Internationalizing the Statecraft: Genocide, Religious Revivalism, and the Cultural Politics of International Criminal Law

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I. INTRODUCTION

The citizens of Nigeria's worst nightmare rang true in November 2003 as the controversial Miss World competition to be held in Abuja, Nigeria, plunged the country into fatal clashes between Christians and Muslims.1 In the midst of already heightened tensions between Christians and Muslims around the revival of the strict Islamic Shari'a penal code in Nigeria,2 an

*Many colleagues provided valuable intellectual feedback throughout the revisions of this paper and I am grateful for their engagement. Special thanks to Marjan Damaska, James Whitman, Oona Hathaway, Amy Chua, Jack Balkin, Sandy Levinston, and the Islamic Reading Group at Yale Law School. Thanks also to my colleagues in institutions where I have presented earlier drafts: The Departments of Anthropology at the University of California-Berkeley, University of California-Irvine, Southern Connecticut State University, the University of South Carolina-Columbia, University of Colorado-Boulder, Columbia, The International Center for Ethnic Justice and Public Life at Brandeis University, The Human Rights Center at the University of Connecticut, Storrs, Osgoode Hall Law School at York University, The University of Sussex Faculty of Law, the Emory University's Center for Humanistic Inquiry, and colleagues at the Boalt School of Law at UC Berkeley. Special thanks for their critical engagement to Hauwa Ibrahim, Laura Nader, Annie Bunting, Susan Drummond, Jane Cowan, Richard Wilson, Sally Merry, Marie Benedicte-Dembour, Bill Maurer, Bill Hanks, Mark Whitaker, Ann Kingsolver, Mihri Cakir-Inal, Donald Moore, Lawrence Cohen, Aihwa Ong, Nancy Scheper Hughes, and Jim Ferguson.

1. These sectarian clashes represented the protestors' disagreement with the pageant. They argued that the principles of female nudity required of contestants were not only vulgar and indecent, but also insulting to Islamic precepts of modesty. The initial violence represented both a reaction to that irreverence and a defense of the Prophet. Interviews by Kamari Maxine Clarke, in Abuja, Nigeria (Dec. 2002).


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article by journalist Isioma Daniel, printed in This Day newspaper, instigated rioting when Ms. Daniel responded to Muslim complaints that the pageant promoted sexual promiscuity and indecency by suggesting that the sacred Muslim leader, were he alive, would have appreciated the pageant. "What would [the Prophet] Mohammad think?" Ms. Daniel asked. "In all honesty, he would probably have chosen a wife from one of [the contestants]."

The social unrest began after an Imam in the Abuja-based National Mosque recounted the nature of the reporter's attack on the Prophet Muhammad and issued a fatwa that called on Muslim worshippers to uphold their moral and legal duty to protect the name of the Prophet against those who offend him. This fatwa (an authoritative legal opinion given by a legal scholar known as a mufti) represented a call to jihad (to strive, to struggle)—that is, a political or military struggle to further the Islamic cause. In an age of increasing democratization propelled by the spread of the Rule of Law (ROL) and international tribunals, such as the International Criminal Court (ICC), this call on Muslims to defend their Prophet is not unusual since it represents the will of the Islamic faithful to defend themselves from what was seen as not only disrespectful journalists, but also attacks on their religious practices by officers of the secular state. For according to the popular definition of a Muslim, she or he is represented as one who accepts and believes that Muhammad is the messenger of God, and Allah's commandments led to the development of the general philosophy for inner peace found in The Qur'an, the Holy Book of Islam. In detailing the path to inner peace, the Qur'an outlines the duties and obligations of the faithful, including the moral obligation to act in defense of the prophet, wherein it

5. Muslim's Condemn Nigerian 'fatwa', supra note 3, at para. 6; Writer's Anger over Miss World Deaths, supra note 3, at para. 7.
7. See THE HOLY QUR'AN 665-66 (Maulana Muhammad Ali ed., Specialty Promoters Co., Inc. 1985) (1917) (hereinafter QUR'AN). This text came to be the Holy Book of Islam – the source of God's commandments made real in Islamic doctrine – and the principles of Islam were recorded in the Qur'an. Id. at intro. Xxv; see also THE OXFORD DICTIONARY OF ISLAM, supra note 6, at 256-57.
prescribes violence in defense of faith and God. It teaches that those who join the struggle are more likely to gain redemption.\textsuperscript{8} In this respect, it is believed by large numbers of Muslims that on the last day, the “Day of Judgment,” Allah will resurrect each person and judge them based on their acts on the earth, thereby determining whether they will be admitted to eternal Paradise or condemned to hell.\textsuperscript{9}

Qualifying for eternal life involves many duties and obligations. One such duty is a response to the ritualistic call to defend the Prophet and Islamic faith. Accordingly, the violence that ensued after Isioma Daniel’s ridicule of the Prophet Muhammad was seen by various members of the faithful as enactments in the exercise of their duty to defend their faith.\textsuperscript{10} As a consequence, hundreds of Northern Muslims armed themselves after Friday prayers at the Mosque and engaged in violent action in Abuja, where contestants awaited the commencement of the December 7, 2003, pageant.\textsuperscript{11} The violence spread to various northern Nigerian cities, particularly Kaduna,\textsuperscript{12} one of Nigeria’s most politically volatile cities located some two hundred miles north of Abuja. Said one Kaduna-based Christian witness, “At around five o’clock Muslim youths came to our homes carrying machetes and chanting ‘retribution, retribution.’ They came in the morning with weapons and began attacking us.”\textsuperscript{13} Other witnesses reported images of unsanctioned destruction in which people ran through the streets and set everything in their paths ablaze.\textsuperscript{14} “People were fleeing in all directions throughout the countryside.

\textsuperscript{8} QUR’AN, supra note 7, at 665-66.
\textsuperscript{11} Consequently, the pageant organizers had to make new venue arrangements. They moved the pageant to London, England and, as a result, contracts were broken and millions of investment dollars were lost to violent protests. See Muslim’s Condemn Nigerian ‘fatwa’, supra note 3, at para. 5. However, these protests were connected to long histories of strife between Christians and Muslims in the Nigerian North and ongoing political instability in the region. See Africa’s Press Reflect on Miss World Riots, BBC NEWS, Nov. 29, 2002, at para. 10, http://news.bbc.co.uk/2/hi/africa/2527339.stm.
\textsuperscript{12} Writer’s Anger over Miss World Deaths, supra note 3, at para. 10. Kaduna is a city with a predominantly Muslim majority of over two million residents. See Herman, supra note 2, at para. 4.
\textsuperscript{13} Interviews data in Abuja, Nigeria (Dec. 2002).
\textsuperscript{14} Interview data in Abuja, Nigeria (Dec. 2002).
The running here and there was confusing and scary.\textsuperscript{15} In the end, statistics on fatalities and injuries released by the Federal Police reported two hundred dead and over five hundred Christians and Muslims seriously injured.\textsuperscript{16} With up to four hundred recognized ethno-linguistic groups and three dominant groups—an estimated twenty-nine percent of Hausa and Fulani in the north, twenty-one percent of Yoruba in the Southwest, and eighteen percent of Igbo in the Southeast\textsuperscript{7}—the region continues to be engulfed in struggles over competing groups vying for political power. The interpretation of the moral and legal obligations of citizens varies dramatically from one part of the national state to another. And at the heart of the contemporary contests have been challenges over the basis for legitimate Nigerian governance, including the constitutionality of the newly implemented Islamic Shari’a penal code.\textsuperscript{8} Among the conflicts are questions concerning the right to an Islamic rebellion. The problem, however, is that an internal armed conflict, such as an

\textsuperscript{15} Interviews data in Abuja, Nigeria (Dec. 2002). And surely as people were fleeing, others were also capitalizing on the opportunity to vandalize stores and market stalls, engaging in the theft of valuable goods. Interviews by Kamari Maxine Clarke, in Abuja, Nigeria (Dec. 2002).


\textsuperscript{17} Though there continues to be disputes over the actual population breakdown, the above figures represent the figures documented by the Nigeria Population Statistics. See Nigerian Population Statistics; Nation by Nation, http://www.nationbynation.com.

\textsuperscript{18} DANJUMA BYANG, SHARI’A IN NIGERIA: A CHRISTIAN PERSPECTIVE 4-7 (Challenge Publications 1988); Vincent O. Nmehielle, Shari’a Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question, 26 HUM RTS. Q. 730, 731 (2004). Shari’a is an Arabic word that means “the way to the watering place.” DANJUMA BYANG, SHARI’A IN NIGERIA: A CHRISTIAN PERSPECTIVE 36 (Challenge Publications 1988). It highlights “the way” — that is, the path or road that every Muslim has to follow in order to earn the pleasures of life and to avoid the wrath of wrong-doing. BYANG, supra, at 36. Also referred to as Islamic law, its formal structure is embedded in the complex of divinely revealed rules to which the Muslim faithful are expected to submit. Unlike the popular technical definition of Western law which highlights written and unwritten rules that are enforced by coercive powers of the state, its validity is located in the manifest will of Allah (God), and its principles represent a broader sphere which encompasses outward conduct, moral value, and cultural principles. BYANG, supra, at 36; Nmehielle, supra, at 737-38; ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 11 (Syracuse Univ. Press, 1990).
Islamic movement in Nigeria that calls on believers to exercise their duty and obligation to defend their leader, may qualify as a defense strategy for some, whereas in other jurisdictions with different religious and ethnic populations, it may be seen as civilian terror motivated by religious irrationality. And yet, in accordance with various domestic or international criminal institutions—such as that of the International Criminal Court—such an act might be classified as a criminal act that would qualify for a criminal investigation, punishable by life in prison. These differences in what constitutes crime are at the heart of some of the contemporary challenges of international human rights. Recent studies of religion and democratization, as they relate to globalization, have tended to either be comparative or have been organized around such areas as culture, politics, social organization, law, or economy. Similarly, discussions of the international domains of legal authority have emphasized the ways in which expanded global institutions have facilitated the formation of transnational networks of activists, north-south nongovernmental organizational partnerships, and trans-border linkages of a broad spectrum of social movements.

Over the last decade of the twentieth century, movements toward the democratization of various African states have led to the collapse of Cold War alliances, minority-led political groups, as well as the subversion of religion in public life.\(^19\) Rule of Law (ROL) and civil and human rights have become the popular global refrain among a wide spectrum of urban and rural activists.\(^20\) This twentieth century wave of individual rights has its discursive roots in North American civil rights struggles over gender/sex and race equality struggles of the 1960s. During the height of the Cold War, demands for civil and political rights emerged with persistent rallies for justice, freedom, and equality that ultimately led to

\(^19\) 11th General Assembly of the Council for the Development of Social Science Research in Africa, *Draft Paper: The African State: Issues and Challenges for Building a Development State* 9, (Dec. 6-10, 2005) (prepared by Kehinde Olayode), http://www.codesria.org/Links/conferences/general_assembly11/papers/olayode.pdf ("The end of the Cold War entailed the rapid collapse of external supports for many authoritarian regimes, thereby greatly weakening them, and making them vulnerable to attacks from 'popular forces'. . . . Since alliances with developing nations could longer be based on Cold War ideologies and interests, 'democracy' became the basis for forging new relationships in the post-cold war [sic] order.").

substantive changes in American legal, political, social, and economic institutions. It is well established that these changes contributed to the ushering in of a rights movement that not only transformed the institutional infrastructure of North American cities but that would ignite the global human rights movement of the twenty-first century. From the Philippines to Turkey and Japan to Russia, civil rights movements have led to transformations in national conceptions of rights and entitlements. In Africa and Latin America, states from Nigeria to Chile, Mozambique to Peru, and pro-democracy movements throughout the third world, have succeeded in ousting dictators, the result being the eventual establishment of new legal regimes that are becoming more in line with Western nations. The resultant democratization and ROL imperatives that are part of the new human rights message have been driven not only by nongovernmental organizations (NGOs), but also states and international organizations witnessing the emergence of global religious revivals growing at rapid speeds of expansion.

