 2; Rome Statute, Art. 6) or a crime against humanity (1993 ICTY, Art. 5; Rome Statute 1998, Art. 7).

War gives shape and meaning to the idea of peace and normality. Wars are fought to 'enforce' peaceful co-existence. Violence becomes the means of sharply differentiating the normality of 'ordinary' life in peacetime from the passionate order of war. Nation-states fight to protect their right to live in peace; men fight to protect 'their' women from the violent predations of other men; groups define themselves through their capacity and willingness to achieve peaceful goals by violent means. Kosovo begins to look like a very familiar story once its claims to provide a 'new' model of 'humanitarian' war are looked at more closely. Support by women and men for war may very well be whipped up by nationalist or militaristic propaganda. Milosevic's capacity to use nationalistic rhetoric to gain support was the main basis for his rise to power, beginning with his speech in support of Serbian interests in Kosovo in 1988 (C. Gibson 1999). But, as Orford also points out, finding the causes of violence in Yugoslavia and elsewhere must take us beyond the local and into the international order of global economic restructuring and post-Cold-War manipulations of sovereignty and security (Orford 1996, 1997). In the interests of the 'higher goal' of national victory or liberation people may tolerate horrendous suffering. The struggle for independence by the Eritrean people in their forty-year civil war against the Ethiopian central government provides an example (Prendergast and Duffield 1999). In this civil war women were also active participants in the struggle, including the bearing of arms (Grinker 1992; Pilger 1991). This pattern repeated itself in the conventional war between Ethiopia and Eritrea that began in 1998. Suffering under these circumstances is not the same, is not felt by the people involved to be the same, as suffering resulting from some other form of disaster. The military historian Robert L. O'Connell argues persuasively that war as a social institution is qualitatively different from other forms of violence (1995: 5).

War and international diplomacy

Modern warfare would appear to be a structurally consistent and essential component of relations between modern nation-states. War differs from other forms of violence and suffering in that war, or the capacity to wage war, is the coercive element that lies behind the effectiveness or ineffectiveness of our existing system of international law. The Gulf War is an excellent example. At no time since the Second World War has there been such unanimous support for an endeavour carried out under the auspices of the UN. The system was universally felt to be effective at last. This rare 'successful' operation of the UN Organisation was for the purpose of engaging in a massive military operation against a single recalcitrant member-state – Iraq. Whether one agrees that the use of force was justified or not, there can be little doubt that the UN system for the collective enforcement of security was effective in achieving its aim of repelling an aggressive force from the territory of a non-belligerent victim – Kuwait. The fact that war was the result, and the success of the war for the 'allies' widely applauded, indicates that it is the system itself which determined the outcome. The UN itself is a development of international legal principles governing the use of force that has a long history within colonial Europe. It is arguably a modern institutional crystallisation of imperial principles long dominant in international diplomacy. The justifiability of the endeavour is judged within terms set by the structure itself, a structure that tends towards war even within the context of explicit provisions and processes designed to avoid it.

Human rights played an essential role in the Gulf War. Governments used reports by Amnesty International and other NGOs to justify their use of force against Iraq. Jonathan Glover repeats stories from this 'festival of cruelty':

> Among the many cruel acts reported, a few individual cases stand out. Hisham al-Abadan, the gynaecologist at Mubarak al-Kabeer hospital, who gave medical treatment to people the Iraqis did not approve of, was found dead with his nails and eyes gouged out. A twenty-year-old woman who was arrested by the Iraqis had all her hair cut off, was repeatedly raped over a period of two months, and, pregnant, was electrocuted. Before she died she had 'her breasts cut off and her belly sliced open'.
>
> (2001: 31–32)

Glover's stories (and there are more) are taken from several reputable journalistic sources such as the *Guardian*, the *Independent on Sunday* and the *Observer* (Glover 2001: 417). Nowhere does Glover question their veracity. Stories of 'atrocities', especially against women and children, are a common factor in the effort to justify the use of force by governments since at least the First World War I (Enloe 1989; Gardam 1993a; Tickner 1993). In today's wars the language of international human rights, especially torture, rape, murder of 'innocent' civilians and even genocide, is repeatedly used. For example, reports of the killing of premature infants in a hospital in Kuwait City by Iraqi soldiers immediately after the invasion was reported (and later retracted) by Amnesty International. These

stories were frequently quoted in the debate on the war in the US Congress and elsewhere around the world. The 'atrocities' were later found to be the fabrications of an effective Kuwaiti public relations exercise (Kellner 1992: 67–71). This is not to suggest that atrocities did not occur in Kuwait. But a very significant problem in the use of human rights rhetoric in relation to armed conflict by the media and others is its easy corruption in the interests of political and economic power and the justification of force-serving purposes that are not primarily humanitarian.

The UN system is built on the acceptance of war as 'normal' even as it claims to reject war as an international solution. The Security Council as the UN's chief organ has the principal task of regulating the international use of force, whether it be through warfare conducted by or between states, or whether it be in the form of international peacekeeping. Where the UN is slow to act, regional organisations or loose regional confederations are increasingly taking over, as in Kosovo, regardless of whether or not these are justified under Chapter VIII of the UN Charter. Other examples include conflicts in Africa (Liberia, Sierra Leone, the Great Lakes region of Central Africa) and even East Timor. In East Timor the vast majority of the INTERFET forces under Security Council Resolution 1264 were from regional powers (Australia, Thailand, New Zealand, the Philippines, South Korea, Singapore, Malaysia, even China). Without this local involvement, and the consent of the Indonesian government, China at least would have vetoed any UN involvement. The British contingent largely consisted of Nepali Ghurkhas in keeping with the desire to increase the 'Asian' profile of the intervention force. African regional peacekeeping efforts have been crucial in reducing the level of violence in Liberia, Sierra Leone and Central Africa either with or without the assistance of the UN or the larger world community (Busumtwi-Sam 1999). The greatest task of these forces is usually protection of civilians and the facilitation of humanitarian aid.

This system accepts that war is not only a consequence of defending territory (one of the principal determinants of statehood) but is a normal condition against which peace is posited as the never-quite-attainable nirvana of 'an absence of war'. Our fixation with boundaries and state sovereignty as coterminous with territorial sovereignty is itself based on the violent disjuncture of difference as an invitation to conquest, a 'beseeching of dominance' in Orford's wonderful phrase (Derrida 1978; DeVries and Weber 1997; Duursma 1996; Koskenniemi 1994; Orford 1997). An example of this is the border war between Ethiopia and Eritrea discussed in Chapter 4. We cannot define peace because we are completely immersed in a system built on war and militarism. This is not to say that internal violence and suffering are not important. They are clearly linked to the warrior mentality and its modern formulation within the international balance of power.

The idea that war is a normal part of international conduct was first given explicit philosophical support in the early nineteenth century by Georg Hegel whose ideas are based on conflict between opposing forces as the inherent nature of historical progression, or dialecticism (Johnson 1991; see also Taylor 1979). It

is important to remember that Hegel's words are situated both in the historical context of the development of the nation-state, including its modern monopoly on the legitimate use of violence (Giddens 1991), and within the wider arena of political and economic transformation in Europe. This transformation eventually encompassed the entire world through colonial conquest, itself a successful implementation of these same hegemonic views and military values (Parker 1996). Capitalist diplomatic requirements or the needs of liberal democracies had supplanted traditional military cultures in Europe by the late nineteenth century. As discussed in Chapter 4, the soldier replaced the warrior. Clausewitz 'sought to detach the conduct of war from militarism in its traditional meaning – the pursuit of war as an intrinsic value for the virtues that could be promoted through bloody combat' (Giddens 1987: 329).

> War and diplomacy became integrally linked, with the former being, as Clausewitz made explicit, the instrument to be applied where diplomatic measures failed or were otherwise rebutted. …The most famous of all remarks upon the nature of war – 'War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means' – is not an expression of a warrior philosophy, but an observation about the practicalities of the precarious existence of states within the European state system. Neither war nor military victory are ends in themselves; they are instruments in the realization of longer-term policies.
>
> (Giddens 1987: 329–330)

Modern attributes of militarism, diplomacy, war and masculinity inherent to the soldier may again be radically changing. We may have entered a postmodern world including 'postmodern' warfare. In this sense the Gulf War appears to be the embodiment of a new type of war and international peacekeeping as the new 'normality'. The Gulf War involved the 'whole international community' and was waged against an aggressive military regime pursuing the modern use of war as 'politics by other means'. The Iraqis appeared to be committed to an extreme form of the masculinist warrior mentality embodied in the figure of Saddam Hussein himself. The War was portrayed as Western 'civilisation' fighting against the archaic and anachronistic violence of a 'terrorist' regime. The actual combat was presented to the world as clinical, clean, highly technologised and, above all, limited. Civilian casualties were supposedly minimised by astonishingly accurate 'smart bombs' and computerised targeting systems. Any non-military destruction was described as 'collateral damage' and was characterised as insignificant (Opeskin and Wright 1991). Human carnage was carefully screened from home audiences (outside Iraq) and even military casualties were pronounced as of little significance. This was a war that involved, apparently, no suffering, no death and no injury (Baudrillard 1995). It appeared as a kind of surreal television war broadcast globally by the American cable news channel CNN and, eventually, the world's media (Taylor 1998). The Gulf

War seemed shockingly familiar as a kind of superficial spectacle. One CNN journalist described the first night of bombing over Baghdad as 'a rain of steel' with little apparent awareness that this spectacle would have terrible consequences for real people hurrying for shelter underneath it. We have seen this drama many times before in video arcades, movie theatres and on television screens and computer monitors. War seems to have changed into a meaningless succession of 'surgical strikes' and war making is described as 'peacekeeping' in which each successive flash of violence is quickly superseded by the next.

> The bloody massacre in Bangladesh quickly covered the memory of the Russian invasion of Czechoslovakia, the assassination of Allende drowned out the groans of Bangladesh, the war in the Sinai Desert made people forget Allende, the Cambodian massacre made people forget Sinai, and so on and so forth until ultimately everyone lets everything be forgotten.
>
> (Milan Kundera, quoted in Glover 2001: 4)

The reality of this first 'postmodern' war is that it was largely waged by both sides against civilian populations in Iraq, Kuwait and Israel. The devastation of the civilian infrastructure of Iraq with the purpose of destroying its economic capacity to wage war beyond its borders (but not within its borders, as Iraq's campaign against the Kurds and the Shiites demonstrated) seems to have been the primary aim. It now appears that this was done with the intention of preserving the existing political order to act as a continuing buffer or counterweight against Iran, Syria and other regimes disliked by the United States and its allies. The twin goals of incapacitating Iraq without destroying it appear to have been completely successful and continued with a low-level military engagement protecting so-called 'no-fly zones' throughout the decade following 'Operation Desert Storm'. This ongoing engagement had, by late 1999, involved aerial strikes close to the total number carried out by NATO over Serbia and Kosovo. In early 2001 President George W. Bush authorised increased strikes around Baghdad itself.

In a postmodern world violence aimed at civilian targets or civil war involving regional ethnic conflicts are increasingly becoming the norm. Larger economic and political forces propelling this violence tend to be ignored in discussions of ethnic violence or 'humanitarian intervention' (Orford 1996, 1997). International policing mechanisms are implemented with more or less success depending on the economic viability of the region. As wars have become increasingly accessible to media images and commentary, and as the victims of war are increasingly appearing on our television screens, human rights are becoming a more and more important tool in defining and combating the use of violence for political ends (Reisman 2000). At the same time human rights and humanitarian concerns may be increasingly easy to use as excuses for the waging of war against unpopular or uncooperative regimes. A contradiction is beginning to emerge. Human rights can be used as tools in opposition to violence or as an excuse for the use of violence in the form of 'compassionate' or 'humanitarian' wars based on 'principle'.

Torture

The connection between human rights and violence is more familiarly described within the ambit of individual civil and political rights, in particular the right to be free from torture. The main political rights such as the right to vote or to participate in public institutions reflect an eighteenth-century European desire to create a civil society in which democracy is exemplified by reasoned debate between representatives elected by those who qualify as members of the franchise (J. K. Wright 1994; Schama 1989). We have already seen that who is, or who is not, entitled to be a part of that franchise, to be a 'citizen' in Kant's meaning, has everything to do with the importance of civil independence (Kant 1797). We have already seen that this quality of independence and citizenship was based on class (property rights), gender and race and is still influenced by this early history (Brown 1995; Landes 1988; Pateman 1988; Singham 1994). These qualifications are in turn shaped by their association with reason or rationality in an Enlightenment sense and are exercised in the public realm.

There is no doubt that states and their officials do commit egregious harm to individuals all over the world. But condemnation of violence in international law has historically been fairly selective. There does not seem to be any condemnation in the law of human rights of the infliction of pain and suffering *per se*. The principal definition of torture requires an ulterior motive, such as the extraction of a confession or a coerced expression of submission, for harm to amount to torture (Torture Convention 1984, Art. 1). Where such ulterior motive as defined in Article 1(1) does not exist torture will probably not be recognised under international law. In addition a public official acting on behalf of the state must inflict the pain and suffering. Although the UN Human Rights Committee has said that states parties to the ICCPR must take 'legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity', it is clear that the principal focus is still on acts committed by persons acting in an official capacity on behalf of the state (United Nations Human Rights Committee 1992: 29). The European Convention for the Prevention of Torture allows for a somewhat different approach. A Committee for the Prevention of Torture has been set up consisting of independent experts. It has considerable powers of inspection and investigation. Not only prisoners, but 'any persons deprived of their liberty by a public authority', are included. This proactive and preventive approach is an encouraging innovation in human rights investigations but the meaning and purpose of the acts investigated are within the prevailing understanding of torture in international law (Steiner and Alston 1996: 582). A protocol setting up a similar process under the UN Torture Convention is currently being discussed.

It is arguable that the reason for this limiting of the definition of torture to acts committed by public officials on behalf of the state is because of the limitations on state responsibility in international law.

> A reason often given or implicit in considering atrocities to women not human rights violations, politically or legally, is that they do not involve acts by states. They happen between non-state actors, in civil society, unconscious and unorganized and unsystematic and undirected and unplanned. They do not happen by virtue of state policy. International instruments (and national constitutions) control only state action.
>
> (MacKinnon 1993: 26)

The problem of state responsibility is a serious one in the area of international human rights, but it is not insurmountable. The Human Rights Committee, as noted above, has commented that torture and inhumane, cruel or degrading treatment or punishment shall be prevented by member states regardless of whether these acts are committed by officials acting in their public capacity or not. This indicates that international human rights law is already moving away from a strict state-based system of responsibility. The Inter-American Court of Human Rights in the case of *Velasquez Rodrigues v. Honduras* (1988) has moved towards an approach based on 'due diligence', meaning that states have a responsibility to 'take reasonable steps' in preventing, investigating and punishing those who commit human rights abuses. This obligation exists regardless of whether the state was directly or indirectly involved. In *Velasquez Rodrigues* Honduras could be said to be responsible for the disappearance, torture and killing of persons within its jurisdiction even though the acts were actually committed by unofficial paramilitary 'death squads' working on their own (but with the implicit backing of the government). According to the Inter-American Court:

> 172. …An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. …
>
> 174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identity those responsible, impose the appropriate punishment and ensure the victim adequate compensation.

In the *Pinochet* litigation of 1998 and 1999 the question of individual responsibility on the part of a former head of state became a serious issue (*Ex Parte Pinochet* 1999). In an important development in the law the House of Lords rejected the argument that the doctrines of 'Act of State' or 'sovereign immunity' could protect the former leader of any nation-state from responsibility for his or

her actions where they were found to fall outside his or her sovereign functions. This includes the infliction or condoning of egregious human rights abuses such as torture. There still exist significant national legal limitations on liability for international crimes within the jurisdiction of individual states. The majority of the House of Lords was unwilling to accept that the principle of 'universal jurisdiction' could be applied in this case (*Ex Parte Pinochet* 1999) prior to such jurisdiction being established by an Act of Parliament. Nevertheless, it is clear that universal jurisdiction is gradually expanding to include areas of humanitarian law such as genocide, war crimes and crimes against humanity. Not only are individuals responsible under the national application of international standards, but they are also accountable to international tribunals designed to implement international human rights and humanitarian law, as in the Tribunals in Yugoslavia and Rwanda and the developing International Criminal Court. Human rights standards are at least to some extent capable of enforcement through criminal remedies. Although establishing individual as well as state responsibility for human rights abuses is important, the focus on remedies aimed at individuals continues to avoid more fundamental causes of oppression and violence (Teitel 1999).

Contradictions within the law against torture

For example, the definition of torture reverberates within the construction of patriarchy involving the historical development of gender, both masculine and feminine, as we have already seen in relation to the citizen/soldier. As Robert Connell has said:

> The patriarchal state can be seen, then, not as the manifestation of a patriarchal essence, but as the centre of a reverberating set of power relations and political processes in which patriarchy is both constructed and contested.
>
> (1987: 130)

This involves the creation and use of selected masculine discourses, some of which may acquire dominance over others. The practice of torture is itself described in terms that identify it with an older pre-Enlightenment masculinity (Garland 1991; Langbein 1976; Peters 1989). The language of rights, law, rationality and objectivity now purports to condemn the violence of the *ancien régime*. Representations of torture provide a continuing arena in which rational European Man fights and defeats the barbarian. It grants to this figure the status of hero or saviour, carrying the 'white man's burden' of civilisation to the benighted savage or, even today, creating 'New World Orders' of international peace and security over the brutality of a Saddam Hussein, Slobodan Milosevic or the warlords of Central Africa. The barbarism against which human rights does battle is coloured in black and red and is gendered as male.

