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HUMAN RIGHTS, INTERNATIONAL

With the founding of the United Nations (UN) the incorporation of human rights into international law received a crucial impetus. After a frightful period in which an ideology of dehumanization of whole peoples led to a world war with subsequent mass destruction and genocide, a general feeling of "never again" had emerged. As a result, in October of 1945, a new institution (the UN) was founded on a three-pronged mission: international peace and security, international development, and international justice. Each prong was connected to specific new institutions and procedures. While the UN's security mission was set up as, above all, a political venture and the development mission as principally an economic challenge, the global justice endeavor was seen as primarily a matter of international law. This meant an extension of the law of states (*jus intra gentes*) to global provisions applying to individual human beings as well (a new *jus gentium*). The emphasis was on human rights. Thus, in the preamble to the Charter of the United Nations of 1945 (the Charter) "We the Peoples of the United Nations" express our determination "to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . ."

The Charter itself stipulates "promoting and encouraging respect for human rights" as one of the purposes of the UN, while connecting this to global peace and stability. Certain institutional arrangements are laid down to establish a Charter-based setting for "respect, encouragement and promotion of human rights." The UN General Assembly is charged with the initiation of studies and the making of recommendations to assist in the realization of human rights. Evidently, the language is rather weak; referring to further institutional

arrangements such as the establishment of a Commission. The Commission on Human Rights was, indeed, established in 1946. Under the guidance of its Chair, Eleanor Roosevelt, it submitted the draft of a Universal Declaration of Human Rights (the Declaration) as a basis for a new International Bill of Human Rights. (The Bill also encompasses two major covenants, adopted in 1966.) After slightly amending the draft text, the UN General Assembly accepted the Declaration on December 10, 1948.

The preamble of the Declaration repeats the reaffirmation of faith in fundamental rights and the inherent worth and dignity of the human being that stood at the cradle of the UN. Not surprisingly, then, the list of concrete prescriptions and proscriptions starts with a confession: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Notably, this post World War II expression of global faith—in legal terminology *ius divinum* (divine law)—reflects two grand principles, one of a substantive and the other of a procedural nature: *human dignity* and *universality* (including inalienability). Indeed, these had already been announced in the Declaration's preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

The first foundational principle of human rights, inclusive human dignity, refers to the inherent worth of the human being, and hence entails the value of human life per se. Lamentably, a person's dignity can be violated, by others as well as himself. Yet, it cannot be taken away, since "even the vilest criminal remains a human being possessed of common human dignity," ~~it cannot be taken away,~~ as U.S. Supreme Court Justice Brennan once put it~~suggested~~ (1972: 273). Thus, it is a question of *being* rather than having. Indeed, rights pertaining to basic human dignity are inalienable. The second foundational principle then,

universality, is reflected in expressions such as *all* human beings, *everyone* included, and *nobody* to be exposed to abuse of power. Together, these two principles ~~y~~ are meant to limit and govern any use of power over human beings. Their starting point is the acknowledgement of every person's right to exist. People count and in principle no individual counts more, or less, than another. No one, in other words, is to be excluded from the scope of the typical human rights term *everyone*.

The two grand principles of human dignity and universality sustain two major values, which are elaborated in distinct articles of the Declaration:

- human *freedom* and its complement responsibility; and
- human *equality* and its complement non-discrimination.

While the Charter had remained wholly vague on the substance of human rights, the Declaration specifies the implications of freedom and equality in concrete rights. A first category, termed *civil and political rights*, encompasses protection against discrimination, life, liberty and security of person, no torture, effective legal remedy and due process, equality before the law, protection of privacy and of family life, citizenship and participation in political decision-making, seeking asylum in case of persecution, freedom of conscience and religion as well as expression of one's thoughts, property, equal access to public services, and freedom of peaceful assembly and association. A second category, entitled *economic, social and cultural rights*, includes the right to a decent standard of living with adequate food, clothing and shelter, access to public health and education, work, and cultural participation. The two major covenants that followed the adoption of the Declaration both begin with a *collective right:* self-determination of peoples. Such rights are conceived as being of a third category. However, all human rights are envisaged as being "universal,

indivisible and interdependent, and interrelated" (World Conference on Human Rights, *Vienna Declaration and Programme of Action*: 1993).