Accordingly, the explosive popularity of African Islamic revitalization and the spread of Shari’a during the 1990s were exasperated because of emerging ROL and democratization movements worldwide. For indeed, many different theories have


been advanced for the rise of radical global Islamic revivalism, the implementation innovations of Shari’a law\(^{24}\) in various regions around the world, and the global spread of democratization and respect for Rule of Law. Scholars writing about the crises of ethnic and religious revivalism and related violence between Muslims and Christians in various parts of Sub-Saharan Africa have looked to explain the allegedly systematic murders of Christians by Muslims as rooted in religious strategies to reclaim age-old practices, thereby defending Islamic power.\(^{25}\) In other words, the violence is believed by some to be rooted in Islamic attempts to reclaim political power in the face of perceived losses to increasing democratization initiatives. This narrative of the revival of Islam describes Islamic reclamation of the once powerful history of Muslim dominance in the modern world. It describes Islamic “revivals” as being mobilized within larger networks of what many adherents refer to as global Islamic “awakenings.” These “awakenings,” involve a return to “tradition” as a means of combating corruption and addressing various political injustices within the secular state. They are, therefore, legitimized by the introduction of Shari’a judicial sanctions.\(^{26}\) Such a revival of archaic religious traditions and moral codes represent a domain of transnational justice and retribution that is in keeping with the fringes of Islamic religious governance. As such, both the moral claims of human rights institutions and the moral claims of increasing fundamentalisms, represent struggles over power,

\(^{24}\) The Shari’a is a code of living for Muslims, and it “is considered to be a divine law, the authority of which depends on the revealed word of Allah, or God.” Bharathi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1964 (1995); see also Michael Gallagher, *The Many Faces of Sharia*, BBC NEWS, June 21, 2000, http://news.bbc.co.uk/2/hi/africa/621126.stm (describing Shari’a law and its worldwide following). Because it is a code for living, “[a] major feature of the Shari’a is that it draws no distinction between the religious and the secular, between legal, ethical, and moral questions, or between the public and private aspects of a Muslim’s life.” Venkatraman, *supra*, at 1964.


\(^{26}\) This process of the colonial mediation of customary and traditional courts has a comparative history of adhering to customary procedural rules with common law substantive rules. See JOHN MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 8-9 (Michie Co. 1994).
authority, and the force of law.

What we see with the Islamic revitalization movements, therefore, is a challenge to secular democracies and its related tenets of public morality as an expression of dissatisfaction with a political regime fundamentally aligned with an implicitly Christian system. Ultimately, this kind of narrative often attributes to religion a solely political function and considers the laws of nation states and international law fundamentally separate from religious practice. However, religious revivalisms must not be seen as separate from the democratization process; they must be seen as constitutive of them.

Accordingly, the struggle for Islamic sovereignty is deeply connected to the role of globalization in Islamic "fundamentalism." The successful 1979 revolution of the Iranian people against the Pahlavi dynasty led to the emergence of an Islamic government under the leadership of the Ayatollah Khomeini in Iran. As is believed, this provided inspiration to Muslims globally who saw in Islam a viable alternative to both Communism and neo-liberal capitalism. In support of this unprecedented event, various groups in different parts of the world joined in the celebratory momentum, adopting the slogans of the Iranian revolution, including "neither east nor west, Islam only." Underlying these claims is an argument that the repercussions of worldwide globalization have been an arousal of cultural insecurity and uncertainty about identities and political control, further resulting in attempts to redefine Islamic practice.

In the Sub Saharan African state of Nigeria, a state not traditionally seen as Islamic, a similar wave of global Islam has engulfed the Nigerian North, leading to the implementation of the Islamic Shari’a penal code in twelve of Nigeria’s thirty-six states.

27. See MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans. 2001). Weber evaded the age-old debates about explicit religiosity and, instead, spoke of the fundamental tenets of Protestantism that has shaped the cultural logics of capitalism. Id. at 95-154. As thus, and in the West, the foundations of the modern state were structured around capitalist exchange and conceptions of value that privileged the cultural logics of Christianity at the determinant of other religious approaches. Id. at 3-12.


30. Nmehielle, supra note 18, at 731; see also Nigerian Muslims Welcome Sharia Law,
The implementation of Islamic criminal law in the Northern states has not been without controversy; the controversies have been tied to challenges over governance, resources, and the basis of the authority of different forms of rule.\(^a\)

One approach to examining the growth of this form of Islamic revivalism in the Nigerian federation is that the nation is getting more decentralized, and part of the decentralization is taking the form of cultural self-determination.\(^b\) Another explanation for the rise of Shari'a has entailed seeing it as a political bargaining chip—that is, recognizing the ways which new norms of democratization have been pushed forward by a Christian president from the South. This is leading to the North's loss of political influence in the Nigerian federation. As a result, various Muslim political leaders are asserting new forms of autonomy and power. Alongside such inter-related developments have been parallel social movements. These movements have been influenced by the hegemonic secularization of human rights norms and are producing renewed alliances in the form of revivalist counter-movements toward the return to utopian possibilities. This explanation of the secular roots of religious revivalism is compelling in so far as religious inspired violence is related to hegemonic power in the life of the law.

Some scholars dismissive of the place of Islamic religion in public life have identified the problem as that of religious irrationality versus modern secular rationality. As such, the Islamic Shari'a is presented by various theorists as an antiquated expression of jurisprudence because it is seen as lacking key conceptions of gender equality and notions of agency, freedom, and autonomy central in liberal thought.\(^c\) By arguing that the development of such Islamic revivalist and religious movements will be replaced by an irreversible evolutionary process, and that a notion of secularism that is devoid of religion will prevail, such scholarly positions presume that not only is true individual freedom and autonomy absent from religious governance, but that

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\(^a\) BBC NEWS, Jan. 27, 2000, paras. 7-10, 14-15 (reporting controversies over the introduction of Shari'a in Kano and Niger).

\(^b\) Herman, supra note 2, at paras. 5-6; Nmehielle, supra note 18, at 732-33.

\(^c\) See generally id. at 739 (listing reasons proffered for the change to Islamic law in Northern Nigeria).

the secular is void of religiosity. This is far from true. Such suggestions of Islamic factional irrationality, underdevelopment, and agentive deficits are misleading and produce unsatisfactory understandings of the motivations of certain forms of fundamentalisms. What remains to be explored more fully, however, are ways in which Islamic Shari’a and international human rights law are similarly rooted in religious foundations. That is, how the conceptual fields related to defining violent actions as legitimate forms of “self-defense,” or as genocide, and therefore criminal are shaped by moral orders that are foundationally religious. In exploring the relationships between sanctioned and unsanctioned killing, just and unjust war, as well as the ways in which both secular and religious spheres of transnational knowledge and authority are shaping local conceptions of rights and popular public norms, I compare the conceptual universes and their juridical codes and punishments surrounding the classification of ethnic violence in Northern Nigeria. However, in thinking about how to define such forms of action in relation to the ways that everyday practices are being reshaped in locally relevant and transnational terms, I explore the play of hegemonic power in relation to the international codification of genocide—one of the four crimes under the subject matter jurisdiction of the International Criminal Court (ICC).34

In the Rome Statute that empowered the making of the ICC,35 the presumptions of criminal liability borrow from precedents in the aftermath of World War II.36 Additional understandings were drawn from the 1977 adoption of Protocol, Addition I to the Geneva Convention37 in order to prosecute grave breaches of the Convention.38 Poplarly referred to as the individualization of

36. See generally SCHABAS, supra note 34, at 5-8 (describing the Nuremberg and Tokyo trials as events leading up to the creation of the ICC); Jimmy Gurule, United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?, 35 CORNELL INT'L L.J. 1, 2-3 (2001-02) (noting the International Law Commission's study of the prosecution of persons charged with genocide in 1948).
38. See Geneva Convention for the Amelioration of the Condition of the Wounded
criminal responsibility, or command responsibility, the Rome Statute assigns responsibility to commanders and other superiors who participate in the commissioning or directing of crimes under the subject matter jurisdiction of the court.\textsuperscript{39} Despite long-standing legal conceptions of individual culpability for individual actions, this involves identifying individual agents who are in command of forces that commit genocide, despite a chain of command, as criminally liable.\textsuperscript{40} All that must be proven is that the individual provided the "means of a substantial step" toward the execution of that crime.\textsuperscript{41} By altering the role of the state as the final arbiter of justice, the statute supplements state adjudication functions with that of its international independent body—the ICC—through which cases under the subject matter jurisdiction of the court can be pursued.\textsuperscript{42}

In section five, I turn to an analysis of the Islamic political crime known as \textit{Al Khuruj}\textsuperscript{43} in order to examine how different modes of calculating homicide may be rationalized in different
spheres of meaning and authority. In relation to differences in criminal liability, I detail the ways that the concept of intention is also useful for exploring differences in culpability. Through this examination, and by comparing the notion of intention used to delineate the crime of genocide to the notion of Al Khuruj, I hope to provoke considerations concerning how various definitions of crimes, formulated for different political purposes, are used in the regulation and punishment of violence, though not necessarily in the eradication of it. Here, although particular acts of violent aggression may be classified by Western jurisprudence as well as international criminal law as "crimes," accompanying some forms of violence are classifications of those acts as obligations committed toward the defense of political goals, and on behalf of a religious leader. The goal, however, is not a comparative one for the sake of producing a relativist analysis of violence. Rather, by exploring seeming differences in doctrinal spheres of "religious" and "Western" legal thought, I highlight the continuing relevance of critically assessing how we understand political rebellions in relation to how the developing corpus of international criminal law is redefining such forms of rebellion in relation to crimes such as genocide. However, such approaches to a comparative inquiry do not require that we presume epistemological relativism as the way to accept all kinds of violence as foundationally legitimate in their own spheres of meaning.

Epistemological relativism asserts that different cultural groupings have varied cognitive senses of the world that produce different practices that are not comparable. It has been used to critique advocates of Western approaches to rationality, however, the drawback with this approach is its suggestion that each cultural practice exists as separate and unaffected by each other and their larger relations of power. In general, relativism has been identified as an argument that purports that all approaches are equally valid or that all moralities are equally good and suggests that all belief systems are true.

Anthropologist Mark Whitaker has argued that there exists three distinct, though overlapping, variations of relativisms: epistemological (or also called cognitive relativism), conventional
cultural relativism, and ethical relativism. In the realm of conventional cultural relativism, most social comparativists would agree that behavioral variations should be explored within the frameworks within which they are expressed. It represents a relatively conservative, though popular anthropological approach to human variation, but that ultimately represents more of what Whittaker refers to as a disciplinary “common sense” than a proper philosophical position. Critics of cultural relativism, however, have dismissed such approaches, suggesting that it is pernicious because it undermines the improvement of the human condition.

The third, ethical relativism, represents the assertion that universal and cross-cultural judgments are not useful because moral values are products of different cultural historical developments over time. Popular in the 1930s when functionalism was predominant in British social and American cultural anthropology, this type of relativism ranging from intercultural tolerance to ethical compartmentalization, shaped the belief that social ethical practices have taken shape as a result of social structural formations and, as such, serve a critical function with which we should not infer. Though all three forms of relativisms have their limitations, they represent an effort in the social sciences, and especially anthropology, to address relationships between culture, difference, and how to measure and frame methodological approaches that are appropriately suited for comparing complex social dynamics.

In this regard, I respond to Professor Khaled Abou El Fadl’s interrogation into whether the legal order that characterizes dissidents should be distinguished from that of the common criminal and instead recast the question by producing an understanding of the crime of genocide in relation to its alliance with the secular statecraft and larger issues of hegemony and power. However, by recasting the focus from the relative epistemological politics of difference in classifying crime to that of the play of power involved in making some spheres of knowledge and power dominant over others, I consider the hegemonic control of the state over the codification, interpretation, and production of the meaning of justified violent action. The goal is to examine the challenges of international criminal law by showing that both the

religious and legal codes that shape the meanings of genocide are not useful in simple relativist frames. Rather, they are fundamentally intertwined and both have been used to mobilize related practices of democratically aligned power. And yet, despite this, it has been the secular state that in liberal democracies of the West that—through a grammar of equal rights, civil liberties, and individual entitlements—has maintained hegemonic control over the meanings of justice. The aforementioned point of departure presumes that nation states have not become irrelevant and that we are not living in a post-nationalist era but that the refinement of the democratic order over the past century has not been for the purpose of rendering secondary the power of the secular state. The internationalization of criminal law and the expansion of its jurisdictional reach reflect attempts by state actors to comply with international treaties and agreements as well as rights-based domestic pressures. For despite the drive toward global governance, whether through international institutions or state-based activities, we shall see that the modern statecraft, with its historically religious influences, continues to define, discipline, control, and regulate various categories of crime, their meanings, and their punishment.