Public officials who commit torture as defined in international law (usually

soldiers, police or prison officers) are overwhelmingly male. Women who torture are not unknown but they appear to be rare, at least within the types of torture delineated within international human rights law. Women as perpetrators of violence are not unknown, however. In 1997 Pauline Nyiramasuhuko was charged with genocide before the Rwandan Tribunal (Charlesworth and Chinkin 2000: 312). Whether the victim is male or female, adult or child, the perpetrator of violence is almost always portrayed as an adult male. This is not to suggest that men are by some essential attribute of masculinity torturers, nor is it simply a function of the 'fact' that most police officers or military personnel are male. The unspoken 'naturalness' of men in the role of torturers is itself a creation of the discourse of violence. Torture, by representing masculinity as inherently aggressive and violent, actually helps to construct men's sexuality as revolving around the abuse of power. Men are no more essentially violent than women are essentially victims. Just as the citizen/soldier is a construction of the modern state and the separation of the state from civil society (Giddens 1987: 20–21), so the representation of male violence is a product of modern socialisation and is replicated in the right to be free from torture.

The discourse of torture as male violence in the public realm ignores the infliction of injury in the private sphere of the home or school. 'Bullying', 'hazing' and initiation rites in many educational facilities may provide an important form of socialisation in which torture may be seen as acceptable in some circumstances. This is again especially true of male cultures such as the military, single-sex schools, colleges and sporting clubs (Connell 1995). 'Private' acts of torture against women and children such as rape, assault, battery, incest, kidnapping of brides, 'dowry deaths', confinement, harassment in the workplace, in the school or in the streets, family violence, child abuse and perhaps also genital surgeries are rarely identified in international law as 'torture' at all. The UN Torture Committee has remained relatively impervious to feminist attempts to incorporate these types of abuse into its agenda (Charlesworth and Chinkin 2000: 246).

The torture which modern human rights law defines and condemns is based on a pre-Enlightenment language of power over the body through which the mind can be controlled (duBois 1991; Langbein 1976). Mind and body are seen as different, but connected. The mind/body split of modern Western discourse has an earlier incomplete manifestation where the mind of the torturer could be imposed on the body of the tortured through physical pain and the fear of pain. This pain served to incorporate the mind and will of the torturer in the place of the tortured's own self-consciousness. Torture is also based on the premise that 'truth' or affirmation of 'the Truth' is hidden in the body and can be extracted through physical suffering (Cloud 1996; duBois 1991). Torture and those who inflict it are, at least in the guise recognised by international law, part of a barbaric or tribal masculinity that is now relegated to narratives of the pre-Enlightenment past. In the overthrow of the *ancien régime* white rationalist Enlightenment Europe sought to control this older form of patriarchy, harnessing the energies of certain types of masculinity to the service of the nation-state and industrial capitalism (Connell 1987, 1995).

Within the modern economy of discipline, physical torture and public execution, which used to be routine parts of European judicial processes, are seen as throwbacks to an earlier form of control of men over other men (Foucault 1979; Langbein 1976). It can be seen as the dark progenitor of the rule of law. From the end of the eighteenth century onwards the Enlightenment position on criminality and social discipline sought to rid itself of such barbarism, arguably at least partly to justify its own superiority, its 'humanism' (Foucault 1979; Hay *et al.* 1975; Langbein 1976; Thompson 1975). Eliminating the more egregious forms of physical torture, mutilation and death from judicial processes was a major step forward. But this elimination was not entirely altruistic, nor was it complete. The discourse lingers on, now transposed to a secular post-colonial world order. Descriptions of torture in international law bear a close relationship to ritualised forms of male sacrifice with the victim as heroic martyr. The imagery is often expressly Christian. There is a disquieting resemblance to Catholic rites of confession, penance and Christian iconography. Descriptions of torture that appear in Amnesty International reports resemble closely the depictions of mutilation and death common in chronicles of martyrdom in medieval Catholic Europe. International human rights' inheritance from Christianity can be seen most vividly in litanies and representations of torture in the popular imagination and in human rights cases. This form of ritualised violence is not one of inclusion for the one sacrificed, however (as in religious ceremonies of sacrifice and martyrdom), but rather of conquest, control and humiliation of men by other men in order to cement the boundaries of the wider community under authoritarian control. The actual infliction of torture *and* its representation serve different communities and different agendas, but both are about maintaining hegemonic power. Representations of torture in international law serve the interests of dominant political and economic players by contrasting the barbarism of pre-Enlightenment social control with the benevolent exercise of modern governance.

Western liberalism offers cleanliness rather than bloodiness as the paradigm of the healthy political order – hygiene as opposed to sacrifice. We define ourselves partly in terms of how diligent we are in managing our garbage (which may be human) rather than our enemies. Archaic forms of violent masculinity did not disappear from the world with the rise of Western liberalism. European ideas about torture were exported through colonialism to the rest of the world. The tortured victim changed colour and became black, red, yellow or brown. The colour of the torturer has also changed in our representations of those who commit torture. Torture is now seen as widespread mainly in non-European settings. In this way the heroic status of European Man as the bearer of civilisation remains intact while torture is continually portrayed as the acting out of sacrifice and power against which the 'civilised' standards of First World cultures can be contrasted (Rejali 1994). Torture, public execution and the state's control over the body have shifted to new and acceptable methods of control. Coercion and punishment through the spectacle of the hangman's noose, the rack, and the thumbscrew were discredited, or at least driven underground, only to be resusci-

tated as examples of barbarism when the righteousness of 'free men' in the name of 'rights' needs to be demonstrated.

The gender of torture

The torture of women also disappeared but into the private realm. Women have always been tortured and murdered by state actors, something which Western history persists in burying and forgetting. Just as the Renaissance and 'humanism' were shaping early modern Europe, misogyny reached unprecedented proportions. The barbarity of the witchcraft trials, involving the torture and murder of tens of thousands of women, remains an enigmatic mystery at the heart of rationalist humanist Europe, as discussed in Chapter 3. Women in guilds, in workshops or small businesses; women as doctors and midwives; as tavern keepers, nuns, nurses, pedlars, merchants, widows, deserted mothers, prostitutes or independent crafts-persons appear to have been hunted down, tortured and murdered on a massive scale (Anderson and Zinsser 1988; Barstow 1995; Ehrenreich and English 1973; Geis and Bunn 1997; Hester 1992; Larner 1990). Married women and men were also tortured and publicly executed, the slaughter was at times indiscriminate. But the vast majority of the victims appear to have been single or otherwise vulnerable women. By the end of the eighteenth century, when the worst of the outrages were quietly forgotten, the entrenchment of the 'private' world of family, women and children had become the prevailing model (Anderson and Zinsser 1988; Gottlieb 1993; Landes 1988; Stone 1979). Coercion and control of women and children within the family did not remove the existence of violence against them, anymore than did the creation of liberal democracies and human rights end the torture of men. It simply moved the barbarity into silence and obscurity, or shifted it onto the shoulders of poor, working-class or colonised women and slaves (see e.g. Human Rights Watch 1991).

Unlike the torture of men there is no useful ideological reason within the discourse of the Enlightenment for contrasting continuing barbarity against women with the rhetoric of human rights. Women and children are deemed in Enlightenment thinking to be protected within the private sphere of family and home under the guidance and control of their husbands and fathers. The European discourse of femininity is about protection and benevolence, patriarchal rule, while the complementary discourse of masculinity within Western democracies extols the fraternal rights of rational equals within a neutral and objective legal order apparently opposed to traditional torture inflicted by older patriarchies (MacCannell 1991). Carole Pateman has described the displacement of older systems of patriarchal law with the 'fraternal contract' of the late seventeenth and eighteenth centuries. The feudal patriarchal state of king and subjects, fathers and sons, was subverted and replaced by a revolution on the part of the sons against the father/state. The 'social contract' is a contract of brothers and 'human rights' were, at least originally, the balancing of claims and needs among the male elite which formed this brotherhood. The patriarchal rule

of men over women within the family was imported into the modern state with little alteration.

The right to be free from torture is limited to the right to be free from abuse by state officials or persons acting on behalf of the state. The prohibition of the flagrant infliction of mental or physical suffering committed by some men against other men helps to define the parameters within which acceptable state coercion and control may be exercised. However, the actual practice of torture may frequently be ignored or not seen as torture. 'Modern' or 'civilised' torture avoids permanent physical mutilation or evidence of bodily injury and concentrates on mental and emotional coercion leading to psychological collapse and invisible forms of damage. An example is the treatment of individuals detained without trial in Singapore between 1987 and 1989. The Internal Security Department in Singapore was very careful to use interrogation techniques such as sleep deprivation, solitary confinement, questioning non-stop over several days, threats, carefully controlled physical force, cold temperatures and psychological pressure that would not cause permanent or visible damage. This kind of torture concentrates on fatigue, fear and emotional stress (Human Rights Watch 1989). Acts which serve the purposes of control within modern state practice disperse and sterilise pain, replacing it with objective surveillance, as in the modern penitentiary, and prescribe its use as rehabilitation or deterrence rather than retribution or confession leading to redemption (Foucault 1979).

These contrasting forms of torture (the pre-Enlightenment and the modern) are still mainly seen as affecting male victims. Women and children are placed beyond the direct reach of the state within the family or home, or are treated by the state through the imposition of welfare and social security as charitable beneficiaries and dependants. The surveillance and control is also present but through medical or social services rather than through prisons and the police. Social welfare fraud is the principal cause of imprisonment of women in many Australian states and other Western countries. The torture of women and children does not need to be defined or proscribed within international law as it contradicts the prevailing discourse of benevolent paternalism in which the private sphere is seen as a place of protection. Hence the abuse of the human rights of women and children may remain invisible in international law even where it clearly falls inside the parameters of guarantees contained in existing conventions, such as the ICCPR, the Torture Convention, the Women's Convention or the Children's Convention. Torture is expressed in the prevailing masculine discourse of rights by an apparently neutral definition which is generally perceived and interpreted in a way which ignores the pervasiveness of derogations from 'the inherent dignity of the human person' as they apply to women, children and many men. Rights characterised as fundamental or even peremptory norms are expressed in such a way as to exclude most of the abuse that women and children in fact suffer. It is arguable that this is at least partly the result of the structuring of international law as inapplicable to the private realm of marriage, sexual relations and morality where the subordination of women is contained and reproduced.

The absence of women from most discourses of torture and violence in international law may have a more insidious effect. Where women do appear in these discourses it is usually as nameless weeping victims of 'ethnic cleansing', military aggression, domestic violence or rape. The discipline of violence keeps women in fear and the portrayal of women as victims reinforces this impression. The effectiveness of violence lies not only in the immediate injury it causes but in the long-term atmosphere of fear that it creates and perpetuates. This fear can become so endemic to a society's accepted practices that we cease to be conscious of it. Men in particular may become utterly blind to the existence of gender-based fear for which they themselves may be partly responsible. To admit such responsibility is psychologically impossible for most men, indicating that it is not a natural or inevitable aspect of gender relations. The extent of denial indicates that the pain of violence is reciprocal. Women and men incorporate this fear into their daily lives to such an extent that social relationships are defined by it. The purposive effects of violence are then not just negative but positive in that they are themselves social structures endemic to society as a whole. International law treats violence in the forms of war and torture as exceptional, whereas they are in fact structurally consistent components of our legal systems, including human rights and humanitarian law.

The colour of torture

The construction of torture is racially based as well as gendered. The victims of official acts of surveillance, control, discipline and violence within Western societies are frequently non-white. Black men, indigenous men or men of colour are disproportionately represented within prison statistics in Western democracies with large multiracial populations such as Canada, New Zealand and Australia (Havemann 1999: 279–327). Black, Hispanic and indigenous men form an extremely high proportion of prisoners on death row in the United States. In Australia the high number of Aboriginal deaths in custody is a national scandal. This scandal has led to a Royal Commission and considerable publicity, but very little real reform of the underlying racism that is part of the pattern of victimisation of black men (Australia 1991). This victimisation extends beyond the criminal law. It may also play a role in such areas of legal regulation as immigration and refugee law (Lubbers 2001). In Europe non-white residents have restricted rights of citizenship or barriers to naturalisation which leave them vulnerable to racist attacks and killings (Soysal 1994: 24–28; *The Economist* 1997, 1999). Non-white asylum seekers in Canada and Australia have frequently encountered difficulties in obtaining the status of refugees. In some cases this has resulted in their return to countries where the likelihood of arrest, torture and killing is high. Australia regularly incarcerates asylum seekers arriving from Asia and the Middle East while allowing 'illegal migrants' from most European countries to move about freely. The Human Rights Committee under the ICCPR Article 9 has condemned the government for imprisoning asylum seekers (*A v. Australia* 1993; Kirby 2000: 14).

But the racism within torture goes deeper than this. The usual representation of torture, that which is embedded within the legal definitions and judicial interpretations of international conventions, plays directly on white fears of black or non-white violence. The perpetrators (and usually also the victims) are portrayed as Muslim, Latin American, African, Asian or Caribbean. The violence is depicted as truly barbaric involving massive physical harm, death or disappearance. I do not want to suggest that such harms do not occur, or that Western human rights organisations do not perform an invaluable service in drawing attention to these practices. But there remain three major problems and these are problems of silence. First of all, the abuses committed against men and women in Western democracies, especially with regards to their race and class, may be ignored. Secondly, the connection between torture and violence in both Western and non-Western countries to political and economic exploitation mainly emanating from and benefiting Western industrialised democracies is hidden. Finally, the state's reliance on the private sphere where the torture and killing of women and children occurs is not recognised.

> For people, especially women, of colour all the elements of their depiction, definition and status as black, lower class, male or female become inseparable from each other making it impossible for them to escape all the associations which come with these elements.
>
> (Mudaliar 2001)

These silences reinforce the Enlightenment values of the dominant language of human rights, echoing the colonial representation of European Man as saviour and Europe as the bearer of civilisation to the world. The infrastructure of gendered relations in the private sphere supporting the external public agenda of politics, law and economics is hidden and wider spheres of power that depend on violence are not identified as such.

Violence against women

During the last decade of the twentieth century considerably greater attention was paid to these problems within international law. The Declaration on the Elimination of Violence against Women 1993 provides an exceptionally wide definition of violence, including 'gender-based violence', whether occurring in private or public life such as

> battering, sexual abuse of female children…dowry-related violence, marital rape, female genital mutilation or other traditional practices harmful to women, non-spousal violence and violence related to exploitation…sexual harassment and intimidation at work…trafficking in women and forced prostitution.
>
> (Articles 1 and 2)

This Declaration was drafted specifically as a response to the absence of a clear condemnation of violence against women within international human rights and the narrowness of criteria relating to violence in torture and other human rights instruments (United Nations 1992b: 2). Although there is no direct reference to violence against women in the Women's Convention, the Committee on the Elimination of Discrimination Against Women that monitors compliance with this Convention adopted in January 1992 General Recommendation 19 which states that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men' (Fraser and Kazantsis 1992: 28). In addition, one of the outcomes of the Vienna Conference on Human Rights in 1993 was the appointment of a UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy. The Beijing Platform of Action of 1995 also devotes considerable attention to this problem. In 1994 an Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was drafted and is now in force.

Despite this recent interest, and some past activity in the areas of prostitution and trafficking of women (see Convention on Trafficking 1950), most forms of violence against women are still not the subject of binding obligations on states, nor are they given significant attention within the main areas of human rights. Sexual harassment in the workplace or in the outside community, sexual assault in most instances, family violence and general acts of violence both inside and outside the home committed by private individuals, religious or educational institutions, corporations or other non-state actors are generally still ignored. Advances, such as those listed above, have resulted from pressure by women's groups and advocates of children's rights insisting that international law must make fundamental changes in the way in which it deals with violence against both women and children. By placing issues of violence against women within the mainstream of international human rights discourse, feminists have begun the process by which divisions between different categories of rights, between the public and the private spheres, and arguably the duality of mind and body, are gradually being challenged and undermined.

The failure to condemn most forms of violence is a strange and striking gap in international human rights. Part of the explanation lies in the way in which 'human' is characterised within Enlightenment discourse. Where human beings such as women are not seen as capable of full individuation (according to the European white male model) even violence will not be condemned as an abuse of human rights. Women are still trapped by their apparent lack of humanity within this model. It is not just that full subjectivity is denied to women, children, the physically and mentally disabled, non-white men, gay men and lesbians, making it more difficult for most humans to be seen as full-rights bearers. It would also seem that this realm of non-subjectivity must also be enforced, including by physical abuse if necessary. Thus violence against children can be accepted as 'punishment' or 'discipline' and violence against women can be, and frequently is, seen in much the same light. It is deeply disturbing for any belief in the universality of international human rights that they do not at present contain

an unequivocal condemnation of even this most basic invasion of human dignity.

International law deals with violence through two main definitional categories – war and torture. War tends to be defined on an interstate basis, although conflicts can be internal as well as external. The effect on individuals, especially women and children, can easily be lost. Torture defines violence on an individual level within a nation-state as committed by state officials. Obviously the two areas can overlap. Torture can be a 'war crime' or a 'crime against humanity' (1993 ICTY; 1994 ICTR; Geneva Conventions 1949; Rome Statute 1998).