Treaty-Based Provisions

In the period following the adoption of the Declaration, the human rights project has been principally interpreted as a challenge to define new standards and to create juridical provisions for monitoring of compliance, interpretation and judgment of individual and state complaints. Thus, the Charter-based arrangements were followed by the creation of Treaty-based mechanisms, beginning with the two principal covenants complementing the Declaration in what is usually called the International Bill of Human Rights: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both in force since March 23, 1976). Later six major international human rights treaties followed, each with its own supervisory committee: the Convention on the Elimination of all forms of Racial Discrimination (in force January 4, 1969); the Convention on the Elimination of all forms of Discrimination Against Women (in force September 3, 1981); the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force June 26, 1987); the Convention on the Rights of the Child (in force September 3, 1990); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in force July 1, 2003); ~~and~~ the Convention on the Rights of Persons with Disabilities (in force May 3, 2008); and ~~.~~ ~~T~~the International Convention on Enforced Disappearances (in force December 23, 2010)~~might be mentioned too, although it has not yet entered into force~~. The committees issue general comments on the interpretation of the treaty in question and concluding

observations on country reports as well as cases involving individual complaints. This last function pertains to most of the covenants and conventions.

Human Rights and International Relations

Sixty-five years after the founding of the UN, human rights looks like a world by itself: a system with its own standards, institutions and mechanisms, a world of experts still far from being intrinsically connected to people's daily life worlds. Insofar as the mass media pays attention to human rights questions and issues, their focus is primarily on international relations and foreign policy. This would not give any reason for concern if the emphasis were just on human rights as an end to be achieved; what permeates international relations is, however, human rights as an instrument to uplift a state's own credibility while undermining that of other states.

In that respect two distinct ways of twisting human rights may be discerned: offensive and defensive human rights. *Offensive human rights* means a focus on violations by *other* states. Illustrative in this respect is the usual practice in the relations between Cuba and the United States: in whatever forum possible, motions are put forward to censure the rival state. The term *defensive human rights*, on the other hand, refers to the practice of signing and ratifying whatever treaty possible (not uncommonly with preannounced reservations) as well as incorporating human rights standards in the country's national constitution, not as a first step towards implementation but simply as a point of positive reference whenever questions are asked as to the country's human rights record. To be sure, the ensuing state obligations are internationally enforceable only if systematic non-compliance were first reported to the UN Security Council and next resulted in action in the form of sanctions. This rarely happens.

International governance is extremely weak in practice. Consequently, the Treaty-based mechanism states (through their governments) can, in practice, refrain from submitting country reports as well as from following up concluding observations, and in the Charter-based bodies they can ignore motions and resolutions requesting essential changes in their human rights policies and practices, while even denying access to mandated UN representatives seeking entry into the country under scrutiny.

Thus while the standards and mechanisms have been created as a legal venture, implementation has always been dominated by international relations. Thus, there is no world court of human rights comparable to the European Court of Human Rights in Strasbourg, whose judgments are executed as standard practice. Membership of the Charter-based bodies is through state representation, implying that states are involved in judging their own cases. The various Treaty-committees are composed of independent experts; in practice, however, appointment requires lobbying state representatives with the full support of one's own government. A slight improvement in this whole set-up is the conversion of the Commission on Human Rights into a Human Rights Council with Universal Periodic Review (UPR) for all 192 member states. The information that is submitted includes reports of special rapporteurs and Treaty-based committees. Yet, although its composition was supposed to better reflect positive domestic human rights records, the Human Rights Council remains a gathering of peers and a number of these have feeble human rights records. Thus, actual membership still includes states notorious for gross and systematic human rights violation such as Angola, Cameroon, China, Cuba, Libya, Russia and Saudi Arabia. (~~For example, i~~In 2009, countries with questionable human rights records—Bangladesh, Cameroon, China, Cuba, Djibouti, Jordan, Mauritius, Mexico, Nigeria, Russian Federation, Saudi Arabia, Senegal and Uruguay—were all re-elected.)

