

Rescuing Human Rights

A RADICALLY MODERATE APPROACH

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Introduction: Assumptions and Principles

The imagining, proclamation, and eventual codification of international human rights law rank among the most significant accomplishments in international relations of the post-1945 era. While the concept of rights on the domestic level had been evolving for centuries, the notion that all people in the world possess certain rights – which their own government is obliged to protect – was nothing short of revolutionary.

The intrusion of human rights into the formerly sacrosanct realm of national sovereignty upended 350 years of viewing sovereignty primarily as a shield against outside influence. While sovereignty was never absolute, its limits were few. One of the only limits relating to rights was the customary international law norm that required states to protect aliens within their jurisdiction, although this protection stemmed from respect for the sovereignty of the alien's state rather than from any broader concern for the rights of individuals within a state's territory. Other limits reflected the responsibility of countries for acts within their territories that might harm another state or the perceived necessities of conducting international relations, such as the immunity of diplomats and freedom of the high seas.

Individual rights, on the other hand, are not in their essence international. Their violation affects other states only indirectly, and the idea that the way in which a state treats its own citizens within its own jurisdiction is a legitimate matter for international concern was truly novel. Illustrative of this hesitance is the long struggle to outlaw slavery. Abolitionist campaigns within countries began to bear fruit in the late 18th and early 19th centuries, and the United States and United Kingdom in 1807 prohibited their ships from participating in international slave trading. However, the first international treaty that banned slavery itself was adopted only in 1926.³

The origins and growth of international human rights norms and what became the international human rights movement have been analyzed by a number of scholars, but it is not particularly relevant to a contemporary understanding of the

content of human rights to decide whether the meaningful internationalization of rights began in the 1930s, 1940s, or 1970s.⁴ Formally, however, identifying as one of the purposes of the United Nations "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"⁵ was surely a landmark. The language of the charter left implementation of this goal primarily in the hands of states themselves, but it made clear that human rights were no longer solely a domestic concern of individual countries.

While some countries still claim occasionally that international human rights norms violate traditional norms of state sovereignty,⁶ sovereignty today no longer permits states to act with impunity with respect to the treatment of individuals within their jurisdiction. This fact is reflected not only in hortatory declarations and diplomatic speeches but in practice. The United Nations and many other multilateral international organizations include the promotion of human rights within their mandates, and regional human rights courts exist in Europe, Africa, and the Western Hemisphere. Every country in the world has ratified at least one of the nine global treaties adopted under the auspices of the United Nations: as of January 2018, more than 165 states had ratified the two core conventions on civil and political rights and economic, social, and cultural rights, respectively; 179 states had ratified the Convention on the Elimination of All Forms of Racial Discrimination; 189 had ratified the Convention on the Elimination of All Forms of Discrimination against Women; and 196 states⁷ had ratified the Convention on the Rights of the Child.

On the regional level, 23 states have ratified the American Convention on Human Rights, of which 20 have recognized the jurisdiction of the Inter-American Court of Human Rights; all 47 members of the Council of Europe have ratified the European Convention on Human Rights, which includes acceptance of the compulsory jurisdiction of the European Court of Human Rights; and 53 of the 55 members of the African Union have ratified the African Charter of Human and Peoples' Rights, of which 24 have accepted the optional jurisdiction of the African Court on Human and Peoples' Rights. Thus, over 90 countries from all regions of the world (except Asia and the Pacific, where there is no regional or subregional human rights mechanism that includes a court) have accepted the jurisdiction of international courts with the authority to issue legally binding judgments on human rights within individual states.

In 2006, the UN Human Rights Council adopted a new procedure, the Universal Periodic Review (UPR), under which the human rights situation in every member state of the United Nations is reviewed on a regular basis, irrespective of which – if any – treaties the state has ratified. The UPR procedure was adopted by consensus, and every UN member has submitted reports on their domestic human rights practices and participated in the quadrennial four-year review process.

In light of these facts and the actions of states themselves, no matter what quibbles or questions remain about the legal and political impact of human rights treaties, the relevance of "soft law" principles and declarations, or the lack of sufficiently robust

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implementation or compliance mechanisms, the argument that human rights are purely a domestic matter is no longer sustainable.