II. INTERNATIONAL CRIMINAL LAW AND THE AUTHORITY OF THE STATECRAFT

The ICC was formed with the signatory power of 120 nation states, and the eventual ratification of 60 of the 120.\(^4\) With its formation, the Court became the first permanent international body able to gain the power to adjudicate individuals for four categories of offenses: war crimes, the crime of genocide, crimes against humanity, and the crime of aggression (when defined).\(^5\) Its formation was connected to the need to end impunity made possible by gaps in national regulation and to respond to atrocities in a post-war climate.\(^6\) As such, it has the power to investigate and prosecute individuals when they are alleged to have committed the “most serious crimes of concern to the international community as


\(^{47}\) SCHABAS, supra note 34, at 18.

\(^{48}\) Rome Statute, supra note 35, at art. 5(1).

\(^{49}\) Id. at Preamble.
With the interactions between and influences of state delegates, members of hundreds of Human Rights Nongovernmental Organizations, academics, lawyers, and concerned citizens, on July 17, 1998, during the United Nations Diplomatic Conference of Plenipotentiaries in Rome, Italy, 120 of the world’s nation states authorized the formation of the ICC through the signing of the Rome Statute.\footnote{SCHABAS, supra note 34, at 18; Gurule, supra note 36, at 2.} As such, the ICC gained its authority through signatory powers of national governments that supported the adoption of a treaty known as the Rome Statute for the International Criminal Court.\footnote{See id. at 20.} The result was a comprehensive text that established the ICC and determined its composition and function.\footnote{The text of the Rome Statute for the ICC contains a preamble and 128 articles, which are grouped into 13 sections. It delineates the court's subject matter and jurisdiction, both temporally and substantively; it codifies the crimes and appropriate sentences. Procedural rules are set forth and means are noted for the development of procedural norms in conjunction with the general principles of criminal law that are to serve in the operation of the ICC. See Rome Statute, supra note 35.}

On July 1, 2001, the ICC entered into force with the ratification of the treaty by 60 national states;\footnote{See id. at 20-21.} and by April 2003 when the Assembly elected a Prosecutor and 18 judges, it signaled the beginning of a new phase in the development of the supranational reach of criminal law.\footnote{These include all the members of the European Union, and all of NATO, with the exception of Turkey and the United States. See Multilateral treaties deposited with the U.N. Secretary-General: Ratification Status of the Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited March 27, 2006).} As of August 2005, the Rome Statute, an international treaty now in force, has succeeded in claiming membership of over one hundred nation states, known as “state parties”—all states which have both signed and ratified the Rome Statute—giving it jurisdiction over crimes within the subject matter jurisdiction of the court and committed on the territory of a signatory state.\footnote{Rome Statute, supra note 35, at arts. 5, 12; see also SCHABAS, supra note 34, at 78. Under the Clinton administration, the United States signed and became a state party to the Rome Statute; the signature and its party status were later rescinded by President George W. Bush. SCHABAS, supra, at 21.} In other words, it is believed that

50. Id.
51. SCHABAS, supra note 34, at 18; Gurule, supra note 36, at 2.
52. See id. at 20.
53. See id. at 20-21.
54. SCHABAS, supra note 34, at 19.
55. Id. at 20-21.
56. These include all the members of the European Union, and all of NATO, with the exception of Turkey and the United States. See Multilateral treaties deposited with the U.N. Secretary-General: Ratification Status of the Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited March 27, 2006).
57. Rome Statute, supra note 35, at arts. 5, 12; see also SCHABAS, supra note 34, at 78.
those who have both signed and ratified the statute have placed themselves under the jurisdiction of the ICC,\textsuperscript{58} imputing large-scale atrocities committed by individuals—especially high-ranking officials—under the jurisdiction of the court.\textsuperscript{59} The coming into force of the ICC, with its jurisdictional reach into both the life of state parties and non-state parties, poses a challenge to former conceptions of sovereignty, even as it states, “[recall] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”\textsuperscript{60} In its preamble, the Statute further establishes the domain of the international, rather than the national, as the unit of humanitarian concern, by “[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”\textsuperscript{61} As such, the ICC is setting new norms for the enforcement of what constitutes particular forms of “crime” and what should be the jurisdictional reach of extra-national juridical bodies.

Practically, however, the court is described as one constructed to address the many gaps in national regulations that currently characterize the limitations of the enforcement of law outside the jurisdiction of national statutes.\textsuperscript{62} The jurisprudence of the ICC is described by not only state officials but the networks of thousands of NGO representatives as bringing criminal law to a level of international attention that will revolutionize the ways that people understand states’ responsibility to “humanity” as well as transform conventional conceptions of the codification of crime and determinants of criminal evidence.\textsuperscript{63}

\textsuperscript{58} Rome Statute, \textit{supra} note 35, at arts. 5, 12. \textit{See also} SCHABAS, \textit{supra} note 34, at 78; Gurule, \textit{supra} note 36, at 12.

\textsuperscript{59} Rome Statute, \textit{supra} note 35, at arts. 5. \textit{See also} SCHABAS, \textit{supra} note 34, at 26. Clauses of immunity have in the past protected governmental officials from being prosecuted for crimes against humanity committed while in office. The International Law Commission structured the Rome Statute in such a way that eradicated protections against immunity. Rome Statute, \textit{supra}, at art. 27.

\textsuperscript{60} Rome Statute, \textit{supra} note 35, at Preamble.

\textsuperscript{61} \textit{Id}.

\textsuperscript{62} See SCHABAS, \textit{supra} note 34, at 14.

\textsuperscript{63} \textit{Id}. at 25.
III. CRIMES UNDER THE ROME STATUTE

A. The Crime of Genocide

The Rome Statute provides for the definition of the crime of genocide; however, the definition of the crime of genocide is similar to the definition in Article 2 of the Genocide Convention. This definition can also be found in the ILC Draft Code Against the Peace and Security of Mankind, and the Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda.

B. Crimes Against Humanity

A crime against humanity is defined in the Rome Statute as a crime "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The crimes against humanity have been recognized in international instruments as part of international law since World War II when it was popularly used at Nuremberg. Today, the definition of crimes against humanity in Article 7 of the Rome Statute extends beyond that which was contained in the Nuremberg Charter. It is used to describe multiple acts of inhumanity "committed as part of a widespread or systematic attack directed against a civilian population, in peacetime or wartime."
The Statute identifies eleven acts that could be classified as crimes against humanity. They include murder\(^{72}\); extermination\(^{73}\); enslavement\(^{74}\); deportation or forcible transfer of a population\(^{75}\); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law\(^{76}\); torture\(^{77}\); rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity\(^{78}\); persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other universally recognized grounds\(^{79}\); enforced disappearance of persons\(^{80}\); apartheid\(^{81}\); and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

C. War Crimes

War crimes are traditionally defined as violations of the most fundamental laws and customs of war.\(^{82}\) There are four categories of war crimes outlined in Article 8 of the Rome Statute.\(^{83}\) As noted in the Rome Statute: "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."\(^{84}\) War crimes constitute a traditional category of international crimes and the existence of universal jurisdiction over war crimes is generally

\(^{72}\) *Id.* at art.7(1) (a).
\(^{73}\) *Id.* at art.7(1) (b).
\(^{74}\) *Id.* at art.7 (1) (c).
\(^{75}\) *Id.* at art.7 (1) (d).
\(^{76}\) *Id.* at art.7 (1) (e).
\(^{77}\) *Id.* at art.7 (1) (f).
\(^{78}\) *Id.* at art.7 (1) (g).
\(^{79}\) *Id.* at art.7 (1) (h).
\(^{80}\) *Id.* at art.7 (1) (i).
\(^{81}\) *Id.* at art.7 (1) (j).
\(^{82}\) *Id.* at art.7 (1) (k).
\(^{85}\) *Id.* at art.8.
recognized. War crimes are grave breaches under the 1949 Geneva Conventions which apply to international armed conflict, other serious violations of the laws and customs applicable to international armed conflict, violations of Article 3 common to the Geneva Conventions which applies to non-international armed conflict and other serious violations of laws and customs applicable in non-international armed conflict. Traditionally, war crimes have been regarded as serious violations of the law applicable to international armed conflict. Today, however, the Rome Statute is considered to have advanced international humanitarian law by including in the definition of war crimes serious violations of international humanitarian law committed during non-international armed conflicts. This definition includes specific sexual and gender-based offences, conscription and enlistment of children under fifteen and attacks against humanitarian personnel as war crimes.

D. The Crime of Aggression

During negotiations for the establishment of the ICC, there was general agreement that the Court would only have jurisdiction if national courts were unable or unwilling to deal with the alleged crime in a fair way. At that time, aggression was identified as one of the four core crimes and specifically subject to the provision under article 5(2) of the Rome Statute. However, in the absence of an agreement on what constitutes the crime of aggression, the ICC jurisdiction is still not operable. To date, the Rome Statute is “consistent with the relevant provisions of the Charter of the United Nations” and amendments to the definitions adopted at Rome are expected to be considered at a review conference seven

86. SCHABAS, supra note 34, at 51-54.
87. Rome Statute, supra note 35, at art.8 (2) (a).
88. Id. at art. 8 (2) (b).
89. Id. at art. 8 (2) (c).
90. Id. at art.8 (2) (d).
91. SCHABAS, supra note 34, at 53.
92. Id. at 55-56.
93. Rome Statute, supra note 35, at art.8 (2) (b).
94. Id. at art.8 (2) (b) (xxvi).
95. Id. at art.8 (2) (b) (xxiv).
96. SCHABAS, supra note 34, at 14; Gurule, supra note 36, at 6-7.
98. SCHABAS, supra note 34, at 32.
99. Id.
years after the entry into force of the treaty.\textsuperscript{100}

The codification of the aforementioned crimes of the ICC represents a particular modernity of the secular state, especially in relation to the hegemonic presence of the International Rule of Law. However, in thinking about the development of the modern state and the rights and obligations of the individual since the nineteenth century, tracing a genealogy of the central principles of democracy, law, and constitutionalism that shaped contemporary international law is instructive in demonstrating that the supremacy of individual rights is far from natural or universal. Rather, it represents the religious roots of the human as sacred and the development of the accompanying language of rights in a context of coercive Western power.

\section*{IV. RELIGIOUS AND SECULAR FORMATIONS}

The ancestors of what is today known as international human rights in the modern West took shape within historically specific nineteenth century conceptions of human sanctity and the moral authority of the state as the arbiter of justice. Beginning with the idea of Natural Law in Latin Christendom which located rules of sociality, creation, and the proceeds of that creation in a "fixed and invariable relation,"\textsuperscript{101} the ideational antecedents for modern human rights first appeared as a form of political contestation closely linked to the volatility of property in relation to the need to protect one's natural right from the arbitrariness of government.\textsuperscript{102} For the modern European nation state involved the monopoly of violence and instruments of coercion and, as a result, the development of a culture of rights took shape as a response to an abusive state.

During this early period, however, the distinction between secular laws and laws that derived their authority from spiritual/religious realms did not produce a separation of the secular as the economy, law, politics, and education from the spiritual realm of the Church.\textsuperscript{103} Instead, the distinction between the religious and the secular changed as a result of the sixteenth century Reformation that followed the breakup of the medieval

\textsuperscript{100} Id. at 34.
\textsuperscript{102} Id. at 297-299.
\textsuperscript{103} See TALAL ASAD, GENEALOGIES OF RELIGION 27 (1993).
Church. Prior to the mid-seventeenth century, Christian values espoused in both Western and Eastern Europe not only constrained those in power but also obliged those over whom power was exercised to comply. Warring between Catholic and Protestant sectors was rampant during this period and religious unity was seemingly impossible since religious toleration was not a widely espoused value in the development of the early European church. Religious conflict had proved to be destructive to the social order since the imposition of religious faith by one religious party on another led to highly volatile enterprise.