A Critical Appraisal

In the context of globalization and the end of the Cold War, one would have expected a revival of human rights as a genuine global venture capable of engaging and mobilizing mass constituencies. That such support has not been forthcoming must be seen as a disappointment (Normand & Zaidi 2008: xxviii). In this respect some observations may serve to clarify certain flaws in the global human rights venture:

- The UN project as envisaged in the Charter was never meant to be *legally* enforceable by *international* means, but "through political means at the behest of powerful states" (Normand & Zaidi 2008: 332). Already the terminology is weak, with the core expression of "protection and promotion of human rights" as testimony to its "soft law" character. Whereas rights signify abstract acknowledgement of interests protected by law, human rights refer to interests directly connected to human dignity, *viz*. fundamental freedoms and basic entitlements. To "protect human rights," then, means protecting the protection of these interests by law. Such discourse weakens the mission.
- While country assessments and cases of human rights violations are treated as a very serious matter, there is little attention to the follow-up of cases in which evident violations of human rights were established. Notorious manifestations of the global *human rights deficit* are (a) impunity of state-related perpetrators of human rights abuse, such as government officials, politicians, prison officers, policemen and members of the armed forces; (b) human rights violations committed under the cover of the public-private divide such as domestic violence against women and children; (c) structurally failing protection of minorities,

giving rise to collective violence and internal and external displacement of whole groups of people; and (d) structural non-implementation of the human rights of those living in situations of extreme poverty and marginalization.

- The juridical nature of the international human rights venture went together with an emphasis on case-by-case approaches. Yet, non-implementation is often of a structural nature, requiring primarily international political action. Insofar as such action has been forthcoming, it has suffered from the almost inherent double standards in the world of states. Effective action requires decision-making by the UN Security Council and that implies consent on the part of its permanent members, including China, Russia and the United States. Thus, gross and systematic violations of human rights are not being addressed in territories such as Chechnya and Tibet.
- Effective protection of minorities requires close ties between the UN's political set-up, which deals with international peace and security, and its juridical branch, which is tuned to the promotion and protection of human rights. Likewise, the realization of economic, social and cultural rights needs the full commitment of relevant development-oriented agencies, including the international financial institutions (IFIs). Yet, mainstreaming human rights as envisaged in the whole UN system of governance has, above all, resulted in documents that reflect policy briefs, reports and policy guidelines rather than the genuine operationalization of human rights at all levels and layers (Normand & Zaidi 2008: 320).
- There has not been much interest in global human rights as a common mission of the United Nations, as envisaged in Article 1 of the Declaration. Instead, member states appear to believe in setting up their own human rights mechanisms—not as

complementary to the international framework but as an alternative—rather than committing themselves to truly supranational supervision and enforcement. Strikingly, even in academic circles the grounds of human rights, as expressed in the first article of the Declaration, are rarely discussed (except for philosophical reflections on human dignity). While such philosophical approaches are not without their utility—see, for example, "In Search of a New Paradigm: Development Interventionism in a Human Dignity Perspective" (Gaay Fortman 2004a: 19–29)—the downside of that endeavor to avoid discussions that might touch upon the axiom of global universality is that concrete human rights tend to get detached from the fundamental values that lie at the core of each distinct human right. Let us take freedom of opinion and expression as an example here. Its ground—liberty—is often interpreted in such a way that the first part of Article 1 of the Declaration is dissociated from the second: the conception of freedom becomes unhinged from an accompanying conception of responsibility. Consequently, through the above interpretation, the grand principle of human dignity loses its significance. Indeed, certain interpretations utilize Article 19 of the Declaration as a license to use offending language and to disseminate dignity-offending material, such as pornography. It is not that the rule of law requires such acts to be outlawed, for such questions implicate issues of the capacity to enforce and the flaws of prosecution in a context of privacy. The point is merely that such claims under Article 19 are unrelated to human dignity as a foundational principle of human rights; they tend to obscure that the human dignity element behind the Article lies in the necessity of truth against power. These interpretations also tend to alienate huge portions of the necessary constituency for the human rights

mission, while also creating a political constituency for relativist positions such as Asian or Islamic human rights.

- International human rights are not yet sufficiently focused on the economic, political, social and cultural aspects of the distinct environments in which these rights have to be realized. As the whole international venture for the protection of human dignity against abuse of power is based on well functioning legal systems that connect national law to international law, efforts to realize these rights primarily require the creation of good government based on the rule of law. In order to overcome the obstacles connected to failing and dictatorially ruled states, well functioning economies and policies to overcome cultural prejudice are essential. That would entail a shift of resources from purely juridical action towards policies supporting political transformation.
- Devoid of global governance, economic globalization has increased socio-economic inequality while creating an adverse environment for the realization of economic, social and cultural rights. Simultaneously, non-state agencies became more relevant actors in the whole international endeavor for structural protection of human dignity. An effective check on human rights-affecting actions by multinational corporations (MNCs) is primarily the duty of states under whose responsibility these companies operate. While at the level of states an increased focus on MNC violations of human rights is clearly noticeable, international regulation will have to follow if violations reach a globally intolerable level (Ruggie 2008). Notably, even international governmental organizations such as the World Trade Organization distance themselves from responsibilities for human rights implementation.