THE PROBLEM

10 December 2018 marked the 70th anniversary of the adoption of the Universal Declaration of Human Rights (UDHR). This should have been an occasion for celebration; instead, human rights are on the verge of becoming a victim of their own success. China, Russia, and other authoritarian states that have consistently opposed attempts to induce compliance with human rights norms have become increasingly influential in international affairs. The relatively solid support for human rights within the so-called West is shaky, as the financial crisis that began in 2008 and the migrant crisis that hit Europe in 2015 weakened support for international commitments of all kinds. The rise of nationalism and populism in Hungary, Poland, the United States, the United Kingdom, Italy, Greece, Venezuela, Turkey, India, and many other countries is, in part, a reaction against the unfulfilled promises of liberal democracy and an international economic and trade regime that seems uncontrollable. The tide of repression in the name of the fight against terrorism continues to grow; fear and uncertainty have replaced the hope and confidence that were shortsightedly proclaimed as the Berlin Wall fell and the Soviet Union disintegrated in the late 1980s and early 1990s.

Academics and pundits now reflect on the “limits,”⁸ “twilight,”⁹ or “endtimes”¹⁰ of human rights; the demise of “the last utopia”¹¹; or their very survival.¹² The more generous write about human rights being at a “crossroads”¹³ or “in crisis,”¹⁴ and write that now is the time for asking “hard questions,”¹⁵ examining “critical perspectives,”¹⁶ or imagining varying kinds of human rights “futures,”¹⁷ many of them pessimistic.

What went wrong? Is the very concept of universal rights becoming irrelevant, even as the world becomes increasingly interconnected? Were human rights always too idealistic to survive the economic and political shocks of the past decade, or have they been “subsumed by the politics of American power and market-based democratic liberalism?”¹⁸ Is it true that “[t]he ubiquity of human rights talk, campaigns, and demands is best explained not by impact but marketing?”¹⁹ Should we abandon legalistic references to rights in favor of concentrating on such pressing matters as climate change, sustainable development, corruption, and the increasing polarization of the body politic? Is it enough just to recognize the hubris of liberal internationalists who hailed the “end of history”²⁰ and the inevitable triumph of liberalism and democracy, and then, after a mea culpa, continue on the same path? Or is it time to undertake a realistic analysis of why human rights now seem to be struggling, despite the fact that they continue to appeal to people (if not always their governments) all over the world who are victims of dictatorship, discrimination, violence, and disappointment at economic and social systems that have failed to improve their standards of living?

It is the thesis of this book that human rights are not only relevant but essential as we move fully into the twenty-first century. I hope to counter those who deny the existence or importance of human rights; educate those who view human rights too narrowly, by excluding economic, social, and cultural rights and/or reasonable interpretative expansions of norms that were formulated decades ago; and discourage those who unthinkingly or irresponsibly expand the idea of human rights in ways that undermine their originally more modest purpose. Human rights, properly understood, are indeed universally applicable, and their abandonment would be an unconscionable rejection of the simple proposition that all human beings share fundamental rights to be respected and ensured by their governments.

It is not enough to simply follow the accepted wisdom of the past several decades. The revitalization of human rights requires not a change in goals but a change in tactics, strategies, and understandings of what human rights can and cannot deliver. Governments that ignore or violate rights remain the primary culprits, but human rights advocates, governmental and nongovernmental, must become more realistic idealists who understand the role and the limitations of human rights in a world never contemplated by those who first articulated international norms in the decades after the Second World War. Foundations and other donors need to do more than simply respond to current crises or popular causes.

Often strident calls from European and other, primarily Western, human rights activists for adherence to the contemporary liberal European construct of society are increasingly feeding a backlash in the rest of the world. This tendency is exacerbated by activists who see an expansive concept of rights as the primary means to effect domestic social and political change; ironically, the same tactic is used rhetorically by anti-rights governments in order to burden human rights with larger geopolitical problems, as a means of undermining and delegitimizing them.

There must be a conscious attempt to return to the principles of consensus and universality that were at the heart of human rights at least through the 1970s. Human rights must be distinguished from other worthy initiatives, such as the prosecution of international criminals, saving the environment, reducing poverty, making business more responsible, and preventing or ending violent conflict. We also must recognize that universality does not mean uniformity and that local variations in interpretation and practice should not automatically be rejected. Overreaching and overselling human rights will only strengthen anti-human rights governments and others who challenge the universal application of human rights by privileging cultural relativism over globally shared values.