By the mid-seventeenth century in Western Europe, it was recognized by various leaders that for social peace to be restored, religion would have to be set aside and a new basis for rule established. It was the signing of the Peace of Westphalia, a treaty signed in Europe intended to end religious wars, which highlighted the birth of modern secular state. This new basis for modern governance—a basis of authority shaped by the natural authority of law—emphasized the centrality of the individual conscience in matters of faith. As Talal Asad has outlined in his explication of the development of the modern state, during the period in which religious freedom and toleration was becoming the dominant value, it became important to develop particular morals that would be tied to the political order of the secular state. These conceptions were driven by the need to regulate citizens to obey the law and respect the authority of civil government.


105. This theory of the religious roots of secularism represents the position of Wolfhart Pannenberg. Wolfhart Pannenberg, Christianity and the West: Ambiguous Past, Uncertain Future, 48 First Things: The Journal of Religion, Culture, and Public Life 18, paras. 9, 13 (1994). According to Professor Pannenberg, “Intolerant dogmatism was probably the most disastrous sin of traditional Christianity from the early centuries up to the beginnings of modern times.” Id. at para. 9. See generally E. Frank Tupper, The Theology of Wolfhart Pannenberg (Westminster Press, 1973) (examining the life and theology of Professor Pannenberg).

106. Wolfhart Pannenberg, supra note 105, at 18, paras. 21, 23.


110. See Asad, supra note 103, at 206-207.

111. See R.E. Allen, Socrates and Legal Obligation 103-05, 111-12 (1980).
However, it became clear that in order for people to make determinations about what was moral, it was important for morality to be understood as legitimate.

In Western Europe, new conceptions of legitimatizing government were developed with the notion of representative government. As a pragmatic notion by which political and social order was based, it developed as the foundation of the modern secular state. Representative government was then followed by the conception of human nature around which systems of natural law and natural morality took shape through the advancement of a natural theory of government. The Enlightenment period and the development of science contributed to the religious idea of natural government and law by fueling the idea of the eternal laws of nature. This influenced Thomas Hobbes' conception of the social contract theory in which he argued that in order to maintain individual freedom within the limits of reason and law, there was a necessity for a civil government that would secure individual survival according to the natural freedom of individuals. Using the cultural concept of human nature as the foundation of the political and legal order, the autonomy of secular society was defined as that which was independent from the influence of religious tradition.

However, what remains critical to explore in the context of the codification of the law and its different influences is to reiterate the formation of the modern secular state in relation to the origins of modern capitalism as the structural foundation of the sphere known as the secular. Max Weber's articulation of the origins of modern capitalism is useful for exploring how the political, economic, and cultural came together to privilege

113. See id. at 364-374.
114. See id. at 216, 364-374.
116. See Asad, supra note 103, at 23-25; see also Asad, supra, at 229.
Christianity within modern secularism.\textsuperscript{118} His account of modern capitalism was developed to demonstrate that it was not simply economic development that shaped the capitalist economy, but a cultural conception of appropriate human conduct that took shape through the Calvinist notion of predestination.\textsuperscript{119} Weber demonstrated how the impact of the Christian sect of Calvinism shaped the cultural logics of modern Western Capitalism.\textsuperscript{120} He explored how Calvin's teachings about God's eternity and the possibility of being among the chosen few provided a powerful motivation by which people worked and engaged in conscientious responsibilities.\textsuperscript{121} This form of rationality of work and values was spiritually Christian and though it was not a starting place in public articulations of government, it worked through a psycho-spiritual and cultural sphere that constituted the principles of capitalist logic, though represented as independent of it.\textsuperscript{122} Seen in this way, the modern democratic articulation of the separation between religion and government was shaped by the long-term transformation of Christian values into capitalist ones. As such, a radical break from Christianity was not needed since human nature rather than religion was eventually transformed into secular beliefs.\textsuperscript{123}

The consequent relationship between Christianity and so-called secular law followed since the ideas about murder, adultery, morality, obedience, and freedom emerged from the foundational texts of the Old Testament, as well as the New Testament (which is said to have been derived from the teachings of Jesus Christ). One such example—the notion that all humans are born to be free and that those forms of freedom should be adhered to by others—originated in the passages of John 8:36 and the disciple Paul's letter in Second Corinthians 3:17.\textsuperscript{124} In these passages, the Bible taught that every human being was created to enjoy the freedom

\textsuperscript{119} See WEBER, id., at 55-80. Indeed, "Capitalism was [considered] the social counterpart to Calvinist theology." Id. at 2.
\textsuperscript{120} See id. at 64-80.
\textsuperscript{121} See id. at 69, 71, 74.
\textsuperscript{122} See id. at 56-80.
\textsuperscript{124} John 8:36 (King James) ("If the Son therefore shall make you free, ye shall be free indeed."); 2 Corinthians 3:17 (King James) ("Now the Lord is that Spirit: and where the Spirit of the Lord is, there is liberty.").
that comes from communion with God, but that it is only in Christ, through redemption from sin and death, that such freedom is fully realized.

In its modern incarnation, John Locke located freedom as the natural condition of the human, the place of good. In departing from the Reformation conception of freedom, Locke argued that freedom would allow for the pursuit of “pure freedom,” and as such, alongside reason it was positively related to law. Today, conceptualizations of freedom are often connected not to the moral good of freedom, but to the presumed assumption of freedom. However, it was the formation of the notion of the self, Locke argued, that limited the contingent character of the individual through a legal concept of the person. This concept of the person existed alongside a religious conception of the soul in which it was the soul that needed protection from the potentialities of everlasting damnation, as articulated in Christian doctrine of Revelation. This interest in the potential condemnation of the soul has resonances in the development of Western principles of criminal law in which it was not only the soul of the guilty, but also the soul of jurors as well as judges, that it was necessary to protect.

The Western model of the European secular state was linked to the medieval version of human rights that drew on Aristotelian thought. Aristotle identified a “natural right” as a right by birth, as opposed to one accorded by convention. This idea of natural right emerged out of feudal legacy and made it plausible for seventeenth-century theorists, such as John Locke, to invoke natural rights as a principle of individual entitlement that could be used against the relatively lawless structures of the early modern state. They also made it possible, in most liberal democracies, perhaps inevitable, to separate the autonomy of secular society from the influence of church and religious tradition. From the

125. See LOCKE, supra note 112, at 94-96.
126. LOCKE, supra note 112, at 94-96.
127. See, e.g., LOCKE, supra note 112, at 287 (“[E]very man has a Property in his own Person. This no Body has any Right to but himself.”).
128. See Revelation 1:1 – 22:21 (King James) (the development of the last days and the concern with the soul in the Holy Bible). For genealogical exploration, see James Q. Whitman, The Origins of “Reasonable Doubt” (Yale Law Sch. Faculty Scholarship Series paper No. 1, 2005).
129. See LOCKE, supra note 112, at 225, 229, 248; see generally LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953) (discussing the evolution of “natural right” from Aristotle, to Locke, to Rousseau).
130. See JEAN-JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY,
development of the reasonable doubt clause as a protection for jurors from the potentialities of everlasting damnation of their souls for the wrongful conviction of an innocent man, to, what we shall see in the next section, the codification of criminal law, its conceptions of intention, thresholds for proof and determinants of individual motives,\textsuperscript{131} the formation of modern common law, like the formation of Islamic Shari’a jurisprudence, has its foundational principles in the religious roots of individual salvation of the soul. Such notions of intention and the articulation of individual responsibility are similarly connected to the morality of personhood. They diverge in the transformation of relevant modern authority.

V. CODIFICATION OF GENOCIDE AND CULPABILITY IN THE ROME STATUTE FOR THE ICC

All three schools of jurisprudence—Islamic, Western European Canon law, and the Common Law tradition—have accumulated large bodies of case law on political rebellions and forms of widespread ethnic killing; however, the treatment of the basis for intention varies. In Western jurisprudence some but not all crimes require a general proof of intent.\textsuperscript{132} The measures and assumptions surrounding the notion of intention vary, as do the measures of what forms of intention constitute culpability for criminal action.\textsuperscript{133} A persistent dispute in American criminal law has centered on the relevance of a defendant’s motive in relation to the extent to which they are criminally liable.\textsuperscript{134} At the heart of the debate is the question concerning whether what is seen as a permissible motive should exculpate someone who has committed a criminal act. The strict interpretation of American criminal law is that proof of intent is rarely made explicit since the motive is seen as irrelevant to the liability of the crime.\textsuperscript{135} Instead, culpability is deduced from the criminal act and the assumption is that the


\textsuperscript{132} \textit{Id.} at 318.

\textsuperscript{133} \textit{Id.} at 317-335.


\textsuperscript{135} Binder \textit{supra} note 134, at 65; Kaufman, \textit{supra} note 131, at 319-321.
consequences of the action were intended.\textsuperscript{136}

In the realm of international criminal law regarding abuses by high-level state actors distinguished by "intentional and knowing behavior," the Rome Statute for the ICC requires conceptions of intent that are adequate to gain prosecution of commanders either for ordering a crime or for negligence in failing to prevent it.\textsuperscript{137} The crime of genocide, for example, borrows from the general principles of Euro-American law and outlines two levels of intent—general and specific.\textsuperscript{138}

General intent denotes crimes for which no measure is established.\textsuperscript{139} All that must be proven is the commission of the act by the accused party.\textsuperscript{140} The authority of proof is drawn from the presumed power of the treaty document. Specific intent (\textit{dolus specialis}), a popular concept in Roman-continent law, implies that the perpetrator expressly sought to produce the criminal action.\textsuperscript{141} In the international crime allegation of genocide, where genocide refers to particular homicidal acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"\textsuperscript{4} finding guilt involves proof of a more precise, specific intent, which links intention to the mental-psychological

\begin{itemize}
  \item \textsuperscript{136} Professor Whitley Kaufman has shown that there has been significant criticism against this doctrine since on one hand some critics have felt that judges do tend to consider motive. By showing the mischaracterization of the role of motive, he attempts to uphold the orthodox assumptions that motive is irrelevant. Kaufman, \textit{supra} note 131, at 324-333.
  \item \textsuperscript{137} Rome Statute, \textit{supra} note 35, at 28 (a).
  \item \textsuperscript{138} SCHABAS, \textit{supra} note 34, at 38 ("What sets genocide apart from crimes against humanity and war crimes is that the act ... must be committed with the specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such."); see also 21 AM. JUR. 2D Criminal Law §§ 127-128.
  \item \textsuperscript{139} \textit{Id.} at § 127.
  \item \textsuperscript{140} \textit{Id.} at § 127.
  \item \textsuperscript{141} Specific intent is the "intent to accomplish the precise criminal act that one is later charged with." BLACK'S LAW DICTIONARY 826 (8th ed., 2004). The most common usage of "specific intent" is to designate a special mental element that is required above and beyond any mental state required with respect to the \textit{actus reus} of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was an "intent to deprive the possessor of [the property] permanently." \textit{Id.} at 896. Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted "with the intent to commit a felony therein." \textit{Id.} at 211. Ultimately, a defendant must not only intend the act charged but also intend to violate law. \textit{Id.} at 825.
  \item \textsuperscript{142} Rome Statute, \textit{supra} note 35, at art. 6.
\end{itemize}
knowledge element (known as *mens rea*) with the physical performance of the wrongful act/crime (known as *actus reus*, which is Latin for "bad act"). Therefore, to be guilty of the crime of genocide in international law, one must show proof of specific intent, which takes into account both the mens rea and actus reus, to allow for a calculation of intention that is more precise with reference to the consequence of carrying out one of the enumerated crimes in Article II of the Genocide Convention or Article 6 of the Rome Statute.