Most commentators agree that certain factors are important contributors to the problem of violence in international relations and international human rights and humanitarian law. In relation to gender-based violence Radhika Coomaraswamy has written:

> A large majority of women writers appear to link violence against women with a lack of economic independence. Levinson studied 90 societies and found wife-beating to be prevalent in 75. The four cultural factors that are strong predicators for wife abuse are sexual economic inequality, a pattern of using violence for conflict resolution, male authority and decision-making in the home, and divorce restrictions for women.
>
> (1995: 21)

She goes on to cite economic dependence as a source of disempowerment for women, preventing them from challenging violence as well as making them more susceptible to it. Restrictions on divorce, forcing women to remain in violent homes; the prevalence of the military as the propagator of violence in society and against women; patterns of socialisation which disempower women; male alcoholism; and the perceived need to control women's sexuality are also cited by Coomaraswamy as important factors (1995: 19).

Violence cannot be treated simply as a symptom of other, more important, underlying factors. Violence begets violence. It is itself a cause not only of more violence but of continuing disempowerment, dependence, fear and inequality. It is both a cause and the result of other causes. Because violence appears to be so pervasive and so deeply entrenched in the structures of most societies it can easily be perceived by both perpetrators and victims alike as somehow 'normal' or inevitable, a 'fact of life'. But violence is no more inevitable than poverty. Severe economic inequality does remain a serious problem, especially for women, on a global basis. The policies of governments and international organisations such as the World Bank and the IMF not only make it more difficult for women to achieve economic independence (let alone economic parity with men) but also seem to rely on women's continuing economic subservience. Violence against women is both a structural cause and a result of this economic domination, and appears to be functional in economic terms. The continuing existence of disparities in income between men and women; barriers to education, including literacy, for women and girls in many countries; the marginalisation of

women's work into the unpaid ghetto of domestic service or low-paid equivalents in the marketplace; and the increasing power of neo-liberal or economic rationalist policies making government cutbacks and regressive tax reform seem an inevitable part of received wisdom suggest that the violence that results from this economic dependence will continue.

> Explaining why gender violence is so endemic is a complex endeavour. …There are innumerable theories ranging from biological and genetic explanations, to those which attribute causation to alcohol and toxic substance abuse, poverty, socialization, and even women themselves. While some of these theories may contain a grain of truth, none of them justify violent behaviour and are better understood as co-factors that can concur in a violent situation. The major point…is to look at violence against women as learned behaviour, which can be changed. Gender violence can be prevented or, at least, substantially reduced if the social and political will exists to make this happen.
>
> (Carrillo 1991: 33)

Violence and human rights

Within war women may be co-opted completely into the militarisation process while continuing to be vulnerable to massive disturbances within and across international boundaries. Women are both increasingly vulnerable to the effects of war and fully represented in efforts to reduce militarism, the use of force and the sale of arms. They are also acting more and more as participants in militarisation, including combat, especially in the West where such participation has been hitherto extremely circumscribed. In addition, 80 per cent of the world's refugees are women and children made so usually directly or indirectly through the instrument of warfare (Turshen 1998; United Nations 1990). It is dangerous to relate women's special role in the peace movement entirely to their vulnerability to war or to their essential femininity surrounding motherhood. Maternal values do not fully explain the role of women in pacifist movements, nor do they co-exist comfortably with many women's apparent desire to serve as soldiers/athletes/citizens in an androgynous parody of modern masculinity. Even in our standards of physical beauty and sexual attractiveness, European women are constantly trying to achieve the slim, taut discipline of male youth. The extolling of maternal values as the antidote to militarism also tends to entrench existing stereotypes regarding women's roles (Ruddick 1989). Nevertheless, women have played a long and honourable role as peace activists, galvanising their communities and countries away from war and violence. For this they have often suffered intense violence themselves.

We need to connect issues of political militarisation (Downing 1992; Kaiser 1990), their economic underpinnings (Kennedy 1988; Orford 1997) and the socio-cultural and psychological implications of such connections (see also Parker *et al.* 1992). We then need to connect these issues to the formation of the

nation-state and international law. Finally we need to see all this in the light of gender, class and race, in particular the formation of masculinity and its contrast to femininity, the construction of citizenship and the spread of militarism throughout our national and international institutions. Simply describing the horrific effects of war, torture and violence on women, men and children, the cost of the arms race (particularly in the Third World) and the consequent loss of development is not sufficient. Until we can recognise the effects of militarism on men and women in our own lives we will be unlikely to redress problems of militarisation and violence more generally.

A serious problem exists in the connection between militarised masculinity, the entrenchment of patriarchy within militarised cultures and human rights. The European model of the nation-state, dependent as it is on this inculcation of the militaristic model, is now the dominant type of governmental formation around the world. Self-determination and nation building have largely adopted the European model of the state as their goal, partly in order for newly emergent states to achieve acceptance within the international community as genuinely equal and credible subjects (Otto 1996a). In addition, the struggle for self-determination has frequently been achieved through armed struggle. The adoption of militaristic values has therefore been inevitably part of this process on both the levels of anti-colonial resistance and the subsequent level of successful transformation to statehood. Human rights exist in a very complicated relationship to this process. The model of human rights that is present within civil and political rights is based on the individual citizen/soldier as the worthy recipient. The myth (and too often the reality) of civil rights is that they must be earned through national struggle against tyranny and oppression. In addition, the citizen/soldier must be constantly on guard to protect against the erosion of these rights by governments that have a natural tendency towards authoritarianism – a belief that is clearly justified. This myth, largely the product of the American and French Revolutionary wars, still has a profound effect on both the respect that we have for these rights and for those who are seen as responsible for winning and earning them. The bearer of human rights is therefore inextricably linked to gender, race, class, sexuality, youth, the inculcation of militaristic values, violence and the state. These links may explain why there is no general prohibition against violence in international human rights law. The worthy protector and bearer of human rights is portrayed within the ideology of human rights as both a martyr and a hero – both in life and in death a passionate and problematic model. This model has been transposed into the juridical field of individual human rights law where the passion may be buried but the problems remain.

Since the Second World War new categories of rights have been developed which undercut the ideal of the militant bearer and protector of human rights. Economic, social and cultural rights are less obviously the prerequisite of the citizen/soldier, extending as they do to those who do not generally fit this model – women, children, the poor and non-Europeans. Nevertheless the struggle for 'social justice', often a catch-phrase for the whole gamut of human rights, is

usually seen as explicitly one of resistance against oppressive power structures. These centres of power may exist as much within corporate or economic structures as in the state, something which traditional human rights thinking has trouble grasping.

As the twenty-first century begins a new administration in the United States seems to be reviving older rhetorical patterns of war and violence to serve American hegemonic interests (Rice 2000). A re-emerging commitment by the United States to increased arms expenditure, including the proposal to develop a National Missile Defense System similar to the discredited 'Star Wars' scheme of the Reagan era, and the apparent American intention to scrap the 1972 Anti-Ballistic Missiles Treaty, is refocusing our attention on a new 'Cold War' dynamic of militarised agendas in the international realm. These agendas seem to rely on a re-entrenchment of masculinist values within the patriarchal nation-state, exemplified by the United States and its 'allies', against the diversity of political and economic interests represented by China and perhaps Russia. What in fact may be occurring is the re-emergence of an even older colonial agenda – the use of hegemonic military power to protect and enhance economic interests. In the Bush administration these economic interests are extolled as 'free trade', as in the April 2001 meeting in Quebec on the establishment of a free trade zone throughout the Americas. The resolution of the US/China 'spy plane' incident in April and May of 2001 appeared to be partly instigated by the need to maintain open markets for American business in China while maintaining American political and military interests in the Pacific region. Gender and race are crucial determinants in the way in which this connection between military and economic hegemony by the world's single remaining 'superpower' will be maintained and enhanced. It is a deeply disturbing trend for any hopeful incorporation of international human rights into international relations.

Catharine MacKinnon argues forcefully that the torture of women is essential to the maintenance of male hegemony (1989). Descriptions of torture of men by other men are also crucial to the maintenance of male power. Here it is the dominant discourse of Western white men, the discourse of rights, law, objectivity and neutrality, that maintains its dominance through a constant analysis, description and rejection of other marginalised masculinities, as well as the submergence of different forms of femininity. All forms of gender within existing social structures seem to be constructed around their differing relationships to power. Not only feminine identities, and identities revolving around sexuality, but also masculine identities are at least partly defined and controlled through this discourse. Black or Third World masculinities; older patriarchal masculinities of 'fundamentalist' religions or pre-modern cultures; feudal masculinities of personal loyalty and bodily sacrifice; the 'wild' masculinities of young working-class or indigenous men; the masculinities of homosexuality are all crucial to the maintenance of the gender hierarchy, which in turn is crucial to the existing international legal order (Parker *et al.* 1992). Representations of torture become an instrument of control, not as we normally see it through the litany of horrors committed by 'other' men on countless anonymous victims, but

as a means of structuring gender, race and class within existing international power structures. This is not to suggest that 'real' torture does not exist. Of course it does. But so does sexual violence and the slavery of women; racist violence and the exploitation of non-white cultures; class-based violence and the discipline of the poor, the landless and the homeless; homophobic violence and the construction of compulsory heterosexuality; colonial violence and the continuing oppression of indigenous peoples; disciplinary violence and the control of children.

On a deeper and much more disturbing level it would seem that human rights theory, law and Western white male discourses of democracy, rationality and objectivity depend on a deep split within the foundations of Enlightenment civilisation itself – the split between mind/body, reason/passion, male/female, white/black, good/evil. Objectification of real human beings and human cultures through dissection and analysis, and the burial of passion or emotion in the literate discourse of rights, allows the language of freedom and human dignity to describe in detail, and co-habit with chilling detachment, manifestations of horror. Torture, whether detailed in the language of human rights itself or relegated to the hidden sphere of patriarchal and colonial control, can exist and even flourish partly as a result of the dispassionate objectivity of this literate gaze. This objective view is that of the author, the soldier, the citizen and the Subject – the bearer of human rights. I would suggest that the civilised masculinities of the West condone at least by silence the commission of countless acts of gross torture on women, children and less powerful men without disturbance while continuing to talk, and especially write, about human rights. The indifference goes much deeper than simple hypocrisy. The very discourse itself allows for this dichotomy to exist and to be perpetuated. What the hero of rationality ignores may be as telling as that which he condemns.

9 Ghosts in the machine

O fellow citizen,
What have they done to us?

(Oodgeroo Noonuccal)

The enforcement of rights

As the new century begins the debate over the relative importance of civil and political rights versus socio-economic rights continues. Social, economic and cultural rights have lost their ideological basis in socialism as a viable political alternative. Instead the focus has shifted to the individual and the primacy of free market economics. But there has also been a change in the approach to civil and political rights. Since 1993 the focus seems to have shifted from state responsibility for human rights abuses to responsibility for international crimes committed by individuals. Again, the horror of a particular event seems to have galvanised world opinion – the slaughter and forced removal of thousands of Bosnian Muslims in Srebrenica (see Honig and Both 1996). This attention on an individual criminal model appears to have gained significant support even among those countries like the United States unwilling to allow their own citizens to be subject to international criminal sanctions for breaches of humanitarian law (Human Rights Watch 2001: 485; Steiner and Alston 2000: 1192–1198). The types of human rights violations covered by international criminal law include war crimes, genocide, crimes against humanity and crimes of aggression. Crimes against humanity can include egregious abuses of such civil and political rights as the right to life, freedom from torture, freedom from slavery, and the right to security of the person (1993 ICTY; 1994 ICTR; Rome Statute 1998). Although international crimes may be committed against 'peoples', as in genocide, the focus is on acts committed by individuals against individual victims. Witnesses must be found to testify before tribunals set up to adjudicate these matters (Charlesworth and Chinkin 2000: 324–329). The Rwandan and Yugoslavian Tribunals have found that systematic brutality can be criminal (*Akeyesu* 1998; *Tadic* 1997) but the role of witnesses is crucial. The International Criminal Court when it comes into force will further extend the range of criminal law as a means of enforcing certain types of human rights abuse. Whether involving international crimes or international human rights more generally, attention is still fixed

firmly on individual rights or individual responsibility for actions committed against individuals even if members of a group (Teitel 1999). The types of rights of major concern are either civil and political rights or egregious breaches of international crimes analogous to civil and political rights.

International crimes do not yet appear to include serious breaches of economic and social rights. There is no logical reason, however, why economic and social rights could not also be incorporated into an individual responsibility model or why responsibility for human rights abuses might not also fall on groups or legal persons, such as corporations, rather than simply individuals. Thus a corporation responsible for massive environmental problems might also be liable for breaches of the right to health. Where the health problems exist on a massive scale such as to endanger a whole population this might be characterised as a crime against humanity or genocide, giving rise to individual responsibility and perhaps also corporate responsibility on the international as well as the national level. International human rights standards are now being linked to business practices and are slowly moving beyond a focus on 'soft law' or guidelines. The UN Global Compact, launched by Kofi Annan on 26 July 2000, is still subject to criticism by NGOs, however, as not containing independent monitoring mechanisms, specific guidelines or real penalties for offending corporations. The prospect of businesses 'bluewashing' their image by securing the UN logo without making real reforms is a major concern (Human Rights Watch 2001: 474).

The paramountcy of political and civil rights in the view of some commentators is not solely because of their negative quality as restraints on governmental intrusion into individual private lives, but because they are seen as genuine rights imposing legal obligations. The logic is essentially tautologous. Because civil and political rights do have remedies for their enforcement they are legally enforceable, and therefore they can be more easily characterised as 'real law'. In international law, where enforcement has been such a problem, this tautology takes on special significance. For example, most conventions protecting civil and political rights provide for interstate and individual complaints mechanisms as optional enforcement structures under their respective regimes (ICCPR Art. 41; First Optional Protocol). The European Court is the best example of this type of compliance. It administers the European Convention focusing exclusively on political and civil rights. States may allow individuals or other states to challenge them legally in an international forum with regards to infractions of civil and political rights, but economic and social rights rarely give rise to such procedures. The enforcement mechanisms are also usually not applicable to groups or collective entities but only to individuals or to states parties to the Convention.

Exceptions to the focus on individual rights are complaints brought under the American Convention where collective or group claims are allowed in relation to the civil and political rights contained in this document. Under the Convention on Racial Discrimination and the 1999 Optional Protocol to the Women's Convention, claims by 'groups of individuals' may also be brought. Both these latter UN Conventions also contain socio-economic and cultural rights. The Committee monitoring the Convention on Racial Discrimination has never yet

heard a group complaint nor one involving socio-economic rights. It is arguable that many individual communications under the First Optional Protocol to the ICCPR effectively involve group or representative claims in many cases (see e.g. *Lovelace v. Canada* 1986). There has been discussion that individual and possibly group complaint procedures need to be added to the ICESCR and the Children's Convention, but many states are reluctant to expand the enforceability of rights under these conventions. The African Charter allows for both state and 'other communications' to be lodged in relation to any or all of the rights listed in the Charter including political, civil, economic, social, cultural and peoples' rights. But the African Commission has heard few complaints and an African Court of Human Rights has yet to be established (1998 Protocol to the African Charter).

Closely related to economic, social and cultural rights are rights to development and to control of natural resources. However, because these are normally seen as collective rights (where they are recognised as rights at all) their relationship to the individual rights under the ICESCR is not usually made explicit. This can be rather confusing. Without economic development and the capacity to control and reap profits from natural resources the provision of economic, social and cultural rights may be extremely difficult. Socio-economic rights are clearly based on models that presuppose economic development towards modern industrialisation. The reference to 'adoption of legislative measures' in Article 2(1) of the ICESCR also seems to indicate that what is envisioned is the creation of social welfare and labour standards through legislation and administrative means on the social democratic model. This model is resolutely Euro-American in origin and focus. The commitment by member states to progressive development of these rights indicates that the drafters of the ICESCR believed that achieving global economic development on the industrial model in the 1960s was desirable, even imminent. The history of the Third World since 1966 indicates that such development may not be achievable by many countries or conducive to social justice where it is.

Even civil and political rights may receive short shrift in the post-Cold-War world. At the beginning of the twenty-first century the prevailing orthodoxy is that private enterprise needs to be protected from state interference, leaving economic arrangements increasingly unregulated and human rights of any kind as irrelevant. This position was evident during the 1997 meeting of the APEC Forum when Prime Minister Howard of Australia declared that discussions of human rights would distract attention away from more important issues and might lead to some states withdrawing their support for the group. This statement was made at a time of unprecedented economic turmoil in the Asia–Pacific region with significant and long-term implications for human rights of all kinds (Tang 1999).

International responsibility for economic well-being

There are many possible perspectives on the global economic order and human rights. One approach might focus on the right of all people to an adequate standard of living including rights to food and freedom from hunger, access to adequate health care, the maintenance of a healthy environment, adequate

housing, education, social assistance, and freedom from civil strife and war. The right to an adequate standard of living is set out, with particular reference to the position of women, in the Universal Declaration of Human Rights Article 24. One advantage of a perspective that focuses on the right of all people to an adequate standard of living is that it requires constant reference to the reality of human experience. Because it focuses on women's traditional roles in the private sphere in providing these basic services it is impossible to avoid the conclusion that international economic and social rights are in fact largely provided by women who receive little if any recognition or reward for their work (Stark 1991). Another advantage of this approach is that there is already a body of international law, particularly within the ICESCR, which can be elaborated, discussed and even implemented.