THE CONTEXT

A few recent examples may be useful. Mainstream academics have called for the extension of human rights obligations not only to international organizations but to corporations, other non-state actors, and even individuals.²¹ An Argentine law

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professor argues that the "constitutionalisation of the international human rights regime" in Latin America now imposes obligations on states to, for example, "adopt . . . adequate and transformational compensation measures to address widespread situations of systematic patterns that produce or reproduce inequality amongst citizens[,] . . . produce public information . . . [and] prevent undue media concentration . . ."²² Amnesty International, one of the oldest and most well-respected international human rights nongovernmental organizations (NGOs), has promoted drafting a treaty to control the arms trade²³ and called for the full decriminalization of all aspects of consensual sex work.²⁴ In comments about Belarus, the committee that oversees the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) expressed its concern at "the continuing prevalence of sex-role stereotypes and by the reintroduction of such symbols as a Mothers' Day and a Mothers' Award, which it sees as encouraging women's traditional roles."²⁵ The UN Human Rights Council has appointed individual experts to consider the relationship between human rights and, e.g., transnational corporations, dumping of toxic waste, the use of mercenaries, the effects of economic reform policies and foreign debt, the promotion of a democratic and equitable international order, and "international solidarity."²⁶

Some of these initiatives or claims are morally defensible, indeed admirable, and calling for greater social equity or attempting to regulate the global trade in arms is laudable and necessary. However, it stretches the imagination to believe that these issues were even present in the minds of those who adopted the Universal Declaration of Human Rights in 1948. That instrument, although not in and of itself legally binding, remains the most widely accepted articulation of human rights, but the popularity of the term *human rights* as a mantra for change has led to a significant expansion of the rights proclaimed in 1948. The unintended consequence of this expansion and accompanying calls to coerce countries to comply with human rights norms may be to set back an entire movement that is based on the proposition that all human beings enjoy certain universal rights that their governments must protect.

Of course, interpretations of international norms change over time, and we should welcome the fact that we have a much fuller understanding of human rights than we did in 1948. Just as "equal protection" in the United States was understood to permit racial segregation until the Supreme Court issued its famous 1954 judgment in *Brown v. Board of Education*,²⁷ people and international human rights bodies today are less likely to tolerate inequities and ill-treatment that were common a half century ago. Calls for restraint in formulating new rights should not serve as cover to justify attempts to turn the clock back to an earlier time, when women, children, minorities, and other disempowered groups "knew their place."

The UDHR refers to itself in the preamble simply as "a common standard of achievement for all peoples and all nations." Subsequent global treaties have built on the rights proclaimed in the declaration and created specialized committees of experts to oversee their implementation, but countries have not been willing to grant

these bodies the authority to issue legally binding judgments. The committees' observations and recommendations merit serious consideration, but countries were not (and most still are not) willing to countenance an international human rights body with the authority to issue binding judgments on issues fraught with domestic sensitivity. While states cannot deny that human rights treaties *do* create binding legal obligations, in most instances the ultimate power to determine just what these obligations entail remains with the countries themselves.

NATIONALISM AND POPULISM

Most of the issues identified above predate the political shift to the right that has occurred in Europe, the United States, and many other countries in recent years. To cite only a few examples, a military coup overthrew the democratically elected government of Thailand in 2014. Elsewhere in Southeast Asia, "hoped-for [democratic] openings never came in Laos and Vietnam, where the Communist Party has always been nakedly repressive. Singapore remains an illiberal, albeit effective, technocracy. The leaders of Malaysia and Cambodia . . . have proved depressingly adept at locking up critics and persecuting opponents . . . Opposition figures in Malaysia find themselves in court on charges as varied as corruption and sodomy . . . [In Indonesia and the Philippines,] liberals have more cause for fear than hope."²⁸ Cambodia banned opposition parties from fielding candidates in the 2018 elections and closed the office of the US National Democratic Institute, accusing it of political interference.²⁹

In 2018, China amended its constitution to permit current President Xi Jinping to remain in power without limit, and suppression of dissent and dissenters has increased considerably under Xi's rule. The European Council on Foreign Relations described as "impossible topics" to discuss with China both human rights, "for which Europe's definition is rejected by China," and international law, "when it does not serve China's interests."³⁰

In Europe, "[p]rogress towards full democracy and commitment to the rule of law in the western Balkans is either stagnating or going backwards," according to a committee of the UK House of Lords.³¹ Hungary and Poland continue to move toward authoritarianism, by electing parties that are centralizing control over all branches of government in the executive. UK Prime Minister Theresa May declared that "she is prepared to rip up human rights laws to impose new restrictions on terror suspects."³² Turkish voters approved a series of constitutional amendments in 2017 that gave President Recep Erdogan "sweeping new powers."³³ Soon thereafter, Turkey was described as "sliding into dictatorship,"³⁴ and Erdogan was reelected as president in June 2018.