Culpability, and how it is designated, is another important principle that is central to the interpretation of intent in international criminal law. Under common law, it is well established that conspiracy is defined as the agreement of two or more persons to commit a crime. In most cases, it does not require the actual commission of the crime itself. In the Napoleonic tradition that has influenced Canon law, conspiracy tends to be viewed as participation in the commission of or attempt to commit the agreed-upon crime. Of late, with the development of international criminal law, both European and American principles of law and authority have been used to determine culpability in devising the new internationalist norms. Borrowing from Napoleonic and Canon law, the Rome Statute

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143. *Mens rea*—intent—means that a person knowingly engages in conduct where they mean to cause the consequence or are aware that the consequence will occur as a result of their actions. See *BLACK'S LAW DICTIONARY* 825, 1006 (8th ed., 2004).

144. See *id.* at 826.

145. The reality is that where genocide is concerned, often the principle actor, the person who carries out the murder lacks genocidal intent. Instead, the tendency is that subordinates are incited by leaders who possess the intent to "destroy the group, in whole or in part." The leader, as accomplice, possesses the intent required in article 6 of the Rome Statute. Thus, according to international criminal law, it is likely that the said party would be found culpable, despite the fact that the subordinate lacks special intent. Therefore, the principle offenders would be guilty of murder, not genocide, because they were unaware of genocidal intent. In an attempt to classify criminal action, the prosecution must look for narrowly tailored conduct and the intended results of action. See *SCHABAS, supra* note 34, at 29-30.

146. *SCHABAS, supra* note 34, at 38. The elements of the crime of genocide are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group. *Rome Statute, supra* note 35, at art. 6.

147. *SCHABAS, supra* note 34, at 103.

148. *Id.*

149. *Id.*
requires an "action that commences execution by means of a substantial step." In other words, it requires the commission of an overt act as evidence of the conspiracy, but imposes no requirement for the commission of the crime itself. Yet, because the architects of the Statute were most interested in linking commanders to crimes committed by their subordinates, in proving culpability the principle of command responsibility has been used to establish culpability, requiring proof of guilt "beyond a reasonable doubt."

On the other hand, questions of liability that relate to defending a crime seen as a political crime (Al Khuruj) varies in various Nigerian Islamic juror circles. Unlike the application of command responsibility in the Rome Statute for the ICC, in Islamic Shari'a theories of culpability in various northern Nigerian contexts, the orthodox reasoning tends to relate it to the obligation and duty to protect Islam; orthodox approaches to guilt tend to be based on a determination of intentionality. As we shall see below, despite the religious roots of criminal law that shaped the formation of international criminal law, the religious fields of authority in both spheres of jurisprudence are politically different. The difference, however, is not based on the false construct of secularism and non-secularism. It is based on a difference in the authority of law. That is, a cultural conception that the source of Islamic law begins with the authority of the Prophet Muhammad as the final Prophet of God, compared to the international law alliances with the state and the role of the statute.

150. Rome Statute, supra note 35, at art. 25 (3) (f).
151. SCHABAS, supra note 34, at 105.
152. SCHABAS, supra note 34, at 103. However, in the absence of proof that actual orders were given, the Statute outlines two approaches. The first undermines the common law presumption of innocence by presuming that the commander ordered his/her subordinate to commit the crimes. The second is to prosecute the commander not for ordering the commission of the crime, but for negligence in failing to prevent it from happening under the Rome Statute, Art. 28. Id.; see also Gurule, supra note 36, at 40-41.
153. This is derived from a range of orthodox interpretations in which the following Qu'ranic verses were cited by Northern Nigerian jurors: "And fight in the way of Allah against those who fight against you, but be not aggressive surely Allah loves not the aggressors." QUR'AN, supra note 7, at 2:190; "And if they break their oaths after their agreement and revile your religion, then fight the leaders of disbelief." QUR'AN, supra, at 9:12; see JACKSON, supra note 43, at 200-202 (discussing "intention").
For millions of Muslims worldwide, the belief in Allah informs cultural practices, as well as the structure of political institutions, judiciaries, and the principles that inform everyday notions of justice, duty, and obligations. Among those who recognize the authority of Islam, it is because they accept that between 571 A.D. and his death in 632 A.D., the Prophet Muhammad served as a conduit of Allah (God) by documenting his principles in the Holy Qur'an. As such, the fundamental principles depart from conceptions of the rights-bearing-citizen whose duties are formulated in relation to the state. Instead, for various members of Islamic faith communities, the Shari'a as a form of Islamic law offers the possibility of adopting particular tenets of Islamic faith as the basis for governance. In Northern Nigerian contexts, like the majority of Islamic states internationally, it is the Shari'a criminal codes, principally informed by the Qur'an and varied interpretations of it, that provides the legal rules by which Muslims are expected to live. These are seen as being laid down in one of the Prophet Muhammad's hadith. As such, belief in the acceptance of God requires the acceptance of the duties and obligations revealed in Muhammad's message.

The fundamental duties, practices, and beliefs are understood through what is referred to as the "five pillars of Islam." They are: (1) the shahada, the profession of faith through testimony declaring, "there is no God but Allah and . . . Muhammad is the messenger of Allah"; (2) salat, the performance of the ritual prayer conducted at five appointed times of the day—dawn, midday, afternoon, sunset, and evening; (3) zakat, the mandatory donation to charity comes with an obligation to share with the less fortunate; (4) fasting during the month of Ramadan with the goal

155. Lewis, supra note 9, at 11-12.
157. Lewis, supra note 9, at 25.
158. Id.
of abstaining from eating, drinking, and engaging in sexual activity; and (5) hajj, the obligation of making the pilgrimage to Mecca at least once in a lifetime. And though these five pillars represent religious obligations of Islamic practice as well as outline the key tenets in accordance with which human relationships with "God" are sustained, they do not delineate a comprehensive list of spiritual duties, beliefs, and standards of conduct that are required. Instead, there exists yet another comprehensive list of obligations that the Muslim faithful are expected to undertake in order to show their obedience to God. These obligations are both spiritual and legal.

The spiritual obligations reflect attitudes and states of faith; the legal obligations reflect rules of conduct and codes of law that require a manifestation of the proper spiritual attitude exhibited through practice. The latter outline injunctions for social justice, rules governing daily life, and the means for gaining individual peace and dignity. The list of laws with enforcement powers is far more limited. In this light, many obligations are actually spiritual and moral obligations but, in legal terms, they represent codes of social action and rules of conduct according to which a Muslim is expected to live.

In questioning whether political dissidents should be distinguished from "common criminals," Khaled Abou El Fadl outlines three sets of moral and spiritual obligations. The first is a set of moral and spiritual obligations that reflect the intrinsic right and duty of the Islamic faithful to serve Allah and the community. It represents, (1) duties of action that he suggests might be seen as legal duties but as I explain, are actually moral and spiritual duties held by various Muslims enacted politically to protect the name of the Prophet; (2) the call on the faithful to form alliances with goodness and protest evil; and (3) the duty to obey Allah's orders. Abou El Fadl details the invocation of all three Islamic core principles in accordance with which legal and moral duties are popularly constituted. These duties are based not only on a

160. Cornell, supra note 159, at 77-87; see also Lewis, supra note 9, at 25. OXFORD DICTIONARY OF ISLAM, supra note 6, at 286, 275, 345, 103-04 (defining shahada, salat, zakah, and hajj, respectively).
161. See Cornell, supra note 159, at 87. For instance, in addition to the "five pillars of Islam," there are also "six pillars of faith." Id.
163. See id. at 10-12.
reverence for the sacredness of life alone, but also refer to the mystical continuity of life, even in "death" (life after death). 164

Popular Nigerian Islamic beliefs often locate the mortality of the body as merely a stage of life itself. 165 In this regard, the first principle of duty points to the importance of the allegiance to God and is expected to be exercised in relation to God first and the state second. The more orthodox interpretation, however, involves a call to Muslims to obey and support the ruler and places a premium on the sanctity of unity and the duty of implementing and protecting Islamic order, including the call to "kill contesters to the ruler's power." 166 Consistent with this principle are responsibilities to a Supreme Being. As the Prophet said, "if people see an oppressor and they do not enjoin him [or her] then God will punish all of them." 167 This view of duty to a Supreme antagonizes fundamental principles of the democratically acting liberal subject, who is endowed by the state with positive and negative rights. Instead, it focuses on how the individual is to be judged (or punished because of inactivity as lack of resistance). Which is to say that one interpretation is that the subject who chooses not to exercise the obligation to act is in violation of their moral allegiance to God.

The second principle, to form alliances with goodness and protest evil, places a premium on the individual's duty to enjoin good and forbid evil. 168 The third principle, to obey God's orders, is related to the second principle in that it also points to duties of obedience. 169 Following the Qur'an and Professor Abou El Fadl's explication, if devotees are engaged in an argument, the first course of action is to:

[M]ake ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the other, then fight ye (all) against the one that transgresses until it complies with the command of God. But if it complies, then make peace between them

164. This is the basic principle of everlasting life of the soul after the death of the body found in not only Islam but also Christianity, Hinduism, and Buddhism. See LIFE AFTER DEATH IN WORLD RELIGIONS (Harold Coward, ed., Orbis books 1997).
165. Here the modern concept of death and one strand of Islamic concepts of death can be argued as being divergent.
167. Id. at 11.
168. Id. at 11.
with justice, and be fair: For God loves those who are fair (and just). The believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers. And fear God, that ye may receive mercy.\textsuperscript{170}

This requirement of obedience and retribution highlights the contingency of peace and the primacy of godly authority.

Abou El Fadl details the underlying philosophies that shape these principles of enjoining good and forbidding evil through obedience.\textsuperscript{171} Examining disjunctures in understanding, as they relate to duty/obligation and ultimately to notions of culpability, he argues that these principles establish the rules of conduct of the Islamic faithful.\textsuperscript{172} But when the focus of rights and justice move from that of individual rights, freedoms, and entitlements, to that of the duties of the individual and their moral and/or legal obligation to God and community, the basis for understanding what constitutes "legitimate" action and "just" punishment is radically called into question.

By introducing the competition over religious and legal domains Abou El Fadl then turns to the concept of \textit{Al Khuruj}, to draw out the difference in calculating intention when the act is seen as a form of moral obligation, a form of defense.\textsuperscript{173} As defined, it is "an assertive act of resistance against the head of the state" or a powerful official or actor, but usefully understood in relation to a call to war by a Mufti or Imam endowed with the authority to declare a fatwa, and to do so in order to implement the duty of the faithful to protect the leader against "enemies" of Islam.\textsuperscript{174} Though narrowly tailored as an act of demonstrated obedience to the Godly "creator," it rewards and excuses rebellions against injustice that befalls people.\textsuperscript{175} Abou El Fadl explores how it represents a nexus between the offense and the uprising, as the leader/government is called upon to respond to such pressure by calling on citizens to defend Islamic

\begin{itemize}
\item \textsuperscript{170} \textit{Id.} at 11 (\textit{quoting QUR'AN} at 49:9-10).
\item \textsuperscript{171} \textit{Id.} at 12.
\item \textsuperscript{172} \textit{Id.} at 27 ("The standards of the Islamic faith require that those who defy authority because they believe that this is what their faith demands of them must be treated with indulgence.").
\item \textsuperscript{173} \textit{Id.} at 13-15.
\item \textsuperscript{174} \textit{Id.} at 13.
\item \textsuperscript{175} \textit{Id.} at 14-15.
\end{itemize}
By illustrating how the orthodox rationale locates the Islamic brotherhood as having a duty to aid and support potential dissenters, Abou El Fadl suggests that that duty articulates an obligation of the faithful to support the Prophet. As the fulfillment of the duty to God is measured in relation to the consequent action, here, it is the motivation of the act that is measured in relation to the action. To explore this as a theory of Islamic legal intent means that one must recognize that it is predicated upon sources of self—that is Charles Taylor's articulation of some forms of knowledge as unknowable by human kind.