Although everyone would probably agree that all people need food, water, shelter and the basic necessities of life, there is considerably less agreement about whether any of these needs can be or ought to be translated into legally enforceable rights. Article 2(1) of the ICESCR makes it clear that the rights enumerated in that Covenant do not give rise to juridically enforceable rights in the same way that the ICCPR does under Article 41 and the First Optional Protocol. Inflicting conditions of life on people that lead to starvation, homelessness, chronic ill-health and poverty will lead to physical deterioration, psychological damage, violence and death just as surely as illegal detention, extra-judicial killings and torture. Those responsible for such conditions of life can be determined on the basis of evidence with no greater difficulty than the task of identifying those responsible for the more familiar litany of abuses. At the most basic level deliberately inflicted conditions of starvation or toxic living conditions on a wide scale could probably already be defined as genocide or crimes against humanity. If these conditions are inflicted during times of armed conflict they may also be war crimes (Bassiouni 1999; Schabas 2000).

Economic, social and cultural rights might give rise to three levels of legal responsibility. First, where hunger, environmental toxicity, egregiously bad working conditions, exploitation tantamount to slavery or bondage or other very serious violations of socio-economic rights are deliberately inflicted on people leading to massive death, destruction or injury, then the abuses ought to give rise to criminal as well as state responsibility. Although corporate responsibility is not yet possible under international criminal law, individual responsibility of managing directors and senior executive officers might be. Starvation can be used as a weapon of war or genocide as or more effectively than mere conventional weapons. Deliberately dumping toxic substances may inflict as much damage as the more usual forms of violence. Failure to provide essential medical assistance to alleviate a major epidemic could be described as a crime against humanity. The possibilities of international criminal action in relation to the HIV/AIDS pandemic are discussed further at the end of this chapter.

Secondly, where hunger or malnutrition, poverty, poor working conditions, homelessness, lack of clean water and sanitation, lack of medical facilities or treatment, limitations on educational rights or other abuses of socio-economic

rights are inflicted at such levels as to cause long-term health, emotional or social problems then both states and other parties ought to be responsible in international law. There is no logical reason why civil remedies could not be introduced at the international level. Civil liability in these cases should not be confined to states but should also include corporate or individual abusers where this is appropriate. This would require a significantly new set of legal principles and new tribunals to be established. Or it may mean the expansion of regional or trade bodies better to incorporate international socio-economic rights. The dispute-resolution processes available through the WTO could be expanded to incorporate at least state responsibility for abuses of human rights including social, economic and cultural rights. Individual and corporate responsibility for civil wrongs at the international level may be difficult to establish but may well be a possible means of better enforcing social and economic rights in the future.

Civil liability for abuse of some human rights is already being pursued at the national level (see Human Rights Watch 1999). Major textile and sports equipment companies are facing legal as well as public relations battles where they are alleged to have infringed human rights (Duffield 2000; Human Rights Watch 2001: 470). The oil industry has come under major pressure in the form of consumer boycotts. A few oil-producing countries such as Kazakhstan and Angola are being monitored by international institutions for corruption and human rights abuses (Human Rights Watch 2001: 470–474). Shell Oil and other petrochemical companies were implicated in human rights abuses in the Niger Delta of Nigeria in the 1990s involving indigenous peoples' rights (the Ogoni people), environmental destruction, corruption, abuse of civil rights in the imprisonment and execution of Ken Saro-Wiwa and others, and massive infringement of socio-economic rights. In the case of *Doe v. Unocal* (1997) a California-based oil company was alleged to have condoned forced relocation, slave labour, rape, torture and killings committed during the construction of the Yadana gas pipeline running through southern Burma into Thailand. These abuses were perpetrated by the Burmese military while fulfilling its security role under the Joint Venture Agreement between the oil company, other companies (Totalfina-Elf of France, the Myanmar Oil and Gas Enterprise and the Petroleum Authority of Thailand) and the Burmese government. The US District Court ruled on 31 August 2000 that Unocal had not 'actively participated in or conspired with the Burmese military to commit human rights violations, and…Unocal's joint-venture with the Burmese government did not make it legally liable for human rights violations committed by the Burmese military' (Human Rights Watch 2001: 475). The Court also refused to accept that it had jurisdiction over the foreign corporations involved. At the time of writing the matter is being appealed.

This suit was brought under the Alien Tort Claims Act, a US federal statute going back to 1789 that allows individuals to bring actions against non-citizens for harms committed anywhere in the world so long as jurisdiction can be established over defendants in the United States. The case of *Filartiga v. Pena-Irala* (1980), where both the plaintiff and defendant were Paraguayan nationals, held that torture was contrary to the Act based on a liberal interpretation of the application of international law even though the torture and murder of Dr

Filartiga's son had occurred in Paraguay. The Act was also used by Croatian and Muslim women in *Kadic v. Karadzic* (1995) attempting to establish civil liability for rape and enforced pregnancy by Bosnian Serb forces under the command of Radovan Karadzic. Victims of a Palestinian raid into Israel also attempted to use the Act but did not succeed as the PLO was not acting on behalf of a state and therefore international law could not be applied (*Tél-Oren v. Libyan Arab Republic* 1984; see also Charlesworth and Chinkin 2000: 145; *Forti v. Suarez-Mason* 1987; Steiner and Alston 2000: 1049–1068). Civil actions in the United States may now be brought under the Torture Victim Protection Act (1992; Steiner and Alston 2000: 1069–1078). These domestic actions tend to concentrate on torture, forced removals, slave labour and killing that overlap with socio-economic rights. Although the Torture Victim Protection Act is very specific in focus, the Alien Tort Claims Act is arguably much broader.

At the third level, states should continue to be bound by Article 2 of the ICESCR to achieve progressively the socio-economic rights contained in this Covenant. Individual and group communications should be admissible before the UN Committee monitoring the ICESCR. A 'violations approach' as advocated by Audrey Chapman is long overdue (Chapman 1995). An important aspect of any longer-term project is international assistance and co-operation between states. This principle could be extended to include non-state actors as well. Many corporate entities already engage in social programmes such as health clinics or schools, and these endeavours can have a positive impact on the development of local people in countries where they operate. International co-operation is a more difficult concept and one that has not received as much attention as it should. How states may co-operate in improving socio-economic conditions through financial assistance, development projects, local initiatives, empowerment at the local level, education and negotiation are matters that occur regularly between and among states. A focus on dialogue at the grassroots level and equality of respect between participating states seems to be the key to successful programmes. Financial institutions such as the IMF, the World Bank and the European Bank for Reconstruction and Development are taking on a more active role in encouraging observance of human rights and democratic reforms and are increasingly threatening retaliatory action where regimes refuse to comply, as in the withdrawal of lending to Turkmenistan in April 2000 by the European Bank (Human Rights Watch 2001: 475). That this activity tends to focus on small, weak states rather than on the major powers where economic and political decisions are usually made is not surprising.

The feminisation of poverty in Asia

The Asia–Pacific region has been a dynamic region of economic development since at least 1980. Most countries in the region have recovered dramatically from the fiscal and monetary crises of the late 1990s partly through institutional change and efforts to attract new foreign investment (as in the case of Thailand) and partly through heavy government involvement in economic recovery (as in

South Korea and Malaysia). Structural changes in many countries in the region have included the incorporation of constitutional change and 'bills of rights', a new push towards adherence to international human rights standards, and the establishment of national human rights commissions. Resolution of long-standing problems of ethnic conflict and inappropriate environmental and development policies are also now beginning to receive some belated attention, although serious cultural, environmental and social problems remain or are increasing. Thailand, Indonesia, South Korea, Bangladesh, the Philippines and Taiwan have all attempted to improve their records on human rights and development issues. Serious problems of corruption, rapid development, environmental destruction, inadequate labour protection, ethnic conflict, failure of rights for women and children, and abuse of indigenous peoples' rights remain however (Tang 1999).

The Beijing Women's Conference of 1995 highlighted the intersection of development and human rights issues for women in the region. Despite political problems with holding the Conference in China it was relatively successful in providing a forum for the discussion of both development and human rights issues at the governmental level and in the parallel NGO forum (Otto 1996). In particular poverty, violence, socio-economic rights and civil and political rights were seen as inextricably intertwined, with development and poverty issues as the most important for most women. Prior to the main Conference there were a number of preparatory conferences and meetings held to collect information and documents from the five different regions of the world and to prepare a draft platform. One of these meetings was held in Jakarta in June 1994, the Second Asian and Pacific Ministerial Conference on Development. At this meeting a *Declaration and Plan of Action for the Advancement of Women in Asia and the Pacific* was adopted (1994), which document was later adopted by the main Conference in drafting the final *Platform for Action* (1995). In the Jakarta Declaration issues of particular concern to women in Asia and the Pacific were highlighted. In the 'Global and Regional Overview' the effect of poverty, structural adjustment and economic underdevelopment was cited as of particular concern for women in the region.

Structural adjustment programmes have hit women hard in Asia and the Pacific. This is especially true for young women, women workers and women in poor families (Jakarta Declaration 1994: para. 1). 'While such policies offer the potential for long-term growth by expanding employment opportunities they have resulted in short-term declines in income and growing unemployment' (para. 3). The feminisation of poverty is a global phenomenon and is a particularly acute problem in the Asia–Pacific region. Any expansion in employment has tended to occur for women in non-regular forms of employment such as the informal sector in home-based and part-time work with few benefits, little protection from exploitation and poor working conditions (para. 4). This has been accompanied by a fall in the level of social services offered by many governments in the region, especially those governments (such as China) moving away from a command-based economy to a free market. This fall has hit women

the hardest as the increased burden of providing such services, including basic necessities of life, health care, education, care of the elderly and childcare mainly falls on women's shoulders (para. 8). The problem was severely exacerbated by the dramatic fall in living standards that occurred after the collapse of economic structures in Indonesia, South Korea, Malaysia, Thailand and other countries in the region between 1997 and 1999. Despite some impressive recoveries the impact on women is still high.

The growing feminisation of poverty is of particular concern in South Asia. The women of India, Pakistan, Afghanistan, Bangladesh and Nepal have the poorest rates of employment, education (including literacy), pay and economic power of all other groups in the region. Only Sri Lanka, despite years of civil war, compares relatively favourably in these sectors, although this data may not include the majority of Tamil women who remain politically invisible (Mudaliar 2001). Indigenous women, members of ethnic minorities, the elderly and girls from rural areas moving into the cities through a process of rapid urbanisation are particularly vulnerable to poverty, exploitation and violence. The Jakarta Declaration states that the numbers of women living in poverty are growing faster than are those of men (para. 16).

> The majority of women in the region reside in rural areas and urban slums, and the majority of women workers are engaged in subsistence agriculture and the informal sector with little or no regulation, legislation protection, and trade union support.
>
> (para. 18)

The 'Asian miracle' has left the women of Asia behind to the extent that poverty can be analysed on gender lines.

Part of the process of resolving these problems lies in challenging our existing definitions of 'work' and 'economic activity' (para. 24). This has been a matter of considerable debate among feminists for some time (Lewenhak 1992; Waring 1996) and has now finally been accepted as part of the international economic agenda (para. 14). The relative inequality of women's participation in the workforce is borne out by statistics gathered by the Asian Development Bank in its 1993 study. Employment rates vary widely from country to country.

> Women's world of work is starkly different from that of men. To start with, women's labour force participation rates are much lower. In PRC [China], Mongolia, Thailand and Viet Nam, women's participation exceeds 60 per cent of the female population aged 15 years and over and is near or above 40 per cent in the NIEs [Newly Industrialising Economies] and elsewhere in Southeast Asia and in Sri Lanka. In Bangladesh, Maldives, and Pakistan, on the other hand, women's participation rate is 20 per cent or lower. In contrast, well over 70 per cent of men aged 15 years and over are in the labour force in most [Developing Member Countries].
>
> (Asian Development Bank 1993: 90; see Tables 24–26 and Figures 55–57)

There are no figures on relative income levels but comparisons between female and male participation in unpaid family work from 1970 to 1990 indicate a major discrepancy in unpaid versus paid work in most Asian nations, in particular South Korea, Taiwan, Indonesia, Thailand, Burma, Afghanistan, the Philippines, Pakistan and Papua New Guinea. The only countries which recorded a significantly higher rate for men in unpaid family work are Western Samoa, Tonga and Fiji, indicating that there may be profound cultural differences within the region over who works where and what kind of work is done (Asian Development Bank 1993: Table 27). More recent statistics seem to indicate that not much has changed (United Nations Development Program 1995; 1997; 2000).

The sex trade: Nepal and India

Violence against women seems to be directly related to the level of militarisation and militarised masculinity accepted within a society. Not only structural adjustment programmes and governmental retrenchment policies, but also the enormous economic significance of the arms trade and related industries, can create intolerable living conditions for women. This was not adequately debated at the Beijing Conference (Otto 1996: 23–25). Where violent solutions are marketed as viable, and alternatives are neglected because they might reduce that profitability, then peaceful means of dispute resolution will be ignored or even ridiculed as impossible. The media and the economic importance of selling violence as a product to media consumers, especially young boys, have also a significant role to play. A direct correlation between the arms trade, vested interests in the use and entertainment value of violence and the widespread incidence of violence generally can probably not be proven, although there is considerable evidence that all these factors play important roles. It is not enough simply to castigate the arms industries, military establishments or the media on moral or ethical grounds. Without confronting the economic determinants of this trade it will continue. And as long as it continues violence generally, including violence against women, will be seen as acceptable against a wider background of destructive behaviour.

An example of the connection between violence and economic conditions leading to the abuse and exploitation of women is the traffic in young women and girls across international boundaries to service brothels and the sex tourist trade in many major centres around the world, especially in Asia. The sex trade is itself a major economic activity in much of Southeast Asia. Thailand and the Philippines are notorious examples where such trade is prevalent, but the sex industry is not confined to these countries. A 1995 Report of Human Rights Watch indicates that the trade is both widespread and deeply entrenched elsewhere in Asia.

The Report estimated that up to one-half of Bombay's brothel population of an estimated 100,000 prostitutes were from Nepal:

> Trafficking victims in India are subjected to conditions tantamount to slavery and to serious physical abuse. Held in debt bondage for years at a time, they are raped and subjected to other forms of torture, to severe beatings, exposure to AIDS, and arbitrary imprisonment. Many are young women from remote hill villages and poor border communities of Nepal who are lured from their villages by local recruiters, relatives, or neighbours promising jobs or marriage, and sold for amounts as small as Nepali Rs. 200 [US $4.00] to brokers who deliver them to brothel owners in India. …Escape is virtually impossible. Owners use threats and severe beatings to keep inmates in line. In addition, women fear capture by other brothel agents and arrest by the police if they are found on the streets; some of these police are the brothel owners' best clients.
>
> (Human Rights Watch 1995: 1)

The extreme poverty of much of Nepal's population was cited in the Report as a prime reason for the trade. The main source of the flesh trade is still among Tamang peasants where the sale of women and girls 'has become an almost traditional source of income' (1995: 15).

> Tamang peasants are among Nepal's most impoverished minority groups. … No longer able to survive on subsistence farming [because of massive evictions], and with virtually no access to education or other means of turning into a cash based economy, the Tamang were forced to migrate in search of other means of support. They found it in low-paying seasonal work as porters or manual labourers in the lowlands, or on road construction sites in India. …But these communities soon found there was another, more lucrative way to earn money. 'A commodity…has been created that sells, and sell[s] very well at that, in the labour market of the sex industry; the body and sexual labour of the Tamang women.'
>
> (Human Rights Watch 1995: 10, quoting Jyoti Sanghera)

The Report claimed that Indian and Nepali police and government officials have been intimately implicated in the trade both as consumers and in taking bribes or unofficially condoning the traffic. Corruption charges and complicity have not been investigated. Economic factors such as bribery, corruption and graft remain obvious incentives, as well as the acceptance of prostitution and sexual slavery as 'normal' even though there are numerous laws in effect in both India and Nepal condemning the trade.

Since this Report was published governmental agencies in India and Nepal have co-operated in trying to reduce the trade. Women, particularly former Nepali prostitutes, have begun patrolling the border crossings to identify and deter young women who may be at risk. Their efforts do appear to be having some impact. In addition, the importance of this activity as a source of income for the women and their families should not be overlooked. Many girls return home after a number of years with money that can then be used as a dowry.

Among Tamang people there does not appear to be the heavy social stigma attached to former prostitutes that may exist in other cultures.

The sex trade industry can often be directly linked to military-based economies. Thanh-Dam Truong's major work on the sex trade in Southeast Asia, especially Thailand, links it originally to the economic benefits accruing to Thai businesses and the Thai government through the use of Bangkok as a 'Rest and Recreation' base for US military personnel during the Vietnam War (Truong 1990: 158–172). The same phenomenon can be traced to former US military bases in the Philippines and existing bases in Okinawa and South Korea, as well as around Asian military establishments throughout the region. Heavy concentrations of military personnel and militarised economies seem to be directly correlated to the amount of prostitution, pornography, sex trade, sexual assault and abuse of women generally within a particular country. Police and military personnel are prime perpetrators of violence against women, both in the home and elsewhere. The reasons are at least partly economic as poor or working-class boys and men are recruited into military or police employment. They are then themselves economically and psychologically exploited by those in positions of power. Already existing cultures of violence against women are exacerbated by immersion into a climate of acceptable, controlled, deliberately instilled violence. It is important to remember that it is not only the economic exploitation of women that contributes to violence against them, but also the powerlessness and vulnerability of men in many cultures.