In Africa, the leaders of Equatorial Guinea, Republic of Congo, Uganda, Cameroon, Sudan, Chad, and Eritrea have all been in power for 20 successive years or more, generally pursuant to sham elections in which no viable opposition was

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permitted.³⁵ Only in 2017 were two of its most infamous dictators – Robert Mugabe in Zimbabwe (37 years in power) and José Eduardo dos Santos in Angola (38 years) – removed from office. Neither Joseph Kabila in Democratic Republic of the Congo nor Paul Kagame in Rwanda show any signs of leaving soon, and a 2017 New York Times editorial was entitled “Democracy Is Rwanda’s Losing Candidate.”³⁶ Outside of Africa, the list of those in power for more than 20 years includes Cambodian Prime Minister Hun Sen, Iran’s Supreme Leader Ayatollah Ali Khamenei, Kazakhstan’s President Nursultan Nazarbayev, and Tajikistan’s President Emomali Rakhmon.³⁷

In 2015, the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, addressed the Human Rights Council in unusually direct terms. While his comments address a wide range of human rights violations, not only those related to populism or democracy, they underscore the challenges that human rights continue to face.

I will focus in this statement on the broad conduct of Member States regarding their obligations to uphold human rights . . .

[W]ith alarming regularity, human rights are disregarded, and violated, sometimes to a shocking degree.

States claim exceptional circumstances. They pick and choose between rights. One Government will thoroughly support women’s human rights and those of the LGBT communities, but will balk at any suggestion that those rights be extended to migrants of irregular status. Another State may observe scrupulously the right to education, but will brutally stamp out opposing political views. A third State comprehensively violates the political, civil, economic, social and cultural rights of its people, while vigorously defending the ideals of human rights before its peers . . .

In recent months I have been disturbed deeply by the contempt and disregard displayed by several States towards the women and men appointed by you as this Council’s independent experts – and also by the reprisals and smear campaigns that are all too frequently exercised against representatives of civil society, including those who engage with the Council and its bodies. I appeal to all of you, once again, to focus on the substance of the complaint, rather than lash out at the critic – whether that person is mandated by States, is a member of my Office, or is a human rights defender . . .

[T]he reality, in far too many countries, of massacres and sexual violence; crushing poverty; the exclusive bestowal of health-care and other vital resources to the wealthy and well-connected; the torture of powerless detainees; the denial of human dignity – these things are known. And Excellencies, they are what truly make up a State’s reputation; together with the real steps – if any – taken by the State to prevent abuses and address social inequalities, and whether it honours the dignity of its people.

The only real measure of a Government’s worth is not its place in the solemn ballet of grand diplomacy. It is the extent to which it is sensitive to the needs – and

protects the rights – of its nationals and other people who fall under its jurisdiction, or over whom it has physical control.

Some policy-makers persuade themselves that their circumstances are exceptional, creating a wholly new reality unforeseen by the law. This logic is abundant around the world today: *I arrest arbitrarily and torture because a new type of war justifies it. I spy on my citizens because the fight against terrorism requires it. I don't want new immigrants, or I discriminate against minorities, because our communal identity is being threatened now as never before. I kill without any form of due process, because if I do not, others will kill me.* And so it goes, on and on, as we spiral into aggregating crises.

I must remind you of the enduring and universal validity of the international human rights treaties that your States wrote and ratified. In reality, neither terrorism, nor globalisation, nor migration are qualitatively new threats that can justify overturning the legal foundations of life on Earth. They are not new.³⁸

HUMAN RIGHTS AS LAW

The phrase *human rights* is extraordinarily broad and can encompass many understandings of what rights are. As implied by the first sentence of this book, however, the contemporary content of human rights is defined most clearly and most powerfully as law. The relationship of law to other regulatory or aspirational frameworks – politics, ideology, religion, philosophy, social justice, or equality, to name only a few – is a recurring theme of the present work. The underlying assumption is that the status of human rights *as law* needs to be protected and that the distinction between legal obligations and other obligations of a moral or political nature needs to be maintained. Human rights may mean all things to all people, but international human rights law cannot.

This understanding of human rights as connoting international human rights law may be criticized as narrow, and it certainly does not encompass every right that someone or some group seeks to assert. As discussed in Chapter 7, this narrow scope should not be confused with an attempt to achieve uniformity in interpretation and application. Law does, however, provide a structural context in which human rights can be best understood in today's world. Law also provides (1) the best evidence of the content of human rights and (2) the best evidence of the essential universality of the human rights commitments that states have actually undertaken. As aptly put by Duke University professor Allen Buchanan, "Human rights law, not any philosophical or 'folk' theory of moral human rights, is the authoritative lingua franca of modern human rights practice."³⁹

This approach does not seek to minimize the role of human rights understood more broadly as an inspirational moral framework that has motivated activists and ordinary people around the world. It also recognizes the political value that many governments have found in human rights, whether it is to promote them or to hold them up as foils for nationalist rhetoric. However, understanding the role of human

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rights as law is essential if one hopes to clarify the other roles that human rights may play, as ideology, utopia, or political weapon.