Therefore, the philosophy of culpability in more fundamentalist Islamic interpretations of the Nigerian Shari'a is determined by whether the violence that resulted in death was caused by a person (free Muslim), not their leader, who is sane (akil) and of age. Culpability is derived from notions of deliberate intent, quasi-deliberate intent, and indirect causation. As such, that person would be seen as responsible (mukallaf) for his/her actions and, therefore, culpable of "deliberate intent." However, if adjudicated in a given Nigerian Shari'a court, culpability would be bound to intention. This is because the believer would likely be absolved of criminal responsibility if he or she were acting out of religious obligation. Such a notion of intention is determined by attention to both the act and to the moral obligation of believers to protect Islam. Where violence is deemed necessary by some, as when a fatwa is called, the relevant context shifts from that of peacetime to that of wartime, thereby making intention relevant in so far as it relates to the ability of the faithful to engage in obligatory action.

176. Id. at 15.
177. Id. at 27.
182. OXFORD DICTIONARY OF ISLAM, supra note 6, at 85. A fatwa describes an authoritative legal interpretation by a mufti or religious jurist that responds to a question
In following this logic one may surmise that the contrasts between Shari'a Islamic movements and political doctrines of international human rights are stark. And though I began by exploring the ways that genocidal violence may be differently legitimatized and codified within varied formulations of law and religion, the underlying goal is to demonstrate why comparisons of “intent” in different legal fields are insufficient for explaining complexities of power. This is because relativist approaches to moral and philosophical questions are limited in practical approaches to understanding how and why people act or do not act and what their action means. A more practical engagement must deal with the empirical spheres of meaning in relation to the place of agency in either the compliance or refusal of others to participate in the reproduction of religious or ethnic strife. For at the heart of such theories of law are totalizing conceptions within which people interpret, judge and, in the end, create obligations from which to act. These obligations shape the domains of authority from which people make complex determinations in both moral and legal terms. As such, the problem with the conflation of a spiritually driven moral and legal obligation, and the processes of interpretation and evaluation through which people choose to act is that it collapses two fields of legal authority which are differently related because they draw from varied conceptual fields but similar in that they are shaped by related genealogies of religious roots. Given this, it is important to distinguish the role of human agency in mobilizing action responsive to moral or legal obligations. Therefore, in the absence of a hegemonic Islamic state which may enforce sanctions against inaction, it is critical to recognize the role that human agency plays in the mobilization of actions that respond to moral or legal obligations.

For instance, under the direction of a fatwa, the reality that some might identify some forms of violence as legitimate acts because they respond to legal and moral obligations of the Islamic faithful to defend one's leader highlights why, in theory, the

posed by an individual or court of law. Id. It provides the basis for court decision or government action of issues not covered by the fiqh literature and, therefore, neither binding, nor enforceable. Id. Often the authority of the fatwa is determined by the mufti's level of education and status within the community. Id.

violence that erupted in Nigeria and led to the relocation of the Miss World pageant was not seen by the more orthodox Nigerian practitioners as punishable under the Shari'a. Instead, in the context of the calling of a fatwa in Northern Nigeria, the argument follows that the acting dissident may not be seen as culpable if they responded to the legal obligation and duty to God to maintain the integrity of Islam. Here we see why the violence in Nigeria described in the opening passage was viewed by various facets of the Nigerian Islamic faithful as compensatory, retributive, and was, therefore, celebrated amongst various Islamic adherents. For some, it was enacted as a quasi-legal political obligation, thereby explaining why the outbreak that followed the calls for jihad in the Mosque—directed against the organizers of the pageant, the journalist, Isioma Daniel, and the newspaper office—was seen as both the intentional fulfillment of a moral, political, and legal duty, as well as a form of retribution, and therefore, an "appropriate" response.

However, it is only empirical approaches to relativism that can produce questions concerning the politics of power, agency, and intentionality. And yet, intentionality, understood in relation to fulfilling legal and moral obligations, is critical for distinguishing political acts of legal obligation from those actions that are deemed wrongful criminal acts in the common law, canon law, and the criminal law of the Rome Statute. In these various canons of law, unless a declaration of just war is called, neither the acting dissident nor the commander is likely to be absolved of crimes committed against civilians. Instead, interpreters of the Rome Statute, such as the Chief Independent Prosecutor and related officials for member states, are likely to judge the terms of jihad as illegitimate, thereby establishing the acts committed as crimes in the context of peace and not war. As such, in relation to charges of the crime of genocide in the Rome Statute, culpability would be measured in relation to the joining of mens rea and actus reus; the legal question to be posed would be whether the offender planned


to promote the uprising with the intention of killing. The next set of inquiries would explore whether the acts were carried out with the specific intent of destroying a particular group. If the acts were not committed with intent and knowledge of the commander, they might be prosecuted for ordering the crime or, in the absence of the mental elements they might be criminally liable for negligence in failing to prevent those under their command from carrying out criminal acts. In relation to individual culpability, the distinction to be made would be based on the recognition of the root principles that shape the elements of the crime of genocide outlined in the Rome Statute, for which the specific intent to kill a religious group is one of the elements of the crime of homicide punishable under the genocide law.

In the case of the violence of Islamic Shari’a and that of the secular state, both the institutional organization and spheres of authority are part of various forms of violence structured in widespread relations of inequality—from the national state to the intricacies of the power of the post-colonial state to Islamic religious organizations that locate the power of obligation and duty to an unknowable God. Each produces and deploys violence in different ways, but the key difference is in how we understand inequality not only in relation to unequal targets of crime, but also in relation to the constructed production of illegitimacy of the Shari’a and its forms of crime in different spheres of power. In other words, the inequality of power between liberal, Western democracies and non-Western states in the international human-rights regime means Western democracies, and international institutions, are able to enforce their own moral, ethical, and political frameworks on other states using extreme violence when they deem its use necessary. That is, liberal regimes use violence to provide rationales for the laws they make and to assure the conditions for their enforcement. Thus, liberalism’s violence lies in its key tenet of universality, which can be enforced by deploying violence when other means do not suffice, because such is made possible by the vast power differentials among states. Within states, differentials in the power among segments of a population

186. SCHABAS, supra note 34, at 280.
187. SCHABAS, supra note 34, at 214 (defining knowledge as awareness that a circumstance exists, or that a consequence will occur, in the ordinary course of events).
188. SCHABAS, supra note 34, at 213.
189. See Elements of Crimes, art. 6(a) (3), in SCHABAS, supra note 34, at 280.
also produce similar potential for deploying violence in ways a state conjoins the production of tenets for rationalizing rights in the making of laws. Thus the modern, secular-state framework, and the international human-rights regime, functions along a continuum where “traditionalist” Shari’a duties of jihad or khuruj are pathologized, religion-based violence (such as that termed “terrorist attacks”) are seen as barbaric, whereas the violence of the modern secular state, its calls to war and ability to declare just war legitimately are normalized, making it non-barbaric that people should be killed in wars where the goal can be said to be the “spread of democracy.”

I end by suggesting that we articulate relativist principles with empirical ends through a rethinking of the state in relation to religious institutions and their relative spheres of international institutional power and logic. Whether the statecraft, new independent institutions or religious organizations are engaged in various articulations of governance, it is important to recognize how state functionaries empower international institutions, and how this is similar to that of religious functionaries who empower transnational and regional religious networks. Despite this methodological relation, the concepts of secularism and that of religion have been differently legitimatized in liberal democracies worldwide, and have held authority differently in unequal relations of power. However, despite the religiosity of “secularism” in the international realm, the UN Declaration presumes a national and international convergence of perspectives on social and human justice under the rule of law for which the treaty increasingly gives substance as the rational voice of the modern state. As such, the violence of modern secularism, its religious roots notwithstanding, call for a radical rethinking of epistemological relativism by highlighting questions about domination and power within multiple domains. The answers posed by these questions will be improved by analyses that recognize the aspect of power that is attained by the law-making authority assumed by states within and as a consequence of the international human-rights frameworks.
VII. GENEALOGIES OF SECULARISM AND THE POLITICS OF CONSTITUTIVE POWER

The classification of particular actions as criminal actions, e.g., genocide, is as political as it is cultural. Classificatory acts represent the authority of particular norms to be represented as legitimate, always supplying a moral dimension that derives from them. As such, the norms that shape the crime of genocide do not hold power because they represent the democratically derived social contract. They hold power because, in keeping with revolutions of the West, such as that of France and America which absolved themselves from religious persecution or the inheritance of social standing, these twentieth century legal norms represent a new moral dimension—the human rights treat as the new social contract of Western modernity.

Through treaty doctrine, and legal and economic authority that reinforce particular conceptions of international obligations and responsibilities, such shared interests are embedded in the enforcement of the duties of the state and protection of the individual. For although the "rights" and forms of "individual autonomy" enunciated in the Rome Statute for the ICC identify human universality as the scope of entitlements, those rights are more restricted than state entitlements in that they are interpreted as rights that citizens hold as protections against their own governments. For ultimately the authority of international law is an extension of the authority of the state which rights are enacted. As such, international criminal law is increasingly operating within a New International Order; that is, it is always in tension with the jurisdiction of any one state. Like Islamic legal questions of jurisdiction, it continues to call into the question the basis for legal norms, obligations, and the duties of its constituency.

With the formation of the legal concept of the person and the state as the realm of authority propelling the development of

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190. See Rome Statute, supra note 35, at art. 1.
191. MALCOLM N. SHAW, INTERNATIONAL LAW 5-6 (5th ed., Cambridge Press, 2003). For example, compared with previous tribunals that have held primary or concurrent jurisdiction, the ICC follows the principle of complementarity, according to which national courts hold jurisdictional primacy, thus, enabling the ICC to take jurisdiction if a state is unable or unwilling to investigate an allegation which the Prosecutor for the ICC identifies as a possible violation consistent with crimes of the type court is authorized to pursue. See Rome Statute, supra note 35, at art. 1.
transnational criminal justice and human rights, liberal conceptions of criminal justice were rooted in the tradition of liberal idealist thought from which the League of Nations was established in 1920. Although it failed in carrying out its ultimate mission, The League succeeded in the development of a new internationalist vision with moral underpinnings that shaped the new institution—the United Nations. And with moral underpinnings that reinforce the legitimacy of individual “rights” and the inherent dignity of human kind, The Universal Declaration of Human Rights (UDHR) begins by asserting the individuality, “inherent dignity and . . . the equal and inalienable rights of all members of the human family” in relation to the state. It insists that unless human rights are protected by the ROL, subjects will be “compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”

Today, the United Nations Charter outlines three possible criteria under which the use of force is seen as legitimate. First, under Chapter VII of the Charter through authorization of the United Nations Security Council; second, if there is an actual or

192. The League of Nations was established by the Covenant of the League of Nations in the Treaty of Versailles and other World War I peace treaties. See Covenant of the League of Nations in Treaty of Versailles, June 28, 1919, Part I, 225 Consol. T.S. 188, available at http://www.yale.edu/lawweb/avalon/leagcov.htm. The Covenant consisted of 26 articles. Articles 1 through 7 concerned organization, providing for an “Assembly,” composed of all member nations; a “Council,” whose original composition included Great Britain, France, Italy, Japan, and later Germany and the Soviet Union, and of four other, nonpermanent members and a secretariat. The Assembly and the Council were empowered in Article 3 to discuss “any matter within the sphere of action of the League or affecting the peace of the world.” Covenant of the League of Nations, art. 3, June 28, 1919, 225 Consol. T.S. 188.


195. Id.

imminent threat of an armed attack and it is used in self-defense or collective self-defense; and third, "to avert [an] overwhelming humanitarian catastrophe." These three components reflect contemporary norms for the establishment of criteria for determining the legitimate use of violence by states and their bodies. In the absence of these state-based determinants, such forms of force were classified as tyranny and equated as an intolerable infringement of state rulers, and looked down on by human rights activists as law above positive law. Tyranny legitimizes rebellion only when it is seen as an act aiming to restore state sovereignty, not when it presents itself as a religious group's response to a violation of "unjust" and "immoral" behavior. As such, what is lawful also may be intolerable suggesting that nothing which contravenes state power or human rights can be legitimately lawful. In other words, the UDHR, which gave form to an international vision of human rights, presumes that a convergence will obtain between universal humanism and state-enforced norms. This remains an unresolved tension between universal humanism and the power of the state to apply and to maintain the law by equating secularism with Rule of Law, and justice with the modern, liberal codifications by which violence is to be interpreted, and the punishment of violators authorized. In that regard, it is the voice of the treaty, recognized through the authority of the law that holds the force of legitimacy. As we can see, this legitimacy represents a mystical authority of legal force that operates alongside national state authority.