The right to live

Economic and social rights, such as the right to food, to be free from hunger, to health or to have an adequate standard of living are at the most fundamental level rights to *live* – the right to exist in a culturally and personally sustaining environment. The right to *life* is a specific and separate civil and political right (Universal Declaration, Art. 3; see also the ICCPR, Art. 6 and the African Charter, Art. 4; American Convention, Art. 4; European Convention, Art. 2). However, this right is not seen as guaranteeing a right to life in a broad sense. Instead it is limited to circumstances of protection from publicly sanctioned imprisonment and violence resulting in death occurring in the public sphere. The Universal Declaration says simply that '[e]veryone has the right to life, liberty and security of person' (Art. 3). Article 6 of the ICCPR is more detailed. Similar wording appears in all three major regional human rights treaties. The right to life is drafted so as to provide limited protection of individual lives while under the control of police, prisons or other government bodies similar to the right to be free from torture. It is a right contained within the model of the social contract and most clearly attached to the concept of citizenship discussed in Chapter 4. A fuller guaranteed right to live does not appear to be envisioned by these documents (see Ramcharan 1985). It is perhaps the most important civil and political right but, like the right to be free from torture, it is too narrow to capture the reality of violence and threats to

life affecting the majority of people, especially women and children (Charlesworth and Chinkin 2000: 233–236).

The right to live is not clearly expressed in any human rights document. Such a more general right must be extrapolated from existing rights. The most important of these is the right to an adequate standard of living defined in the ICESCR Article 11. Other rights that are relevant to a right to live might include the right to development (UN Declaration 1986), the right to a reasonable and sustainable environment, and the right to education. This last right is especially important for women. The need for equitable redistribution of resources is another essential component in guaranteeing the right to live for all peoples. Thus principles set out in the Charter of Economic Rights and Duties of States are also relevant, although this document has become almost completely irrelevant in today's global marketplace (UN Charter 1975; see also Bedjaoui 1979). All these rights, however, may be ineffective without taking into account the specific cultural context in which they must operate. The right to education, for example, cannot simply assume that literacy in a dominant language will adequately fulfil the right to live of indigenous peoples, as discussed in Chapters 5 and 6. A right to development can itself be problematic if industrialisation and the building of economic systems on a First World model are simply assumed. The right to a sustainable environment can actively work against the right to live of indigenous and rural peoples if the protection of wildlife and wilderness areas is given precedence over human needs.

Rights which do not tend to be enumerated in existing human rights instruments but which must also be part of a broader definition of a right to live include the right of access to clean and adequate water supplies. It is estimated at the beginning of the twenty-first century that nearly one-half of the world's population does not have access to safe drinking water, and this picture appears to be worsening. Unlike a right to food a right to water is nowhere guaranteed in any human rights instrument. There is similarly a need, but no clearly expressed human right, to have access to cheap and sustainable supplies of energy. In addition there ought to be rights of access to the basic resources necessary for growing and distributing food, thereby guaranteeing conditions for survival. The ICESCR Article 11(2)(a) talks about 'technical and scientific knowledge' as part of a reform of 'agrarian systems' necessary to meet the problem of hunger and the need to create more efficient agricultural practices. But this is not the same as ensuring the basic needs of farmers to implements, equipment, water, good soil, seed and fertiliser in order to grow food. A further right which is extremely important for women but which rarely receives much attention within the context of basic living conditions is the right to reproductive control in order to space and limit the number of children as contained in the Women's Convention, Article 16(1)(e). This right is not contained in any other convention and is confined to married women only. Single mothers of children have no such rights guaranteed in international law. Finally, the right to be free from war and civil unrest is crucial for long-term survival.

The right to land also needs to be better understood and protected in international human rights. At the moment there are no formal guarantees over rights to land. An individual right to property, which appears in some human rights instruments (Universal Declaration, Art. 17 and African Charter, Art. 14; American Convention, Art. 21; European Convention, Protocol 1), may in fact work against guarantees to land ownership for women, indigenous peoples or the rural poor by entrenching existing property rights in the hands of powerful individuals and corporate entities. Territory is one of the basic components of statehood. Disputes over territory and boundaries are a major cause of wars and violence world-wide as we have seen in Eritrea and Ethiopia. Land is also the crucial ingredient for long-term sustainable economic survival for most people. One of the most disturbing trends in the second half of the twentieth century was the acceleration of land expropriation, consolidation of land resources in the hands of the wealthy few (including multinational corporations and 'agri-businesses') and the removal of millions of people from their land world-wide. Women are particularly vulnerable as legal systems frequently provide little or no protection for women, sometimes denying them rights to land altogether (Butegwa 1994; Ilumoka 1994). Indigenous peoples have suffered massive problems from loss of land and traditional territory stripping them of their resource base and way of life. Land rights, native or Aboriginal title to land and rights associated with traditional ownership of land are at the core of the right of self-determination for most indigenous peoples (see *Delgamuukw* 1997; *Mabo* 1992; *Van der Peet* 1996; *Wik* 1996). Land is power even in a world that appears to have moved beyond a feudal infrastructure based on control and use of land. The right to live must have as one of its central planks the right to own and keep land on the part of those most economically and politically disadvantaged.

The right to live and self-determination: Somalia

The right to live is perhaps most crucially connected to the right of self-determination. Political cohesion sufficient to exercise a right of self-determination is generally defined in terms of language, religion, race or ethnic origin. But a 'Self' cannot consist only of territory, boundaries and political institutions. A 'Self', to be defined in terms that recognise the needs of all human beings, must begin with a basic right of existence, the right of people to live beyond the bare minimum of survival. In this sense a country such as Somalia, not Yugoslavia, is the real test of what a 'Self' might be under international law.

In Somalia no major differences of language, religion or ethnic origin exist to create diverging groups competing for rights of self-determination as there are, for example, in most of the countries of Central and southern Africa. The historical progression of Somalia from colony to trust territory and finally to independence was not radically different from other countries in the former colonial world, particularly in Africa. Yet a combination of colonial neglect, First World exploitation, massive arms sales, autocratic local rule, the collapse of

democratic institutions, and worsening economic conditions, compounded by environmental degradation and drought, drove Somalia to the point in 1991 when it ceased to be a viable unit under international law. Although it continues to exist as a nation-state in international law this legal identity has become little more than a shell. Somalia's substantive status suffered a devastating blow in the early 1990s from which it has never fully recovered (Adam 1999). The northern part of the country has splintered off to create a collection of small independent fiefdoms for which there is no clear international legal recognition. The rest of the country remains mired in the politics of gang-warfare and hunger. This process is not confined to Somalia. Its neighbour to the south, Sudan, is also experiencing a slow and agonising death from civil war and starvation (Ali and Matthews 1999) while Ethiopia and Eritrea are just emerging from the grip of war, drought and famine.

The disintegration of Somalia should force us to rethink our international legal priorities in terms of basic human needs. Political and civil rights cannot exist without basic guarantees of survival. Where political, economic and social institutions based on the requirements of militaristic patriarchal elites are allowed to spiral out of control, the first sufferers will be women and children. The needs and rights of these members of the group must be addressed first, not last, in redefining what is meant by self-determination. Food, shelter, clean water, a healthy environment, peace and a stable existence must be the first priorities in how we define or 'determine' the 'Self' of both individuals and groups instead of the present definitions based on masculinist goals of political and economic aggrandisement and aggressive territoriality. In international law, however, the right to self-determination focuses on political rather than on economic rights or basic survival needs. This is reflected in the priority given to aspects of self-determination contained in the definition in Common Article 1 of both the International Covenants as discussed in Chapter 7. Only in the last substantive sentence is it stated that 'in no case may a people be deprived of its own means of subsistence'. The primary peoples' right under Article 20(1) of the African Charter also declares that '[a]ll peoples shall have the right to existence'. However, this right has been primarily directed at the decolonisation of African peoples subjected to European colonial rule or apartheid. It is first and foremost a political right of self-determination in the narrow sense. Once self-determination is achieved international law focuses on the nation-state through its government rather than on the peoples who comprise the state, allowing individuals to claim only those political, civil, economic and social rights recognised by the state as protected by international law.

In mid-December 1991 the United States, acting as an agent of the UN, took the unprecedented action of ordering troops into Somalia for the purpose of ensuring that relief food supplies reached the people. Other states followed. This action was taken without the consent of the Somali people or that of the rival warlords who in a precarious sense controlled parts of the country. Since the defeat and flight in January 1991 of Siad Barre, Somalia had been without a

government of any kind. This desperate situation, exacerbated by years of war and drought, led to famine and the apparent collapse of any kind of ordered society. The UN effort was more successful than is generally acknowledged in saving thousands of lives in immediate danger of starvation. But the foreign troops and UN administrators were unable to resolve the deep lawlessness which had taken over most of the country despite the best efforts of mediators, local village elders and aid workers. The fact that the country was, and is still, awash with arms largely imported into Somalia from the United States and European nations made the reintroduction of social order virtually impossible for a military force whose purpose was ostensibly 'peacekeeping'. The absence of immediate success, and the capture and murder of American and Bangladeshi soldiers (Bowden 1999) led to the view in the United States that the mission had been a failure and American troops were soon withdrawn. The Somali exercise is still perceived by the UN as a whole as a major embarrassment. A Somali government has since been formed, first in exile in Djibouti, and then in Mogadishu itself. But the level of violence is still extremely high. Ten years after the immediate emergency the situation there remains chaotic, many people are still going hungry and the prospects for a restoration of peace and order are as far away as ever.

In earlier chapters the issue of female genital surgeries for women and girls in Ethiopia, Kenya and Sudan was raised. It is an extremely difficult problem of culture, human rights and gender. The vast majority of the women of Somalia have been circumcised, but this part of their lives may be much less significant as they face starvation, endemic malnutrition, dislocation and continuing violence. Where social structures have broken down as completely as they have done in much of the Horn of Africa, the focus is on acute issues of survival. The creation of small clan holdings in northern Somalia was at least partly the result of traditional Somali elders taking political control out of the hands of competing warlords. For these elders female genital surgeries remain an uncontrovertibly important part of cultural life and gender roles. Women who wish to conform to the relative peace of a return to traditional life and escape from the chaos of militarism and development gone wrong accept that genital surgeries for themselves and their daughters cease to be a matter of personal choice. It is possible, however, for women to begin a process of negotiation within their communities and families to end or limit the practice. This might be done with outside assistance. But this assistance must be requested and practically useful, given the realities of life for women in these countries. This process of negotiation cannot occur when more fundamental problems of existence remain fragile. Hunger, violence, gender and culture give rise to bleakly intractable problems for any human rights analysis in northeastern Africa. For the women of Somalia, Ethiopia, Eritrea and Sudan self-determination, work, stable family life, a reduction in violence and an increase in appropriate forms of education are crucial. These rights may, however, take forms or priorities unacceptable to human rights or feminist analysts unfamiliar with the requirements of a right to live in the Horn of Africa.

Food and freedom

> On one trip…we went ostensibly to hunt for the 'fat goanna'. …With crowbars for digging sticks, billy cans for coolamons, matches for firesticks, a blanket to sit on (no need to prepare a cleared area and make a 'cloth' of crumbled ant-hill), we were the modern well-equipped hunting party. However as soon as we were in the country, the influence of settlement life melted. Pairs of women fanned out in different directions, their calls echoing back and forth across the creek where…I wandered in search of bush tobacco which grew in such areas. We dug for frogs buried deep in damp sand in the bank of the dry creek, pulled up the crunchy little bush onions, found a shady spot, lit a fire and waited for the others to return. In the quiet of the afternoon we watched the shimmering haze over the hills beyond the creek and the women began reminiscing about when they walked through this country as girls, when they had first seen white men. …Finally the other women drifted back, we ate our fill and shared the remaining food: I was given the tail of a goanna (a sweet white meat), and my favourite part of the animal. At sundown, we loaded into the vehicle and returned to [the settlement].
>
> (Bell 1983: 54)

The women in this passage are from Warrabri in Central Australia and are of the Kaytej people. A 'goanna' is a large monitor lizard; a 'billy can' is a metal bucket used for making tea over a campfire; and a 'coolamon' is a wooden basin or dish made or used by Australian Aboriginal people. Unlike a traditional anthropological perspective on hunting and gathering societies, often caricatured in the popular media, hunting and gathering are not activities necessarily segregated on gender lines. Both women and men hunt, gather fruits, berries, nuts and small insects and care for the land.

Women in places such as Warrabri who still keep to much of their traditional lifestyle are responsible for up to 80 per cent of their community's diet. Women distribute both what they gather and what men find. The meat which men provide forms a relatively small percentage of the diet and is always supplemented by the women's contribution. Aboriginal women now not only hunt and gather but also buy food in the local shop or supermarket. Their job is still to distribute this food to their families in accordance with kinship obligations. However, camps are now located around the settlement store rather than close to hunting grounds and places where food can be found, places that used to be largely selected by women. White men and, to a lesser extent, Aboriginal males now determine campsites. Previously women would hunt to feed themselves and those with whom they were camped. Women ate first rather than last and if the hunting party was returning to the *jilimi* or women's camp the men would not share at all, although children would. Now this opportunity is reduced as food is purchased from the settlement store and there is no longer the segregation necessary to protect the women's right to eat first. As white culture has penetrated this community it appears that Aboriginal women's positions have been reduced through the restriction of the group's freedom and the imposition of white male values (Pettman 1992; *Warlpiri* 1995).

The major direction of efforts by Aboriginal women and men in Australia (as well as in North and South America, New Zealand and elsewhere) is towards land rights and some form of self-determination. The problems of nutrition, health and social dislocation are seen as fundamentally connected to the takeover of land by white European settlers. Aboriginal women rely on the land not only as a source of food and water but also as an integral aspect of their culture and religion. Without connection to the land Aboriginal people are separated from the main source of meaning in their lives. In Australia, as well as in other former colonies, the land is being damaged through environmental degradation such as soil salinisation, erosion, water pollution, the introduction of exotic species, the destruction of native plants and animals and the use of chemical fertilisers as a consequence of European intrusion. In Australia, Aboriginal people directly identify both environmental problems and social problems within their own communities with the removal of the land from their guardianship. Women's roles as food providers are intimately connected to their responsibilities within kinship structures, ritual obligations, land guardianship and political efforts towards self-government and self-determination.

Aboriginal women and indigenous women in countries besides Australia often strenuously reject the options and issues highlighted by white Western feminists as irrelevant to their own problems (Huggins 1991; Moreton-Robinson 2000). Even more strenuously indigenous women can see white feminist solutions as expressions of colonialism. Many indigenous women declare categorically that there is no sexual discrimination in traditional Aboriginal societies, that the discrimination that exists is directly a result of white Western colonialism (Behrendt 1993; Bell 1983; Bourke 1997; Huggins 1991; Moreton-Robinson 2000). Social issues relating to food, health, housing and violence are directly related to this same history. Self-determination, self-government or some level of autonomy are seen as the principal means by which the devaluation of women can be reversed and the recovery of their roles as life-givers, elders and providers of food and shelter for their families can be fully achieved. Although indigenous women around the world live in a wide variety of circumstances and have differing relations to the land and kinship structures, the example of Central Australian Aboriginal women bears considerable similarities to other women who are still trying to maintain a traditional or indigenous lifestyle. Women's positions within these societies, frequently of an equal or superior position to that of men, have often been degraded through contact with European cultures under colonialism (Bell 1983; Moreton-Robinson 2000). Food production, distribution and consumption are key areas of 'women's business' in which the search for self-determination is most vividly illustrated (Chinkin and Wright 1993).

The lives of indigenous women are not all the same and colonialism, or the neo-colonialism of global economic structures, has differing effects on women around the world. For example, women living in southern Africa have significant problems that differ from indigenous and non-indigenous women in developed countries (Ilumoka 1994; Momsen and Kinnaird 1993). Their husbands frequently work for wages on large, white-owned cash-crop enterprises. They are

rarely at home so most of the women in local villages are at the centre of all economic and family life. Their days begin before dawn and continue until well after sundown. In addition to childcare, food preparation and subsistence farming, where up to 80 per cent of the food for their families is grown, African women also raise other commodities as cash crops. Women do almost all the work of subsistence farming and domestic chores in southern Africa. Their lives consist of constant overwork, which is not deemed to be 'productive' by existing economic standards (Waring 1996). Although their role is important within their own communities it is under constant threat through the introduction of Western development models and the shift from subsistence farming to cash-crop agriculture (1995 Beijing Declaration). Women are disadvantaged as development capital and technology go to men rather than to women (United Nations Development Program 1995). Their tenuous ownership of small plots of land is under threat from rural land redevelopment projects (Butegwa 1994). In addition, women frequently cannot use the new seeds and modern agricultural techniques because they cannot read, do not know how to borrow money and will not be accepted as appropriate persons to obtain credit or to own farmland (United Nations Development Program 1997). The women of southern Africa have a slim hold on subsistence as they are under constant threat from drought, war and disease (Turshen and Twagiramariya 1998). The drought of 1992 made many women in Zimbabwe vulnerable to becoming 'economic refugees' as in other parts of Africa. The fact that this particular tragedy was averted was through the successful implementation of food aid and agricultural assistance through the World Food Council and the FAO of the UN. It is an example of the success of some UN initiatives in emergency aid and longer-term food assistance. Flooding in Mozambique and Madagascar, political instability in Zimbabwe and high levels of violence in South Africa continue to make women's lives difficult. Finally, HIV/AIDS is devastating almost every country in Sub-Saharan Africa (Gray 2000; McGeary 2001; Morrison 2001).