This dichotomy is expressed by the former executive director of Minority Rights Group International, Mark Lattimer. He accepts that, "[a]s human rights demands become more detailed and comprehensive, more constitutive, the weight of human diversity they attempt to bear becomes too much – and the edifice collapses."⁴⁰ However, Lattimer notes that a more expansive claim for human rights based on politics, morals, or justice "is made so persistently by human rights lawyers around the world, as well as finding a grounding in the history and philosophy of human rights, that it surely deserves to be treated seriously, even if this means rethinking legal categories or touching on the relationship of justice to human dignity, or what it means to be human."⁴¹ While I disagree that expansive claims are what is needed now, these are, indeed, options that need to be treated seriously.

Law can change, and international human rights law is no exception. Neither the Universal Declaration nor any other human rights instrument was handed down on golden tablets or otherwise revealed through divine intervention. Human rights were consciously created by diplomats, lawyers, and lobbyists to respond to the lessons of the two major wars of the twentieth century. Human rights are linked to modernity, to constrain the capacity of the twentieth century state to coerce its citizens and to recognize the obligations of government to promote equitable development and protect those in need, rather than simply consolidating its own power.

The continuing evolution of international human rights law is demonstrated by the adoption of numerous treaties at the global and regional levels that expand, nuance, or occasionally limit the broad norms articulated in the UN Charter or by the UDHR. New norms await further elaboration and agreement, and interpretations of existing norms may shift – just as domestic statutes and constitutions acquire new meaning in order to respond to new situations and new problems. We should welcome this process, although proclaiming too many new norms without ensuring that meaningful consensus exists within all regions of the world can be problematic, as discussed further in Chapters 5 and 10.

THE GENERAL APPROACH

The arguments set forth in this book are pragmatic rather than philosophical, realist rather than visionary. They assume that the constraints of the current international system of states will continue to exist for the foreseeable future and that neither a world government nor a new "super" or "hyper" state will have the capacity or legitimacy to mold the world into any particularly orderly shape. These assumptions do not flow from a conclusion that today's governmental institutions, national or international, are perfect or even particularly functional. However, with all due respect to the necessary work of philosophers and theorists, there is no alternative set of international institutions on the horizon (or even in distant mirages) that is likely

to develop in the foreseeable future. Greater effectiveness, transparency, and accountability from all levels of government must be sought, but no system of global governance will ever be able to assume responsibility for protecting the rights of billions of people around the world.

Perhaps the best hope for significant change in international structures was the European Union, and the EU remains a laudable example of what sufficient political will can accomplish on a regional level. However, even prior to the 2016 referendum in the United Kingdom that narrowly resulted in a vote to withdraw from the EU, the limits of "Europe" in replacing national feelings with transnational competence or allegiance were already evident. While the articulation of and respect for human rights within Europe have been constant concerns of the EU and the more inclusive Council of Europe, Chapter 7 discusses the many ways in which even regional consensus and consistency have reached their limits. Debates over whether the EU suffers from a *democracy deficit*, due to the fact that European citizens are thought to have insufficient direct influence on EU decision making, only reinforces the fact that states, not the European Union, remain the fundamental building blocks of international politics and economics.

My arguments also are premised on the proposition that international human rights law has had a positive influence on the situation of individuals across the globe and that maintenance and better implementation of that law should be encouraged.⁴² It does *not* presume that either human rights or law generally is the primary agent of change within or across societies, but it does argue that human rights norms can facilitate the development and influence of other socio-economic-political-moral change agents in ways that are likely to respond to the needs of most people in the world.

As just suggested, I do not believe that human rights are the answer to all of the world's problems, an issue discussed particularly in Chapters 3, 4, and 5. Properly understood, human rights articulate a minimum standard for the relationship between individuals and their governments, but they should not be utilized to impose any particular conception of the ideal society in every corner of the world. At the same time, human rights constrain some of the acts that might have been legally and politically viable options for states before 1948. Just as colonialism and slavery are no longer legally or morally acceptable in the world, neither are genocide, torture, unfair trials, despotism, discrimination, unjustified limitations on basic freedoms, or government failure to put the rights of its population above the interests of its entrenched elites. Without international law, we risk a return to the nineteenth century, in which war was a legal and oft-used instrument of policy, and international cooperation was achieved through royal marriages and secret negotiations. While progress toward a better world has been ragged, this is not the time to go back to national isolationism or to pretend that a benevolent world government is a viable option.

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