Since 1989, we have witnessed a drastic increase in the number of national constitutions being re-written, treaties signed against violence, genocide, and war crimes, and a widespread shift

197. U.N. Charter art. 51.
198. British Attorney General’s Advice to Prime Minister Blair on the Legality of the Iraq War, para. 2 (Mar. 7, 2003), http://www.number-10.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf. The use of force to overcome a humanitarian catastrophe represents the development of an exceptional basis for the use of force. Id. at para. 4. This was the justification for the Kosovo crisis of the 1990s, as well as the justification for the No-Fly Zones. Id.

199. See Id. However, in highlighting that which appears outside of the norm for legitimate violence, the report makes clear that self-defense is defined as "an actual or imminent threat of an armed attack." Id. at para. 3. In other words, the use of force must be seen as necessary and deployed as a means of averting an attack. In this way it must represent a proportionate response in the context of imminent danger. Id.

in the management of criminal jurisdiction. These transformations have led to gaps in the enforcement of new legal principles being negotiated between states and international institutions. Although such developments may suggest that territoriality and state power are no longer significant in this age of globalization and international membership, in the realm of international criminal law, various transformations have led to the development of an independent International Criminal Court in which territoriality and citizenship continue to form the basis for the jurisdiction to pursue a case. For in modern liberal democracies it is the authority of the state—the statecraft—and its deployment of law and the economy, along with “self discipline” and “participation,” that characterizes the political legitimacy of the Rule of Law. Through the creation of national and international techniques for the dual management of crimes such as genocide, national governments, through the statecraft, continue to participate in various techniques of international management, thereby maintaining hegemony over the classification of various forms of violence.

Similarly, the Shari’a, as a religious articulation of a related legal order, stands in for the greater assertions of state power—to act, protect, and kill legitimately, within relevant spheres of authorial power. And unfortunately, the practices of Islamic criminal Shari’a in Northern Nigeria, are often viewed through a lens which envisions what is unlawful as that which is judged from the perspectives of North American and European secular states, and ought not to be lawful. And though I am in no way advocating the legitimacy of any form of violence, the ways that both human rights infused international/state regimes—like overtly religious regimes—are not free of social constructions of justice, and criminal action is epistemologically constituted and justified.

National state, international, and religious rules of law maintain core principles that operate within distinct regimes of authority which, though they are made to appear distinct, are actually inseparable, sharing in the regulation, not the elimination, of violence. These ideals reflect the types of authority we value, the motivations we agree are acceptable, and the force of law


which does not necessarily reflect empirical or social truths, but which exists through the mystical foundations of state enforcement. Thus, in the case of human rights and its related norms derived from international law, it is the statute that establishes its authority. And the modern nation-state continues to claim the power to exercise violence, and to do so in relation to the Rule of Law. It reflects the violence of legal norms, their social meanings, and the relations of power and authority within which they are embedded.

Meanings of genocide, therefore, must involve not only understanding varying cultural meanings of intention around homicide, but also empirically distinct methodological questions regarding an understanding of the genealogies of the Rule of Law and the force of the statecraft as constitutive of the ways in which subjects engaged in neo-liberal democracies in the West rationalize action. The conceptual hierarchies, which are present in the exercise of individual/Muslim obligations to the authority of the religious ruler first, and state-based democratic principles second, raise questions concerning the relationship between concepts, theory, and practice, as it also calls into question differences between exercising the obligation and duty to act and managing that duty in relation to other implications and constraints. In the end, balancing both the spheres of authority which shape religious and legal knowledge, and the domain of interpretive agency within which people make determinations, allows us to return to empirical relativism as a way to document the relations of power among international, national, and religiously-inspired regimes of knowledge and power. This approach allows us to rethink the philosophies of obligation in terms of the contingences of power; detailing its deployment represents the empirical work that can be most useful analytically. For though some states are more successful than others in enforcing their determinants of legitimate violence, in relation to widespread democratic principles, all but a few have continued to maintain power through the hegemony of statehood alone. And this is not just because both share a genealogy of religiosity. It is because they have drawn their force from the myth of sovereign authority and its sacred political forms that are being maintained through an illusion of secularism, the logic of legal sanctity, and
the force of military and economic power.\textsuperscript{203} For, it is the expanding alliance between the state and international/global institutions and their fundamentally religious genealogies that defy comparison with transnational Islamic religious rule.

The merger of the histories of religious rationality and the regimes of power that legitimize certain forms of legal classifications and their punishments have given rise to the need to go beyond comparative reason as the basis for understanding the modernity of national and international power. The basic definition of secularism describes a separation of organized religion from organized political power inspired by a specific set of values.\textsuperscript{204} In the early modern period, Jean Jacques Rousseau first put in place a model for the place of government and law in society.\textsuperscript{205} In doing so, religion was relegated to the spheres of the social—beyond the terrain of political action.\textsuperscript{206} Much of 19th century positivist thought was also directed towards the hoped for replacement of religion by science.\textsuperscript{207} The popular positivist thought was heralded by Auguste Comte in which he espoused an evolutionary scheme that presumed that the development of the modern nation state would need to evolve from societies engaged in fetishism to those more advanced than those that used the rationality of science.\textsuperscript{208} Arguing for the historical inevitability of it, Marxists referred to such developments as the increasing "secularization" of thought.

However, the definitive text on the underpinnings of religious norms in capitalist society was Max Weber’s \textit{Protestant Ethic and the Spirit of Capitalism} in which he evaded the age-old debates about explicit religiosity and, instead, spoke of the fundamental tenets of Protestantism that shaped the cultural logics of capitalism.\textsuperscript{209} Accordingly, in the West, the foundations of the modern state were structured around capitalist exchange and

\textsuperscript{204} Asad, supra note 103, at 1.
\textsuperscript{206} See id.
\textsuperscript{207} See Asad, supra note 103, at 23.
\textsuperscript{208} See August Comte, \textit{The Theological Stage}, in \textit{Theories of Society} Vol. 1 646-56 (Talcott Parsons, et al. eds. 1965).
conceptions of value that privileged the cultural logics of Judeo-Christianity.210 As such, Weber demonstrated that religious logic was fundamental to the formation of modern capitalist life and its power was in its ability to render itself invisible, yet continue to reproduce itself through daily norms of capitalist exchange.211 In following Weber, over the past decade, the increased presence of religion in public life has led scholars writing about the new face of state power to examine the increasingly overt relationship between religious faith and legal governance.212 For in the end, few models have succeeded in addressing the ongoing presence of religion and religiosity in the socio-political sphere. Rather, in implicit and explicit terms, a fusion of religious, moral, and political conceptions have prevailed and constituted the basis for a political order that is made possible through the economy, the law, and the statecraft, but has managed to represent itself as secular.

Max Weber wrote about the disenchantment of the world because of the inroads of modern rationalist ways into traditional social arrangements.213 These eroded the sense of awe and respect for sacred institutions and beliefs and set the groundwork for understanding the modernization of modern institutions.214 However, it was Talcott Parsons who had used to the idea of “modernization” as a lens through which to view all developments in non-Western societies.215 He articulated increasing forms of secularism as the withdrawal of religious discourse from the public sphere.

In an attempt to disrupt the relationship between religion and the secular, Jurgen Habermas argued that there existed a division between political society and civil society and that religion should not play a role in political society.216 For Habermas, it was the realm of moral and public formulations of religion that he felt should be outmoded.217 But, as Weber has demonstrated, the

210. See id. at 3-12.
211. See id.
213. See WEBER, supra note 209, at 1063-65.
214. See id.
217. See Id.
formation of secularism involved the formation of cultural values that were deeply embedded in Judeo-Christian religious sanction.\textsuperscript{218} This influence of religious principles shaped the organization of society, the work ethic, its value, the basis for what constituted a crime and, therefore, its punishment, as well as the norms and values enforcing their legitimacy.\textsuperscript{219} Conceptions of the individual, and thus, notions of the human, were aligned with the state’s management of and entitlement to the surveillance of the body.

Conceptions of the human and human responsibilities to nation-states over the perceived authority of “God” vary across cultural groups. There exist a range of debates today on what it means to be “human” and to whom rights should be attached. The notion of the intrinsic worth of the individual as “human,” in which human life, alone, is sacred, is a social construct and has its roots in the fundamental principle of liberalism. Similarly, the notion that humans are “rights bearers” and what counts are their rights in the modern temporal present can be traced to a range of European countries but is not generally acceptable worldwide.

In 1215, the Magna Carta established rights as a concession from King John to the Barons of England.\textsuperscript{220} The King granted to them various liberties such as the right to wardship and inheritance so long as they owed him a duty.\textsuperscript{221} This political negotiation established a social contract between rulers and subjects and established legal terms for the protection of rights, as derived from a contract.\textsuperscript{222} By the middle ages in Europe, a notion of rights was shaped by particular moral standards that were, in theory,

\begin{itemize}
  \item \textsuperscript{218} See WEBER, supra note 21, at 3-12.
  \item \textsuperscript{220} Magna Carta, preamble, para. 1 (1215), reprinted in A.E. DICK HOWARD, MAGNA CARTA: TEXT & COMMENTARY (1998).
  \item \textsuperscript{221} Id. at paras. 2, 4 (1215).
  \item \textsuperscript{222} See A.E. DICK HOWARD, MAGNA CARTA: TEXT & COMMENTARY 7-8, 23 (1998).
\end{itemize}
articulated as universal, and based on principles of natural law.\textsuperscript{223} These principles of natural law were not contingent on political concessions.\textsuperscript{224} Rather, it was derived from the idea that humanity is sacred and should be protected.\textsuperscript{225} Much of the genealogies of universal rights in the literature begin in the Middle Ages and trace the idea of natural law to a theory of rights that identifies individual rights as the sacred and foundational basis for human kind.\textsuperscript{226} With the development of modern conceptions of natural law, philosophers such as Hugo Grotius, Thomas Hobbes, and John Locke expanded on these standards of rights and privileges and developed the idea that individuals have a general duty to adhere to moral standards and that governments have an obligation to concede to basic concessions of the social contact.

In various regions of Europe the development of the Liberal Position on Rights established two basic principles: first, that human beings possess rights to life, liberty, the secure possession of property, and the exercise of free speech—all inalienable and unconditional.\textsuperscript{227} Second, that the central role of government is to protect these rights.\textsuperscript{228} Therefore, political institutions were to be judged on their achievement of this function. In 1789, the French Revolution led to the widening of this concept with the Declaration of the Rights of Man and of the Citizen.\textsuperscript{229} Shaped by British and French colonialism in the 17th and 18th centuries, what would become the United States enshrined such rights in the 1791 Bill of Rights.\textsuperscript{230}

Though such declarations employed universal language, up until the mid-twentieth century, the notion of "rights" were only associated with domestic issues. They rested on the nation state as the source of sovereignty\textsuperscript{231} and took for granted the limited

\textsuperscript{223} Talcott Parsons, \textit{The General Interpretation of Action}, in \textit{THEORIES OF SOCIETY VOL. 1} 87 (Talcott Parsons et al. eds., 1965).
\textsuperscript{224} \textit{Id.} at 87.
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Id.}
\textsuperscript{228} \textit{Id.} at 693-94.
\textsuperscript{229} \textit{Id.} at 694; see Declaration des droits de l'Homme et du citoyen [Declaration of the Rights of Man and of the Citizen] (1789) [hereinafter Declaration of the Rights of Man and of the Citizen]. The Declaration is incorporated into France's current constitution. Constitution de 1958 pmb. (Fr.).
\textsuperscript{230} \textit{See} U.S. CONST. amends. I-X.
\textsuperscript{231} \textit{See} Declaration of the Rights of Man and of the Citizen, \textit{supra} note 229, art. 3.
application of such rights and responsibilities. However, in the second half of the twentieth century and into the present, the development of international relations and the network of states engaged in the international law regime have radicalized the basis for the attainment of rights. As a result, predominant principles of rights are secured by the notion of a common humanity in which, by virtue of being “human,” individuals possess rights.