Another problem is the fear of expropriation of land. For indigenous women in Australia, Canada, New Zealand and the United States land expropriation is an already accomplished reality and the reclamation of land through land claims or recognition of 'native' or 'Aboriginal' title is a major political preoccupation. For the women of southern Africa lack of access to land is also a major issue and land that women still hold is constantly under threat. Rural workers forced from their traditional lands are pushed into exploitative employment conditions by cash-crop growers or other industries, or they migrate to already congested urban centres in search of work, food and shelter. In addition, legal barriers to the ownership of land by women still exist in some countries. Although mutual support among village women provides informal networks of help it is generally not enough to manage the outside pressures within African societies. This is a problem endemic to Africa, Asia and Latin America. Until the problem of access to land is resolved, especially for women, hunger and malnutrition will continue.

Via Campesina, an international NGO of farm workers, peasant and indigenous peoples' organisations, has stated:

> We demand genuine agrarian reform which gives landless and farming people – especially women – ownership and control of the land they work and returns territories to Indigenous peoples. The right to land must be free of discrimination on the basis of gender, religion, race, social class or ideology; land belongs to those who work it.
>
> (1996)

Women in southern Africa, like the women of Central Australia, are aware of their vulnerability and have taken steps to identify some of the causes of their oppression and to end it. Land redistribution has become a major issue in Zimbabwe such that a large percentage of farmland, now held by a small minority of European settlers, is being redistributed (Van Horn 1994). Whether women will benefit from this remains to be seen. The enforced distribution that made headlines in Western newspapers in early 2000 focused on the political benefits of land distribution to allies of President Mugabe and the use of violent land takeovers as part of an anti-democratic campaign of intimidation. Women appear to be significantly absent from this process.

In relation to the advancement of capital resources other than land, a very hopeful sign has been the development of 'micro-credit' banks in many parts of the world. The most famous of these is the Grameen Bank begun by Mohammad Yunus in Bangladesh (Bornstein 1996; Hotz 1997). The purpose of the Grameen Bank is to make small loans on reasonable terms of credit available to poor rural and urban people. This Bank has since expanded well beyond Bangladesh, including to Africa, and has inspired a number of successful imitators. The Bank specifically targets women as the best recipients of small loans such that 95 per cent of all loans are in fact made to women. It appears that women, unlike men, are more responsible in how they use the money and are better at making repayments. Their small increase in prosperity is directly shared with their children, families and community. Repayment schedules are almost always met and interest rates are set at reasonable commercial levels. The result has been a transformation in millions of women's lives and the lives of their families and communities. For many this means the difference between food security and a level of living standards above that of mere subsistence, including adequate health care and education for children, especially girls. It also means escape from debt-bondage to private moneylenders often resulting in virtual slavery. In the absence of other sources of credit this is the only way in which women in Africa, Asia and other parts of the world can obtain even the smallest amount of capital sufficient to maintain a farm or start up a small business.

Land, food, water, education, health care and adequate living standards are the most fundamental criteria for guaranteeing human rights for the majority of the world's people. Freedom in a political sense cannot be separated from economic and social rights (Sen 1999). The role of women is crucial. A political right to self-determination is a very complex right in its effect on the lives of women. For women in Somalia or Sudan self-determination might mean clinging to traditional community roles in the face of overwhelming economic

and social disaster. In Zimbabwe land redistribution is a significant problem closely associated with self-determination at the community and national level. Overseas aid in implementing effective land management must include the rights of women, but there is little indication that this is going to be the case. For indigenous women in Australia on the other hand self-determination is seen as the key to resolving serious problems, including problems of health and nutrition. Internal communal problems may make self-determination in a wider sense problematic. Family-based violence and sexual assault are serious problems in Australian Aboriginal society, as well as among indigenous communities elsewhere. As has been noted, '[m]ore Aboriginal women have died in domestic violence in Queensland and the Northern Territory…than all Aboriginal deaths in custody' during the 1980s and early 1990s (Pettman 1992). Even where communal and family violence is extremely high, indigenous women have a strong sense of solidarity within their communities and with other women and men of their village, clan groups or in the country as a whole. Indigenous women's networks are being developed internationally with human rights to self-determination, socio-economic rights, peace and development as key points of discussion. But this network is usually not recognised as a source for a radically new vision of 'self-determination' in international law.

'Shame has fallen on the earth'

Women in many parts of the world have done and are continuing to do much to redress economic and human rights issues. But local efforts to resolve issues of basic subsistence cannot succeed where national and international militarism, misguided economic policies and First World interference have become entrenched within regional structures. Women may attempt to ameliorate their circumstances to some extent by mutual co-operation and innovative efforts to reform economic and social structures, but these local efforts are fragile and intensely vulnerable to larger fields of power. This is not to say that resistance on a small scale is not necessary, but that it is simply not enough. Whether the local efforts are initiated by the people themselves or whether overseas aid agencies are involved, they cannot function without major structural support. The breakdown of local efforts to achieve a kind of 'self-determination' for women in the face of large-scale power imbalances is a constant danger. Somalia is a classic example of a resilient people, with considerable assistance from NGOs, unable to cope with a massive structural breakdown that was directly linked to international political and economic agendas. A major realignment of priorities within international structures and institutions is necessary or else we will continue to see more 'Somalias'.

Somalia, despite the attention it received in the Western media, is not unique. Rival governmental and insurgent factions in southern Sudan use denial of food aid as a weapon, and large numbers of Sudanese people are slowly starving to death due to war, drought and lack of access to food supplies. Rwanda, Sierra Leone and the former Zaire have presented heartbreakingly familiar images of violence, disease and dislocation. It is arguable that the problems facing Africa

and other countries in the Third World are directly connected to the traditional view of self-determination as a political and economic right based on the model of patriarchal statehood imported from the First World. The decolonisation process has not improved the lives of most Africans nor of others in the developing world arguably because the concept of self-determination that was adopted is geared towards servicing First and Third World male elites and their own goals of political, military and economic ascendancy. Third World countries, while given apparent political self-determination, are increasingly caught in the neo-colonialism of global capitalism and militarisation. This has led directly to situations such as in Somalia and to the likelihood of this situation being repeated in other countries.

The tragedy of Somalia is not gender neutral in its causes or in its effects. The large majority of victims are women, children and the elderly. The warring gangs consist of young men and boys armed with military hardware sold to Somalia by arms merchants around the world to meet the military needs, first of Siad Barre and his elite group of advisers, and now warlords uncontrolled by any central authority. The male priorities of military aggression, territorial expansion and authoritarian control have been played out in Somalia on a level of anarchy and chaos, but these priorities are not fundamentally different from those which shaped the country and which are repeated elsewhere. Somalia has never been isolated from the competition between First and Third World patriarchal systems, a competition heavily weighted in favour of the developed world. The primary sufferers in this competition are women and children. If we focus our attention outside the traditional tools of self-determination, i.e. the political rhetoric controlled by male elites and violence, we will be able to see a new set of priorities and new means of defining how both individuals and peoples may be 'Selves' determining their own futures.

To take one final example: the holocaust of HIV/AIDS is devastating many countries in the developing world. Africa has been particularly hard hit: '24 of the world's 25 most AIDS-affected countries are African' (Morrison 2001: 197). The world has been criminally slow to respond. Despite the extent of the tragedy over the last ten years or longer, only now are First World countries waking up to this disaster (Thurman 2001: 191). *Time Magazine* recently put the story on its front cover with an emotive picture of a mother and child and the words 'This is a story about AIDS in Africa. Look at the pictures. Read the words. And then try not to care' (*Time Magazine* 2001: Cover). World opinion is again being galvanised on the basis of emotive appeals with a focus on the roles of mothers and children at risk from the disease. The language of war in the 'fight' against HIV/AIDS is already being deployed (Thurman 2001). But the connections to other factors including economic restructuring, globalisation and militarisation, particularly in Africa, are not necessarily being discussed. Gender roles and attitudes towards sexuality are crucial, but national agendas based on masculinist goals of economic and political power are also stifling debate in many countries in Africa, with notable exceptions in Uganda, Senegal and Botswana. In addition, the picture that emerges is often one of mass suffering in

which the human complexity at the local level is lost. In this case the individualistic nature of human rights analysis can have a positive benefit in localising and humanising what might otherwise be an overwhelming and anonymous pandemic.

> The value that I see of employing a rhetoric of rights here lies in the disaggregation of anonymous suffering. Looking at society through a prism of rights forces one to see individual faces among the masses. The idiom of rights turns the statistics…into individuals, each of whom has his or her own narrative with multiple plots and themes. Moreover, unlike reactions grounded in shallow sentimentality, which generally result in no more than fleeting agitation, I believe that the 'rights' talk can claim our sustained attention, even in the face of societal aversion.
>
> (Gray 2000: 2)

Three major problems in tackling HIV/AIDS in the developing world are, first, the reluctance of political leaders to identify, monitor or directly address the problem in their own countries. Secondly, the failure of multinational pharmaceutical companies to make essential drug treatments available at an affordable cost has made effective treatment virtually impossible for most countries. Both these problems are directly connected to the major enterprise of economic globalisation, trade liberalisation and the increasing dominance of Western economic requirements. Third World leaders are not insensitive or ignorant of the effect of AIDS on their people, but they may see the problem from a perspective not wholly caught up in the logic of medical science, research and development. The disease is clearly caused by the HIV, but poverty, war, gender relations, culture, economic restructuring and dislocation profoundly influence the extent of the disease in Africa and elsewhere. Many national leaders fear that publicity about the disease will bring shame on them and their people, lead to a reduction in foreign investment and a further descent into isolation and poverty: '[I]n some parts of Africa, the name for AIDS translates as "shame has fallen on the Earth" '(Kofi Annan, as quoted in Gray 2000: 31). Local prejudice combines with fear of economic reprisals on an international level.

This leads to the third problem and that is the connection of HIV/AIDS with cultures, gender and sexuality. Adequately addressing the problem is going to require men in Africa and elsewhere radically to rethink their attitudes towards women and sex (Obbo 1993). The shame and taboo attached to the perceived promiscuity of AIDS sufferers, especially women, will have to be dealt with. Gender roles need to be radically re-examined and the rights of women must be taken seriously. There is a hidden connection as well between female genital surgeries and the spread of the disease in some parts of Africa. Women and girls are significantly more likely to contract the disease than men. According to *Time* the infection of teenage girls is four times that of boys in some countries (2001: 33). Circumcision of males is sometimes encouraged as a means of preventing infection because it is felt to promote better hygiene in men. But the circumci-

sion of girls and women, including radical labial infibulation in some countries, is rarely identified as a problem. Circumcision creates trauma to the genital area that can be inflamed by sexual contact. Some forms of genital surgery require cutting in order for intercourse to occur. Anal intercourse is used as a means of birth control, or is preferred by male and female sexual partners where the woman's sexuality is compromised by severe forms of infibulation. All this makes women and girls much more vulnerable to infection than men. The sex trade industry also plays a major role in spreading the disease. Many of the young girls and women interviewed for the Human Rights Watch Report in Bombay were infected with the virus (Human Rights Watch 1995). If they survive, many of these girls return home taking HIV/AIDS with them as part of their dowries. Men who frequent brothels or package sex tours also contract and carry the disease home with them, often to unsuspecting wives and children. Finally, war and the movement of soldiers help spread the disease and have been a massive problem in controlling HIV/AIDS and other diseases in Central Africa. The outbreak of the Ebola virus in Uganda in late 2000 seems to have come from guerrilla fighters crossing the border between Uganda and Rwanda, ultimately traceable back to the Democratic Republic of the Congo where the previous infection had occurred.

Sandra Thurman was the presidential envoy on AIDS co-operation and Director of the White House Office of National AIDS Policy under President Clinton. In this role she belatedly took on the issue of AIDS as a global pandemic. But she persisted in the policy that, as there is 'no cure or vaccine in sight', medical intervention can be largely ignored. Instead the focus continued to be on prevention, 'basic AIDS care and treatment', supporting orphaned children and 'developing the infrastructure needed to implement effective programs' (Thurman 2001: 193–195). But it is clear that effective medical treatment could be made available to the people of Africa and Asia as it has been in the developed world and in some Third World countries brave enough to ignore the threats of economic reprisals. One example is Brazil.

> Since 1997, virtually every AIDS patient in Brazil for whom it is medically indicated gets, free, the same triple cocktails that keep rich Americans healthy. … Brazil has shredded all the excuses about why poor countries cannot treat AIDS. Health system too fragile? On the shaky foundation of its public health service, Brazil built a well-run network of AIDS clinics. Uneducated people can't stick to the complicated regime of pills? Brazilian AIDS patients have proved just as able to take their medicine on time as patients in the United States.
>
> (Rosenberg 2001: 28)

The combination of drug therapies that has proved successful in managing symptoms and slowing the course of the disease to the point where it is now a chronic rather than an inevitably fatal condition in First World countries is protected by patent laws. Under the WTO and the TRIPS Agreement patent protection can be

waived in the face of a national emergency (TRIPS, Art. 31.b). In addition, although Brazil reluctantly passed patent laws protecting medicine in 1996 in order to comply with WTO requirements, the legislation states 'that anything commercialized anywhere in the world by May 14, 1997, would forever remain unpatented in Brazil' (Rosenberg 2001: 31). Medical patents contain similar loopholes in other jurisdictions, or are not protected at all. On the basis of a national emergency (which HIV/AIDS must surely be for many countries, especially in Africa) many countries could legally do what Brazil has done. This could include either manufacturing their own generic brands of AZT, ddI, d4T or 3TC, or importing them from countries like Brazil under 'compulsory licences'. The cost of a two-drug anti-HIV cocktail in the United States using protected brandname drugs is $1,000 a month. Using generic drugs without patent protection in Brazil the cost is as little as $78 per month (O'Loughlin 2001). So disturbed are drug companies becoming over the adverse publicity and competition from Third World drug manufacturers that they have belatedly begun to redress some problems. AZT (manufactured by GlaxoSmithKline), which is effective in halting the transmission of the disease from mothers to their children, is now being made available at little or no cost in some countries. Merck & Co. is discounting two of its drugs in some countries by up to 90 per cent. But the corporate effort is slow, grudging and probably too late for most people now infected. Pharmaceutical companies have also been active in trying to prevent generic manufacturing of drugs, as in South Africa where litigation brought by the Pharmaceutical Manufacturers Association of South Africa (representing thirty-nine multinational drug companies) slowed national efforts to make treatment available (Chinkin 2000: 32–34; O'Loughlin 2001). In addition economic reprisals may well occur, either through the dispute resolution mechanisms of the WTO, or through the implementation of trade sanctions in the United States or Europe where most of the drugs are manufactured. The US has filed a complaint against Brazil in the WTO on the import of cheap drugs (Boseley and Astill 2001). What is at stake, on the one hand, are billions of dollars in corporate profits and, on the other, millions of lives. The economic and humanitarian trade-off could not be more stark.

There is a possibility that the denial of affordable medical treatment to people in developing countries might be seen as criminal under international law, giving rise to individual responsibility. Under the International Criminal Court a crime against humanity need not be linked to armed conflict (although the spread of HIV/AIDS has been traced to the dislocations caused by war in Africa). The definition includes 'extermination' (Art. 7.1.b) and '[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' (Art. 7.1.k). The failure to provide necessary medical treatment might be included under either category. Article 7(2)(b) elaborates on the definition of extermination to incorporate 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. This provision overlaps with the definition of genocide which includes '[d]eliberately inflicting on the group conditions of life calculated to bring about its

physical destruction in whole or in part' under Article 2 of the Genocide Convention, which is repeated in the Rome Statute, Article 6. It is unlikely, however, that the denial of medicines for treating HIV/AIDS would be genocide unless there is 'intent to destroy' a particular ethnic group, but it may well fit the detailed definition of 'extermination' as a crime against humanity.

The Statute makes it clear that only 'natural persons' can be tried before the ICC (Art. 25). This would presumably exclude corporations but would still allow for prosecutions against individuals who are making decisions about the provision of medication. Crimes committed before the Statute is in force will not be justiciable (Art. 11). But other human rights bodies have been imaginative in allowing for claims to succeed where the abuses can be said to be continuing, even though they may have commenced long before the relevant provision came into force for the country involved (see e.g. *Lovelace* 1986). It is impossible to predict what the particular procedural and evidentiary burdens will be that might influence this type of action. 'Elements of the offence' or the interpretation of the basic provisions may preclude legal action of an international criminal nature with regards to the provision of basic health care. Individual responsibility leading back to corporate inaction not involving the direct or indirect involvement of state actors may still escape liability within a state-based international legal order. In South Africa, however, the failure of the government to use existing laws allowing for the manufacture of generic drugs and President Mbeki's 'eccentric views' that AIDS is not caused by HIV (O'Loughlin 2001: 21) may have indirectly contributed to corporate intransigence as a foundation for legal liability. Not just *Time Magazine* is identifying the pandemic as a crime against humanity (*Time Magazine* 2001: 20). Stephen Lewis, former Canadian Ambassador to the UN, has asked 'why isn't this mass murder?' (Lewis 2001; see also Kirby 2000: 79). Litigation in South Africa was settled in April 2001, and Kenya has since passed laws allowing cheap generic drugs to be bought or made (Bosely and Astill 2001). But the problem still remains immense, as the WTO itself has belatedly realised (2001).