- In the aftermath of September 11, 2001 (9/11) the world has seen a strong revival of exceptionalism in respect to international law, with the United States and its "coalition of the willing" in the forefront. Exceptionalism is a term generally used to describe the ways and means by which states exempt themselves from the international legal and political order. The United States is a prime example of state-based exceptionalism as it embodies a combination of three elements: hegemony (and with that the idea of expansion), unilateralism ("going it alone"), and pre-emptive strike (Chace 2004: 15–18). The expansion of this last element by President George W. Bush to include preventive strikes aimed at eliminating a presumed threat before it becomes imminent has been particularly disconcerting. Within the setting of the problematique of concern here, the phrase *exceptionalism* may be used to describe any attempt to exempt citizens and institutions from democratic public-political authority and its laws, policies and actual decisions, based on assumed incompatibility with national principles. In the wake of the Global War on Terror, as the Pentagon termed the United States' response to 9/11, even rights very close to the core of human dignity such as due process and the prohibition of torture have been grossly and systematically violated. Highly problematic from a human rights perspective is the exceptionalist spillover to the rest of the world, including countries like Israel and Iran.

Positive Perspectives

Notwithstanding these serious flaws in the operation of the international human rights system, there are certain hopeful signs.

- Notably, the whole venture is of a programmatic rather than an immediately conclusive nature. In fact, it all started with a Universal Declaration of Human Rights. This does not mean, however, that the term *rights* as used here is meant in the sense of a moral category as if these moral rights could be distinguished from legal rights. Rights signify interests protected by law, and in this sense human rights are not distinct from other rights. It should be noted that rights are never simply self-executing. Indeed, to realize one's rights under the law always requires action and this applies to declared rights in particular. Hence, although the down-stream, or top-down, effect of international human rights standards is rather weak, upstream action, from the bottom up, may well serve to actually secure the fundamental freedoms and entitlements that are meant to be protected (Gaay Fortman 2004b: 13–17).
- Although UN General Assembly Declarations do not routinely qualify as international law, through periods of customary state practice and guided by a strong o*pinio juris* (an established legal opinion) these may well result in customary international law, generally regarded as *jus cogens* (obligatory law). This applies, for example, to certain core elements in the Universal Declaration of Human Rights such as the right to life, liberty and bodily integrity (prohibition of torture) and due process, as the International Court of Justice emphasized, for example, in the Tehran Hostages Case (United States Diplomatic and Consular Staff in Tehran, Judgment 1980: ¶ 91). Yet, even to get *jus cogens* enforced through effective judicial remedies remains a huge challenge. Hence, the downstream venture will always need linkages to upstream action on the part of those whose rights are at stake and the agencies that support them.

- The international human rights project was never intended as a separate venture, aside from regional and national mechanisms. Europe has created a very strong regional system through the European Convention on Human Rights and the adjoining European Court of Human Rights in Strasbourg. The regional mechanisms in Africa and in the Americas are gradually being reinforced. Even more importantly, national human rights institutions—supervisory commissions and institutes—play an increasing role. Moreover, national legislators and particularly national judiciaries often manifest an activist attitude when it comes to human rights implementation (Gaay Fortman 2006: 22–44).
- Despite its flaws from the legality perspective, international human rights law has created a strong notion of global legitimacy, which is particularly significant because no global government currently exists. Consequently, no use of power is considered legitimate if it violates international human rights standards.
- Although the original language of the international human rights venture is juridical and protective, in actual practice the project is at least as political and transformational as it is juridical. This strategic observation is represented in Figure 1.

[Insert Human Rights International Figure 1 about here]

Figure 1. Human rights in a functional as well as an instrumental setting

Source: Bas de Gaay Fortman, Human Rights, entry in David Clark (ed.), Elgar Companion on Development Studies, Cheltenham (UK): Edward Elgar, 2006, p. 264.

To conclude, in the struggle for public justice, international human rights provide not just legal resources as based on positive law, but also political means anchored in public legitimacy. Additionally, human rights function not merely to protect people with regard to the freedoms and entitlements they have already acquired, but in their emancipatory struggles for socio-political transformation as well. Thus, the whole picture offers a plural perspective based on a civilizational commitment of chief importance.

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