Prior to the twentieth century, international law—traditionally represented as a set of rules agreed upon by countries and meant to govern the relations among them—asserted principles of sovereignty that were embedded in the state. However, in the twentieth century it took a different turn to address questions of international concern. By extension, international criminal law developed as a twentieth century phenomenon, along with the idea of a permanent international criminal court.

The ICC has its roots in the end of World War I in which the world community sought to establish a world court. Moreover, the phenomenon of interconnected state obligations and duties that gave rise to the moral impetus of international law, and by extension the ICC, was the moral force of human rights. Driven by the desire to punish World War II war criminals, international law took shape in the modern era and by the late 1980s it grew exponentially with the growth of global capital, and ultimately the rise of new institutions of social organizing—that of NGOs.

In tracing the shift in NGO participation in order to clarify shifts in sovereignty that gave rise to an international court, the human rights literature of the current period has tended to trace a genealogy that describes the nineteenth century as a period in which the interference of one state in the affairs of other states to enforce obedience to a governing authority was a moral question neither intended to develop into an alliance of states against others.

233. Id. at 208.
234. See SCHABAS, supra note 34, at 1-2. Indeed, while in force in the twenty-first century, the creation of the ICC “is not a new or novel idea.” Gurule, supra note 36, at 2.
235. See SCHABAS, supra note 34, at 2-3.
236. See HENKIN, supra note 232, at 278.
237. See id. at 278-79.
nor to usurp the power of state sovereignty. As the narrative goes, the system of territorial sovereignty which emerged with the European Enlightenment and shifted after the French and the American revolutions had previously been seen as being in the domain of the monarch and shifted to a political power of the people to a given territory. The state was the primary field of governance and the protection of its sovereignty was seen as central. The legitimacy of nineteenth century states and their actors depended on the loyalty of this territorially bounded group to their people, to their markets, and to their nation. And these efforts had their roots in a nationalism based on common ancestry or culture that involved political movements to unite people to a sovereign state.

By fostering a sense of national belonging there developed conceptualizations of individual placement in relation to national territory and a mythical heritage that would be codified by the twentieth century instruments of the modern state. However, what developed were regimes of multiple tiered nation-states, differently connected to colonies and territories in which explicit national laws designated the limits of what could take place within state boundaries. In independent states, these laws were fueled by legal norms for democratic governance on behalf of the rights of the state. In colonial states, the laws of the imperial powers and principles of humanitarian law often prevailed.

What developed was a regime of state rules in which there were limits to what could take place within state boundaries. This understanding was fueled by notions of civility and particular norms and standards which would provide a legal framework for democratic governance, humanitarian norms, and punishment systems on behalf of the right of the state. Approaches to the belief in the global nature of international standards are often seen as having their roots in the tradition of liberal idealist thought from which the League of Nations was established in 1920. Though the League of Nations may have

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238. See HENKIN, supra note 232, at 127-30.
239. See id. at 127-30.
240. See id.
241. See id.
242. See id.
“failed” in practice, its moral underpinnings survived to buttress the theoretical framework of the liberal institution, which is now the United Nations. Liberal universalism has proved very attractive, historically, as on the surface the language of liberalism—such as its assumptions about individualism and liberty—has ubiquitously become the starting point for any discussion on human rights, democratic practice, state security and interdependence. It has cornered the general world conception of what it means to be a “civilized” society engaged with other “civilized” states on the world stage.

In tracing the formation of human rights regimes, human rights advocates use discourses often describing World War II as the event that accelerated the process of sovereign autonomy. By the end of the war, various forms of national and ideological alliances came to constitute a system constrained by sovereignty. Compared to the period prior to the twentieth century, international law took a different turn in which questions of international concern became more central. Indeed, the United Nations was an institution established to “discuss questions of international concern, with institutional continuity, and a constitutional framework of agreed purposes and principles.”

At the time of UN formation, only fifty countries signed the charter and the infrastructure for the development of modern international institutions took shape.247 With the UN set up with five permanent members of the security council having veto power and states still under colonial rule, it was the General Assembly that became the organ for the public expressions of common interests and the diplomatic “will” of the international community. For example, the General Assembly considered the most fundamental principles of law—that there can be no

244. The failure of the League of Nations set precedence for the gap between universal moral pursuits of liberalism and the ability to follow through domestically as well as on a global scale. Exemplary of this is the United States’ refusal to sign the covenant as well as its policies of racial segregation which dominated its domestic policy well into the late sixties. See generally SHAW, supra note 108, at 24-31 (describing the failures of the League and lack of U.S. participation).


248. SCHACTER, supra note 246, at 226.
punishment of crime without a pre-existing law (*nullum crimen sine lege, nulla poena sine lege*)—in order to reconsider the authority of the newly formed UN to punish German acts *ex post facto*.249

As the explanation of the formation of modern transnational justice goes, proponents of the ICC argue that in keeping with the Nuremberg Principles of the Hague Charter—whose goals were not founded simply on state preservation—the contemporary institutionalization of an international system has become increasingly interconnected. Here it is believed that state actions and rules of enforcement are becoming just as central to the protection of the interests of other states as they are to the protection of the state in question. This move toward discourses of the interconnected humanity of humans, facilitated by the creation of regional and international institutions and treaty-imposed obligations on world citizens, is erecting limits on sovereign autonomy.250

With the establishment of new norms in the international arena, the United Nations declaration of 1948 established rights of the human.251 Here, ideas of rights were deepened with the development of second generation rights such as "economic, social

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249. *Id.*; see also Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg, 41 AM. J. INT. L. 172 (1947), reprinted in *HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 116 (Oxford Univ. Press, 2d ed., 2000). In a unanimous vote, they argued that international law is established not only by treaties, but also in the customs and practices of states that gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military court. *Id.* at 117. It was felt that the principle of no punishment without pre-existing law was not a limitation of sovereignty but a principle of justice. The circumstances of aggression committed by agents of Nazi German against Jews and various people of neighboring counties were deemed to be punishable *ex post facto* (as abhorrent that that may be to civilized nations) and the perpetrators should have known that his/her actions were wrong. Therefore, it would be unjust for such actions to go unpunished. *Id.* at 116. Ultimately, the formation of the Nuremberg Tribunal under the rules of the Hague Convention established that "individuals have international duties that transcend the national obligations of obedience imposed by the individual state." *Id.* at 117. Here, the development of War Crimes and Crimes Against Humanity were normalized as international criminal categories because they were seen as in humane acts, regardless of their motivation, committed in execution of an aggressive war. See *id.* at 118. This issue of motivation—intent—will be revisited later.

250. See *SHAW, supra* note 108, at 574-76 (noting international human rights regulations and institutions like the United Nations have limited the sovereignty of states).

These first and second generation rights were represented as possessed by individuals. And as such, it established a treaty for the recognition of the “inherent dignity and the equal and inalienable rights of all members of the human family” and stipulated that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” It reported that “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people” and established that if “man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Yet, the perceived universality of definitions of the “human” is only an indicator of the force of Euro-American and Byzantine influence in the ideological principles of human sacredness. While determining the substance of rights and the distinctions between humans and citizens continued to progress, so did the debates for determining the index for measuring humanity.

Following the UN declaration, three regional initiatives established similar and competing principles. By the Cold War period, national self-determination movements led to increasing independence struggles and new states, while formerly colonial territories of European powers, came into being. Despite new state aspirations of sovereignty, these claims became increasingly limited. What was once the traditional right of the state and its people was recast in relation to the development of an international security regime.

In 1950, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms was established. Following the Cold War, the United States emerged as a major

255. Id.
power and rights-driven democratization agendas in post-colonial states in places such as African and Latin American countries eventually led to an emphasis on the Rule of Law (ROL). As is often incorporated in such ICC-human rights discourses, the claims to sovereignty of third world despots became increasingly limited. "What was once the traditional right of the state and its people to govern its affairs without regard, approval, and consideration of other states, has become one of interconnection" said one of the advocates of universal jurisdiction of the ICC.\(^\text{258}\) However, despite such popular discourses of transformation, conceptions of state sovereignty were more theoretical than they were practical since states have always balanced the practical challenges of maintaining and negotiating power relations in the international sphere.

In 1969 came the American Convention on Human Rights.\(^\text{259}\) This was followed by the 1981 African Charter on Human and People's Rights.\(^\text{260}\) The European Convention established that "[e]veryone's right to life shall be protected by law" and "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."\(^\text{256}\)

The American Convention outlines that the "essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."\(^\text{262}\) In accordance with the UDHR, it establishes the "ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."\(^\text{263}\)

\textsuperscript{258}. Research by Kamari Maxine Clarke (on file with author).
\textsuperscript{261}. European Human Rights Convention, supra note 257, art. 2.
\textsuperscript{262}. American Convention, preamble, Nov. 22, 1969, O.A.S.T.S. No. 36, available at [hereinafter American Convention].
\textsuperscript{263}. Id.
By the 1980s, charting the changing logics of governance, sovereignty, and the language of "human rights" became popular among those interested in local-global transformations. The study of international relations became more institutionalized and involved explorations of the changing place of sovereignty in studies of inter-state relations. Conceptualizations of national policy and their connections with local life took shape in the realm of political science and early studies of international customary and treaty law. The discipline of political science involved explorations of the connections between domestic politics and international affairs. Schools of management and business developed the areas of transnational business, legal scholars interested in thinking beyond doctrinal applications of law developed the study of law and society, and by the 1990s, sociologists and anthropologists began exploring the modernity of the state, globalization, and the relationship between the local and the global.

Borrowing from the 1981 Charter of the Organization of African Unity—a charter that outlines that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples"—the further expansion of rights with the development of third generation rights (the rights of "peoples") led to the passing of the African Charter on Human and Peoples’ Rights. Popularly referred to as the "Banjul Charter," the establishment of an African charter led to the development of a collective dimension of rights. In Article 21(1), the Banjul Charter outlines that peoples have the right to "freely dispose of their wealth and natural resources"; in Article 29(2) and (7), the individual has a duty to "serve his natural

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266. Brown, supra note 227, at 691-92.


268. African Charter, supra note 267, at art. 21(1).
community by placing his physical and intellectual abilities at its service,” as well as to “preserve and strengthen positive African cultural values in his relations with other members of the society.” All of these aspects of human rights, their levels of priority and possible incompatibilities, and the principles that underlie them beg for further discussion regarding the basic moral and ideological values that authorize their legal power.

The African Charter on Human and People’s Rights outlines that not only should “fundamental human rights” which stem from “the attributes of human beings” and “justifies their national and international protection” but, “the reality and respect of peoples rights should necessarily guarantee human rights.” Here, it states in the preamble, “taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.” To further clarify the extension of “humans” to “peoples” it highlights the need to recognize the mission of achieving “total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neocolonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions.”

Promoting and protecting human and peoples’ rights and freedoms involved “taking into account the importance traditionally attached to these rights and freedoms in Africa.” These principles of human rights emerged after World War II, and established a conception of individual sacredness as a secular principle. The end of the Cold War led to the beginning of a new consensus whose secularist rhetoric shaped the nature of liberal democracies and their related norms concerning the rights of the human and the authority of the state. This pronouncement that human beings are sacred and have a fundamental obligation to the state and the state a duty to its citizens reflects, as Michael Perry

271. Id.
272. Id.
273. Id.
has argued, an "intellectual affirmation" rather than a "truly existential one," but is nevertheless reflective of the deeply Judeo-Christian roots of the human rights tradition. Thus, understanding the establishment of human rights norms in the twenty-first century as new constructions of the individual and linkages to both national and international institutions involves understanding the formation of the religious compromise in the West, as religious governance became secular governance.