Skeletal ghosts of the dying will continue to peer out at us from our television sets until we understand that food and health are not simply needs but rights – part of the larger and fundamental right of all people, both individuals and groups, to live. And like civil and political rights the rights to food and adequate medical treatment should be enforceable. When we begin legally requiring those, whether states, individuals or corporations, responsible for the intolerable living conditions and early deaths so many people suffer to be accountable for their decisions then we will begin to create a genuinely global human rights structure. Civil and criminal actions at the national and international level regarding serious breaches of environmental law or egregious breaches of humanitarian law are already reasonably common. This type of litigation could be extended to serious breaches of related human rights such as a right to health or a right to food. Requiring states and non-state actors to ensure sub-standard living conditions are not being imposed on people for whom they are responsible is not

fundamentally different from requiring adherence to guarantees of life, security of the person, freedom from torture, war crimes or crimes against humanity.

10 Becoming human

the nightmare of our encounter is not over
your overgrown offspring
swear by the western god of money and free enterprise
that they are doing their best for Africa…
My son built your cities
What did your son do for me?

(Grace Akello)

Ten years ago Karen Engle wrote 'the international law of human rights has been built largely by its own criticism' (Engle 1991–1992: 520). In the last decade of the twentieth century issues that had appeared to be intractable problems within human rights, principally some types of enforcement, suddenly began to seem capable of resolution. There is a growing but still incomplete consensus that individual abusers of certain types of human rights such as torture, genocide, war crimes and crimes against humanity should be legally responsible for their actions as a matter of international criminal law. Nation-states that permit egregious breaches of human rights are also being subjected to condemnation, ostracism, sanctions and even military intervention. The discourse of human rights has become a major focus of international relations, diplomacy and the use of force. The UN has never been under such pressure to provide the personnel, institutions, troops and resources necessary to ensure the protection of human rights and nation building in places such as East Timor, Kosovo and Sierra Leone. But much of the discussion of human rights at the end of the century tended to focus on a limited range of civil and political rights and areas of humanitarian concern, excluding socio-economic and cultural rights from serious consideration. These other types of rights tend to be relegated to the fringes of international trade law or the dubious basket of cultural relativism and ethnic violence. In some ways there is now *less* room for critique and analysis than there was in 1989 despite the powerful new voice that human rights have gained since the end of the Cold War.

At the beginning of the twenty-first century it is becoming increasingly obvious that international human rights face several very serious challenges to their legitimacy and acceptability. These challenges have, I would argue, five major facets.

1 The failure of international human rights to address adequately the effects of European colonisation

An ongoing part of the discussion of human rights that has been important since the drafting of the Universal Declaration of Human Rights in 1948 is the role of culture in complicating the creation and implementation of rights in international law. This is currently being addressed as the 'problem' of cultural relativism and its apparent challenge to the universality of human rights. I would suggest, however, that cultural diversity is not a problem but rather a necessary prerequisite for the survival of human beings as human. Our cultural and communal ties tell us that we are not simply alienated cogs in a globalised corporate machine, but that we are all unique human personalities connected to others like, and unlike, ourselves. Human rights depend on the richness of cultural diversity. They are also significant in protecting such diversity from the homogenisation of governments, private corporate actors and individuals who find submissive and conformist societies easier to control and manipulate. Human rights are about resistance to the demand for conformity and submission, although sometimes they may also be about meeting communal requirements of responsibility, sharing and (yes) conformity. The powerful revival of difference as a fundamental characteristic of the quality called being human was an important development of the late twentieth century and is likely to remain a central issue for the twenty-first. The challenge which cultural diversity represents is not to human rights, but rather to outmoded and rigid ideas about what human beings are and who human rights are for. These ideas are themselves determined by specific histories, mainly but not solely European, and by Euro-American cultural baggage exported globally through centuries of colonialism and economic globalisation.

There continues to be an inability on the part of those who still control much of the legal discourse either to understand or to accept responsibility for the role that Western nations have played in the disappearance of the world into the European colonial enterprise over the last 500 years. In the first year of the new millennium this debate was again vociferously played out in the celebration, or condemnation, of the 500th anniversary of the European presence in Brazil. A 'post-colonial' world cannot come into existence simply by declaring it to be so. As has been said by leading indigenous scholars Marie Battiste and Sa'ke'j Henderson:

> The governments of the day, often our legal guardians and fiduciaries, do not want to discuss ways of transforming legal or political institutions to include Indigenous peoples in nation-states. They do not want to end their national fantasies and myths about their nations. They do not want to expose the injustices that have informed the construction of state institutions and practices. They do not want to create post-colonial states. They do not want to sustain efforts at institutional reform. They reject the idea of hybridized states that include Indigenous peoples in the political and adjudicative realms. They want Indigenous peoples to vanish in separate replicative or imitative institutions or into organizations without equalized funds or capacities or shared rule. All these efforts are attempts to conceal

> the constitutive contradiction or unwanted side effects of the artificial, imaginative settler-state and law, whose search for innate order has failed. Most of the nation-states of the Working Group on the Draft Declaration want to rewrite the entire text of the declaration to conform to their colonial orthodoxies and views of Indigenous peoples as minorities. They have no remedies for colonization. They are preoccupied with a different idea: how not to end colonization, and how to prolong their gross privileges.
>
> (Battiste and Henderson 2000: 7)

One positive consequence of decolonisation has been an astonishing and diverse cultural renaissance of many peoples around the world. This goes beyond mimicking Western models of political and economic life and towards the creation, or re-creation, of non-European models of human behaviour. In this sense the human right of self-determination is having a much broader and deeper impact than has hitherto been acknowledged. International human rights have not proven themselves sufficiently flexible or open to this cultural renaissance and have so far failed to move beyond stale debates over 'universality' versus 'cultural relativism'. The challenge of addressing the meaning and impact of colonialism and decolonisation within human rights means facing the complexity and positive aspects of diversity and cultural pluralism. That many Western human rights commentators are reluctant to see diversity as a 'good' is indicative of this inflexibility and is possibly dangerous to the long-term development of the human rights movement. International human rights could slide into irrelevance at precisely that moment when they should be most useful in transforming authoritarian structures into institutions and processes that respect democratic participation and governmental, individual and corporate responsibility for the integrity of all human beings.

2 The relationship between international human rights and global capitalism

Because international human rights are part of an interstate legal order, piercing the veil of the state to address directly the power of non-state actors, such as multinational corporations, is extremely difficult to do (see *Barcelona Traction Company* 1970). This means that much of the abuse which human beings actually suffer cannot be adequately addressed within 'mainstream' human rights discourse. Relative to the first major challenge, that of colonialism and cultural diversity, it means that new forms of colonialism described as development or globalisation do not become visible as aspects of human rights abuse. Serious problems of political and economic monopolies on power, corruption and the distribution of and access to wealth and resources persist. While the real achievements of economic development tend to be ignored by proponents of human rights standards, the major players and beneficiaries of corporate expansion regularly dismiss any attention to human rights as irrelevant. These contradictions became much more obvious at the close of the twentieth century with the near collapse of economic viability in many countries in Asia and Latin America.

International human rights advocates have challenged China, Indonesia, Burma, Peru, Colombia and many other countries for their obvious and egregious abuses of civil and political rights. But they have often failed, until very recently, to pay adequate attention to the effects of uncontrolled corporate penetration of much of the Third World (see Klein 2000). This penetration has normally been achieved with the co-operation of national governments and elite groups who have frequently reaped large profits from these activities. There has also been insufficient recognition of the extreme social, economic and cultural dislocation felt by women, children, indigenous peoples and the poor generally when this economic penetration either fails owing to financial or structural collapse, or is instituted without regard for the human and environmental costs of uncontrolled development. Only very recently have international human rights become sensitive to these problems, mainly through the insistence of grassroots movements dedicated to the inclusion of women, children, indigenous peoples and the poor who have brought these problems into international discourse. The economic woes of countries in East Asia and Latin America have also served as a catalyst for greater attention to human rights in a broader sense, as in Thailand, Indonesia and Brazil. I would argue that the structural and theoretical paradigms within which human rights still exist, and the dominance of neo-rationalist economic discourse, tend to make the inclusion of most people as genuinely effective subjects of human rights very marginal (see Soros 1998). This is so even as the universality and indivisibility of human rights is promoted by international political and economic institutions.

The vast majority of human beings – the 'people without history' – are still dismissed or ignored by most Western commentators on international human rights and international law as peripheral. I would suggest that this is indicative of a deep level of irrelevance within international legal discourse that goes well beyond debates on priorities, standard setting or enforcement. Much of Asia, Latin America, the Islamic world, Eastern Europe, the Pacific and Africa are now going through major economic, political and cultural resurrections out of colonised histories which, although very different at some levels, share many common features. At the same time women are not only demanding their inclusion into existing international and national structures but also calling for fundamental changes to those structures. Indigenous peoples and representatives of other marginalised groups, such as the physically and mentally disabled, are no longer satisfied with their own exclusion from the status quo, or indeed with a state of affairs that seems to depend on that exclusion. The spread of capitalist institutional and ideological structures and ideas has had the contradictory affect of placing great stress on vulnerable groups, and of providing space for the revival of cultural and other identities as globalisation weakens the power of nation-states to control their domestic affairs. International human rights have played an important role in this globalisation, subverting the cardinal principle of state sovereignty in international law and fact. But the type of international human rights cited as worth protecting usually covers only a narrow range of civil and political rights with their emphasis on individual liberty, representative democratic institutions, the rule of law and protection of private property (Robertson 1999).

3 The connection between international human rights, state sovereignty and democracy

Closely related to globalisation, self-determination and the centrality of cultural difference is the issue of state sovereignty. Disputes over humanitarian intervention and enforcement of human rights that became particularly acute at the end of the twentieth century revolve around the importance of state sovereignty and the humanitarian ideals of the post-war international order. Is international law merely an expression of the collective agreement of an expanding number of nation-states? Or does it represent a global expression of the rule of law? If international rules are no more than the sum of their parts, with each sovereign entity free to determine its own acceptance of human rights for the people within its boundaries, then what meaning can international human rights possibly have for the majority of the human population?

The exercise of the right of self-determination has meant the gradual expansion of the number of states from less than 50 immediately after the Second World War to nearly 200 at the beginning of the twenty-first century. International law is based on the sovereign equality of states. This doctrine was established when that equality was divided among a very few mainly European states sharing similar ideas about the nature of international law. They formed the 'colonial club', some very old (Spain, Portugal, France, the United Kingdom, Russia), and some much more recent (Belgium, Italy, Germany, the United States, even Japan). Italy, Germany and Japan were dismissed from the 'colonial club' as a result of two world wars in the first half of the twentieth century, while the Soviet Union continued the Russian Empire in Europe and Asia well beyond that of other European powers. The nature of 'states' in international relations has moved from the inclusion of ramshackle empires such as Austro-Hungary, Ottoman Turkey and Imperial Russia at the end of the nineteenth century to a gradual concentration of statehood into 'nation-states' from the early twentieth century onwards. The sovereign equality of states is based on an apparent sameness of political and legal culture that never really existed. Not even a façade of sameness can hide existing differences in the vast array of new states from giant Indonesia to tiny East Timor. We know that at least the rhetoric of rights has a powerful influence on the expression of dissent, resistance and struggle against the authoritarian urges of the modern nation-state. State boundaries are inadequate bulwarks against the flow of people, ideas, information and the tools of resistance, including arms. The dream of statehood depends on the rigid maintenance of boundaries in international law. The apparent collapse of this rigidity is causing disturbance within the ranks of international theorists and practitioners. But as feminist, post-colonial, indigenous, postmodern and critical scholars of international law are beginning to remind us, this rigidity has never been an accurate picture of the world for the vast majority of the world's people. (Abu-Odeh 1992; Alston 1997; Anaya 1996; Anghie 1999; Cass 1996; Charlesworth *et al* 1991; Kennedy and Tennant 1994; Koskenniemi 1999; Scott 1998; Simpson 1994; Tennant 1994).

On the other hand, if international law is a kind of global system of law applicable to all, on what is it based? Is it necessary to find some universal binding

principle of right in order for this system to operate consistently? A Kantian perspective would suggest that there must be. Do international human rights represent that universal principle? The development of the Universal Declaration suggests that agreement on basic core values of human rights among a group of representatives from a wide range of cultural, religious and political backgrounds is possible. Deconstructing the history of the idea of human rights suggests that there are threads connected to some surprisingly diverse sources. If there is no universal underpinning for human rights or international law, then how do we counteract the anarchy of independent state sovereignties operating on their own terms in a world in which no dominant ideological or philosophical agreement on standards of behaviour exists? The movement and development of international law at the beginning of the twenty-first century clearly indicates that we are moving beyond positivist models of state sovereignty and a horizontal international legal structure dependent on the consent of 50, or even 200, separate nation-states. The relationship between regional organisations, states, individuals, groups and corporate entities is being redefined. Globalisation is no longer a term strictly confined to economic rationalism and free trade. With the expansion of the world's economy has come an expansion of the demand for a global civil society (*Foreign Affairs* 2001; Rees and Wright 2000). International human rights are the principal focus of this discussion. We are effectively renegotiating our world. The concept of *universality* is being replaced by the notion of *globalisation* in which overarching claims of Truth are giving way to negotiations over truth at a more human level.

What has been disturbingly absent from this discussion are many of those voices of people affected by this restructuring. Within this debate the distribution of political and economic power is crucial. Human rights can play a significant role in providing a range of discourses that embody power for the powerless. The concern is that, by moving towards a globalised world, we may be translating vertical authoritarian notions of state sovereignty from the national to the supra-national or international level. It is important to retain at least some aspects of a horizontal system of international law among at least notionally equal partners, but to expand membership in this global club to new locations of sovereignty – peoples, individuals, corporations, labour unions, NGOs, international organisations and other entities. Recognition of the role of multinational corporations means bringing them directly into the discourse of public international law and civil society, not to validate the power they already have, but to integrate them into systems of surveillance and control which are already beginning to limit the sovereignty of nation-states. Our systems of international implementation and enforcement of human rights must eventually come to include *all* effective players, not just the state and the individual. Human rights monitoring and enforcement will apply to Shell Oil or Exxon as much as it does to Nigeria, the United States, Augusto Pinochet or Slobadan Milosevic. It must also apply to international organisations, including the UN itself (see UN Rwanda Inquiry 1999 and Statement of Secretary-General 1999).

Human rights therefore present international law with the challenge of democratisation going beyond liberal ideals of pluralism. International institutions and structures will need to become more reflective and more representative of all

the individual and collective entities that make up our world (Falk and Strauss 2001). This includes nation-states, but must also include other players. NGOs and broad social movements already have a profoundly important role to play in developing international human rights law (Stammers 1999). The institutionalisation of democratic systems at the international level is already occurring in regional arrangements in Europe (see Hammer 1998). Although no global system of legal regulation will be able to avoid some necessity for centralisation, vertical distributions of power and common standard setting, the terms of this system ought to be set with the widest inclusion of those affected by it from the individual to the national or regional level. Restructuring the UN Security Council to move it beyond the consolidation of power formed in the aftermath of the Second World War; reforming the human rights treaty bodies within the UN; and making the UN bureaucracy more transparent, accountable, efficient and responsive are already being discussed. Perhaps, as Elizabeth Evatt has reminded us, the original post-war proposal of H.V. Evatt, that an International Court of Human Rights should be set up, needs to be reconsidered (Evatt 2001). Other major international institutions, principally the World Bank, are engaged in major reforms at the structural and institutional level. Human rights may provide a vehicle for the inclusion of the greatest range of voices in this larger project as well as forming part of the substantive foundation for international processes and legal regulation. Even the WTO has suddenly been confronted by the prospect of 'street politics' and violent resistance to its programme of economic development. The revolutions that established the first expressions of human rights in North and South America, Europe, Asia, Africa and the Pacific have also now become global.

4 International human rights and violence

International human rights still do not contain a complete and unequivocal condemnation of the use of violence. We are still reduced to force or the threat of force to achieve international aims. The use of terror and death by national governments and paramilitary organisations is still widespread. It seems that, since the end of the Cold War, this violence has increased. It may simply have become more visible as dominant divisions between East and West or even North and South have collapsed or are collapsing. Too much of the transformation of the world from the post-war era to a 'New World Order' (in President George Bush Sr's chilling phrase) has been violent. For every 'Velvet Revolution' in Czechoslovakia or peaceful bickering over constitutional arrangements in Canada and Quebec there have been too many violent clashes – Northern Ireland, Romania, Yugoslavia, the Russian Federation, Turkey, Iraq, Kuwait, Israel, Lebanon, Afghanistan, Kashmir, Sri Lanka, Burma, Indonesia, East Timor, Ethiopia, Eritrea, Somalia, Sudan, Liberia, Sierra Leone, Nigeria, Rwanda, Burundi, the former Zaire, Angola, Colombia, Peru, Ecuador, Haiti, Mexico, even the United States itself – to name only a few places trampled by serious violence since 1989. In addition to violence on a national or even regional level (as in the creeping conflict in Central Africa which has claimed tens of thousands of lives since the Rwandan massacre of 1994) there are

also the continuing problems of violence in the home, on the streets and in the workplace. This violence has primarily been inflicted on women and children, but the elderly and many men, including gay men and members of minority groups, are also affected by it. Families are routinely torn apart by violence often passed down from one generation to the next. Family violence is frequently associated with violence outside the home, as in assaults and robberies against individuals on the world's city streets and in the fields and mountains of rural life. Kidnapping and hostage taking are common forms of publicity and revenue raising for many groups from Colombia to Russia to Yemen to the Philippines, as well as being an exercise of control by men over women in many countries. Children are often caught up in the more widespread conflicts afflicting their regions, trained as little soldiers before they reach their teens. Girls, boys and women are pushed into what amounts to slavery through the 'sex trade industry', frequently involving violence. The arms trade and the continuing presence of landmines (despite the recent progress in this area) still mean that the world is awash with guns and explosives killing and maiming thousands of people every year. First World countries, such as the United States, are heavily implicated in this trade, creating a world of death and terror inside as well as outside their borders. For most people in most of the world 'war' in some sense has never ended, but has become a normal part of human existence.

This psychological and social reliance on violence is, I would argue, the most significant effect of a failure to redress imbalances in political and economic power and is the pivot around which much human rights abuse revolves. Indeed, terror, enforcement through punitive means and violent death are frequently portrayed as intrinsic to the human condition, much as poverty and hunger have been characterised. We now live in societies in which the normality of violence is so pervasive that we rarely acknowledge even the possibility of real change (see Arendt 1970). The rhetoric of human rights is frequently used to justify this violence, either in arguments in the United States and elsewhere on the 'right to bear arms', or in the violent struggles for self-determination and human rights occurring in many parts of the world. International human rights will have to face the problem of violence in a genuinely concerted and broad-based way or the plague of violence will continue to haunt the implementation of human rights more generally.

But, international human rights are not part of a secular or civil religion and the Universal Declaration and other covenants and treaties are not sacred texts. They are legal documents, the result of intense negotiation and compromise by very fallible human creators. These creators were and frequently still are white, male and Euro-American, but an examination of the history of international human rights indicates that this too is a simplistic and inaccurate picture. The tendency to talk about human rights, especially that relating to violence, in mystical or quasi-religious language is itself a problem. The discourse of torture sometimes reads like a martyrology connecting human rights to the imagery of Christianity in a never-ending crusade against the infidel and the heretic, still frequently portrayed as Islamic. Saddam Hussein or Slobadan Milosevic are portrayed as Satanic, this century's new Hitlers, with 'humanitarian' or 'compassionate' bombing by the West

as just war against the barbarian. Human rights are more and more being used as the sacred missionary text justifying these actions. This denies the direct role that international political and economic forces play in the creation of conditions conducive to the very violence that is being condemned. These same global forces overwhelmingly benefit the First World. This is not to deny that Hussein and Milosevic are responsible for horrendous breaches of human rights, including aggression, torture, murder and even genocide. Nor do I wish to deny the transformative effect that human rights can have, including the establishment of legal responsibility for human rights abuses.

5 Implementation of international human rights

This brings us to the last challenge to international human rights which itself directly involves violence, not just as an object of concern, but as its tool. The last decade of the twentieth century saw genuine progress in the development of mechanisms for the enforcement of human rights. Since the 1960s human rights implementation had mainly resided either in the monitoring and complaints procedures supervised by the UN Human Rights Commission, or in committees set up to monitor specific conventions both within the UN and within regional arrangements. These methods, although they achieved much in publicising and educating both governments and people about human rights, seemed to offer little in the way of real progress in implementing human rights effectively for everyone.

The role of NGOs at the grassroots level has been essential to the development of human rights and to their implementation at the global and the local level (Steiner and Alston 2000: 938–983). They have assisted in the development of human rights standards tailored to meet the needs of specific groups, such as women, children, migrant workers and ethnic minorities. They have also served an invaluable role in bringing human rights abuses to the attention of the world community and of demanding that these abuses stop. In some cases NGOs, working with other governmental and private agencies, have been successful in ending serious abuse and in rebuilding shattered communities such as is now occurring in East Timor. They have worked closely with the UN and other international organisations, sometimes in a formal relationship and sometimes not, to focus attention on the needs of real human beings affected by global shifts in power and local problems. Much of the standard setting and implementation of human rights that has been achieved would not have been possible without the work of individuals and groups in highlighting human rights abuse as a central concern. In many cases human rights advocates and workers have themselves become the objects of abuse including torture, 'disappearance', terrorisation, exile and murder.

Beginning with the establishment of the Tribunal on War Crimes in the ex-Yugoslavia, there seemed to be a renewed commitment by most of the world's major powers actively to prosecute and condemn the infliction of the most egregious human rights abuses. The model that was chosen, both on an international and on a national level, was that of criminal law. Some human rights abuses have long been the subject of international criminal law, giving rise to individual

responsibility and universal jurisdiction. The list of such abuses includes war crimes and grave breaches of the Geneva Conventions, crimes against humanity, crimes against peace, crimes of aggression, genocide, torture, slavery and piracy. The European and Japanese war crimes trials following the defeat of Germany and Japan in the Second World War gave rise to tribunals specifically designed by the victors to replace summary execution with courts of law and convictions for crimes punishable by judicial execution and imprisonment (Taylor 1992). The Nuremberg and Tokyo War Crimes Tribunals established basic principles of law firmly entrenching individual responsibility as a matter of international law. This was supported by the Genocide Convention, the 1949 Geneva Conventions and (eventually) the Torture Convention, all of which place responsibility on both states and individuals for serious abuses of human rights. International human rights were not just new in establishing individuals as subjects of international law after 1945. They also established individual responsibility for crimes committed, not just at the national level, but at the international level.

Relatively little action was taken, however, as the world solidified into Cold War politics. After 1989, and especially after the collapse of the communist regime in the Soviet Union in 1991, room suddenly opened up for a more aggressive approach. The conflict in Bosnia and the fragmentation of Yugoslavia, accompanied by a sudden vacuum in power where the old Soviet Union had been, created a space for the establishment of an international war crimes tribunal focusing on individual responsibility for the first time since Nuremberg. This in turn established a precedent that was quickly followed for the prosecution of offences committed in Rwanda. International tribunals have also been proposed for East Timor, Sierra Leone and (after twenty years of delay) Cambodia. International criminal law has increased and developed so rapidly that an International Criminal Court has finally been agreed in the Rome Statute of 1998.

The model for this aspect of human rights is the law of criminal enforcement (Teitel 1999). Domestic criminal law has been adapted to suit these international tribunals. The focus is on the responsibility of individual perpetrators rather than on states. Serious problems are beginning to emerge. Individuals may be hard to track down and bring before the tribunals. Evidence may be difficult to gather and present. Who will police this new body of law? Large areas of human rights abuse still lie outside the jurisdiction of these tribunals and of the ICC. Nation-states seriously affected by human rights abuses may find the processes and results of international tribunals costly, slow and disappointingly inadequate, as was apparent with the Rwandan Tribunal. Although there is a serious need to acknowledge and stigmatise the perpetration of abuses, and recognise the suffering of the victims as real, criminal punishment does little to bring warring sides together and reconcile differences essential to long-term peace and security. International criminal law as it is presently being developed is based on a 'retributive' model of justice. This may be satisfying emotionally to victims, prosecutors and members of the wider community. It could also have a deterrent effect on would-be tyrants. But it may

have the effect of perpetuating resentment and conflicts, leaving old patterns of hatred and abuse untouched or even exacerbated.

Perhaps what we need to think about is what Archbishop Desmond Tutu and others have described as 'restorative' justice (Tutu 1999). This concept of justice emphasises the importance of testimony, confession, recording of experience, shared history, and amnesty or forgiveness. It is aimed at achieving responsibility, respect and reconciliation outside a criminal process. This type of justice aims at the telling of all the various 'truths' that make up the 'true' history of injustice with the aim of ultimately restoring peace and justice to the nation as a whole. Martha Minow describes the application of judicial processes to atrocities in international law as a means of negotiating the fine line between 'forgiveness and vengeance' (Minow 1998). She also describes the work of 're-membering', truth telling, and the construction of a shared history as a means of healing and reuniting the collective (Minow 1999). The South African Truth and Justice experience has been painful, incomplete and not always successful. But I would suggest that our fixation with a retributive model of justice needs to be tempered with an examination of the possibility of restorative justice on an international level.

Perhaps what we might consider is the establishment of a 'Truth, Justice and Reconciliation Commission' on an international level for peoples coming out of long histories of serious violence and oppression. The criminal justice model could co-exist with this for cases where confession and amnesty are simply not adequate. The UN has already played an important role in truth and reconciliation processes in various countries, in particular Guatemala. Demands for recognition of the harms done by colonialism, slavery, war, apartheid, state violence and invasion are now being made through legal, political and diplomatic channels from South Africa to Washington. Perhaps a way of legitimating and focusing this discussion might be through an international commission dedicated to such claims. Implementation of human rights must go beyond empty platitudes, or even aggressive forms of enforcement, to include education and the establishment of long-term and effective dispute resolution techniques including reconciliation and civil processes of justice.

Finally, serious consideration must be given to substantial reparation to peoples still suffering from centuries of colonisation, slavery, oppression and dispossession. The Nigerian Nobel Laureate and human rights activist Wole Soyinka has argued strongly that reparations are an essential part of the healing of wounds inflicted on Africans by centuries of slavery (both European and Arab) and colonialism (1999: 23–92). Reparations need not focus solely on monetary compensation but might include acknowledgement of responsibility for past and continuing wrongs including serious discussion of the ways in which colonisers and colonised can work together to achieve greater equity in the world and proper attention to the real contribution of the colonised and the enslaved to the wealthy and the powerful. This investigation needs to be looked at systematically and on a global level rather than confined to the few nation-states willing to engage in the rhetoric of *mea culpa*. International law needs to include within

its framework not only a criminal model of human rights enforcement, but also substantial civil and reconciliation processes that can redirect attention away from punishment and towards genuine reconstruction.

These five challenges mean that we must abandon some of our most cherished preconceptions about what human rights are for and whom they are meant to protect. Although it is usual to assume that human rights are universal, I believe it is necessary to question this assumption, although to do so looks dangerous or simply silly. But the tendency for local narratives, histories and expectations about what it means to be 'human' to be inscribed onto cultures and peoples without questioning the appropriateness of what these mean can lead to some difficult problems in the area of human rights. I am referring here to the inscription of Euro-American values on the rest of the world. International human rights cannot avoid the project of provincialising Eurocentrism. But this does not mean dismissing human rights as yet another example of cultural imperialism when they are in fact much more than this. By questioning the theoretical commitment to universality in a strong form we are left with the possibility of human rights as a global system of law applicable to political, economic and cultural patterns within and alongside international relations and other areas of international law. By giving up the commitment to universality as a theoretical construct it should be possible to engage in the kind of dialogue that might lead to cross-cultural, common or shared standards for human behaviour.

But we also need to insist on the application of existing human rights standards where European or Western constructs (such as the modern nation-state or economic industrialisation) are adopted. The expansion of Western structures is not always a unilateral imposition of colonialism. Enthusiastic adoption of the apparatus of modern statehood, the trappings of nationalism and reliance on economic arrangements and industrialisation based on European models should make anti-human-rights regimes cautious about their rejection of human rights standards. A significant example is Singapore. If European institutions are adopted then the human rights that should go with them must also apply.

But human rights cannot simply depend on the globalisation of Western economic, political and legal structures for their legitimacy. What is necessary is a serious restructuring of international law-making institutions towards a genuinely inclusive model of the rule of law at the international level. The old positivist model of state sovereignty was always an illusion. It is no longer serviceable, not even to the powerful few. This means that international institutions must become more democratic. This does not mean simply translating the façade of representative democracy to the international level. Rather this requires a restructuring of the models of international participation that acknowledges and includes all the essential players in the formation and implementation of international law and human rights. Democratisation in some form is the only means by which this can be achieved. This democratisation already operates on an informal level. But even many NGOs are less than fully representative of the constituencies they speak for. International democracy

needs to be institutionalised, and civil as well as criminal organs for the implementation of human rights need to be established. Envisioning a global civil society in which vertical and horizontal axes of power and law making co-exist is going to be difficult, but not impossible.

It is no longer feasible to imagine a world in which human rights will not form part of the discourse for change, no matter how much disagreement there might remain over their content and procedures. Nation-states that have hitherto refused to engage in any meaningful discussion on human rights are now beginning to consider their relevance. Ratification of international conventions on human rights has never been higher. Even China has finally ratified at least the first half of the International Bill of Rights, the ICESCR, although with reservations. Whether human rights law is a universal system may be debatable, but it is clear that it has become a global system.

A crucial aspect of any discussion of human rights is history. Rather than relying on grand narratives of the 'Rise of Europe' we are now beginning to see history in much more complex terms. Recognising multiple layers of history as part of the story of human rights does not mean giving up on a coherent account of their various meanings. One important role that human rights processes and discourses can play is to ensure a shared or common understanding of history, incorporating the histories of those people who have been silenced or 'disappeared'. In establishing a Truth and Reconciliation Commission in South Africa one purpose was to expose the actual history of apartheid, not as one immutable set of objective facts, but as the telling of many stories, often excruciatingly painful, so that the reality of apartheid could not be denied or forgotten. Richard Lyster, one of the seventeen Commissioners, has emphasised the need for a shared understanding of the past and the refusal to allow atrocities to be buried (Lyster 1999). Before there can be reconciliation there must be recognition of the truth of the wrongs that were done, or are still being done. Australia and Canada have both struggled in recent years over their own histories of colonisation, recognition of Aboriginal rights and reconciliation. On the one hand there are those who demand an accounting for past and continuing wrongs. On the other there are those who see this as 'black armband history', a distortion of the traditions of nationhood. Until Australia, Canada and other former settler colonies with indigenous peoples within their borders can fully 'tell' their own history from the perspectives of all those who lived it, and are still living it, no reconciliation and no maturity as a nation can occur. Until we face our colonial history the 'whispering in our hearts' of evils buried will still haunt us all (Reynolds 1998).

This need for a fully historical perspective is also important internationally. Global history is a history of colonialism. It has not ended. The connection between international law and European colonialism has received little attention in mainstream international legal analysis, including human rights, until recently. Decolonisation has only just begun to free the territories, economies, cultures, minds and bodies of the majority of the world's peoples. Those individuals who cannot recognise their own position within colonialism are often the most vocif-

erous in their demands that human rights are the representation of universal values of freedom, equality and justice. Challenges to this certainty are not 'alternative', they are central. They insist that the current orthodoxies of international law be exposed in all their provincialism and the promise of international human rights law unravel the constraints of this most closed and parochial of clubs.

The prominence of the literate subject is nowhere so intense as it is in the fields of diplomacy, international law and human rights. The Universal Declaration of Human Rights has a sacred status in international law and the proliferation of treaties, conventions, resolutions and reports indicate that the production of written words has never been lacking in this most literate of subjects. What has never been explored, as far as I am aware, is the relationship between the subject of human rights and the literate subjectivity of the coloniser. Literacy is a crucial aspect of human rights, both as an essential component of basic human rights such as the right to education and freedom of expression, and as the paradigm for the rational, rights-bearing subject. The implications of this for those who fall short of the literate subject have not hitherto been explored. Much more work needs to be done on this. The nature of 'humanness' incorporated within human rights must expose its often hidden assumptions about who rights are for. It is not always obvious that all human rights apply equally to everyone, or even that they should.

Social and economic rights have received much less attention in recent years and international legal responsibility for the failure to implement these rights appears to be much more difficult to establish. We concern ourselves with the 'ethnic cleansing' of murder and war, but we forget the holocausts of hunger and HIV/AIDS. In Sub-Saharan Africa war, famine, death and disease ride together (Nikiforuk 1992). The liability of corporate actors and the role of international financial institutions, both public and private, must receive much greater attention in the future. All people are directly affected by widening imbalances in wealth and the globalisation of a certain type of economic thinking. Restorative justice must also include social justice. The connections between the failure to protect economic rights adequately and the incidence of violence are reasonably well established. Even where violence appears to be motivated by ethnic hatred, economic factors are often important. But I do not believe that it is possible to eradicate violence altogether, no matter how well we may eventually protect all types of human rights. The human capacity for hate and confrontation is unlikely to disappear in the near future. Indeed it is arguable that human rights are necessary not because of any inherent or universal quality of integrity or human dignity, but because of the ubiquitousness of human greed and violence. We developed human rights *because* of our evil actions, not in spite of them. Human rights are not about creating a paradise on earth. I do not believe in Utopian ideals. What they do promise, and might achieve, are processes of respect and responsibility that can create the conditions necessary for humane standards of living and behaving on a global basis for all of us.

There is no attempt in this book to define what 'human' means. Our historical preoccupations have too often been blinded by assumptions of truth or superiority which do not hold up under scrutiny, and alternative histories are often deeply involved in resistance to 'master-narratives' such that any determination of the 'self' of humanness is difficult or impossible. Those of us who are most certain about our own identities may be the least able to escape from this blindness or resistance. We do not know what 'being human' is, we are still in the process of becoming.

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