

HUMAN RIGHTS AND STATE RESPONSIBILITY

INTRODUCTION

Human rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses. Examples of human rights are the right to freedom of religion, the right to a fair trial when charged with a crime, the right not to be tortured, and the right to engage in political activity. These rights exist in morality and in law at the national and international levels. They are addressed primarily to governments, requiring compliance and enforcement. The main sources of the contemporary conception of human rights are the Universal Declaration of Human Rights (United Nations, 1948b) and the many human rights documents and treaties that followed in international organizations such as the United Nations, the Council of Europe, the Organization of American States, and the African Union.

The philosophy of human rights addresses questions about the existence, content, nature, universality, justification, and legal status of human rights. The strong claims made on behalf of human rights (for example, that they are universal, or that they exist independently of legal enactment as justified moral norms) frequently provoke skeptical doubts and countering philosophical defences. Reflection on these doubts and the responses that can be made to them has become a sub-field of political and legal philosophy with a substantial literature.

This entry includes a lengthy final section, International Human Rights Law and Organizations, that offers a comprehensive survey of the international system for the promotion and protection of human rights.

1. The General Idea of Human Rights

The Universal Declaration of Human Rights (1948) sets out a list of over two dozen specific human rights that countries should respect and protect. These specific rights can be divided into six or more families:

security rights that protect people against crimes such as murder, massacre, torture, and rape;

due process rights that protect against abuses of the legal system such as imprisonment without trial, secret trials, and excessive punishments;

liberty rights that protect freedoms in areas such as belief, expression, association, assembly, and movement;

political rights that protect the liberty to participate in politics through actions such as communicating, assembling, protesting, voting, and serving in public office;

equality rights that guarantee equal citizenship, equality before the law, and nondiscrimination;

and *social (or "welfare") rights* that require provision of education to all children and protections against severe poverty and starvation.

Another family that might be included is *group rights*. The Universal Declaration does not include group rights, but subsequent treaties do. Group rights include protections of ethnic groups against genocide and the ownership by countries of their national territories and resources (see Anaya 2004, Baker 2004, Henrard 2000, and Kymlicka 1989).

In this section I try to explain the general idea of human rights by setting out some defining features. The goal here is to answer the question of what human rights are with a general description of the concept rather than a list of specific rights. Two people can have the same general idea of human rights even though they disagree about whether some particular rights are human rights.

Human rights are political norms dealing mainly with how people should be treated by their governments and institutions. They *are not ordinary moral norms applying mainly to interpersonal conduct* (such as prohibitions of lying and violence). As Thomas Pogge puts it, "to engage human rights, conduct must be in some sense official" (Pogge 2000, 47).

But we must be careful here since some rights, such as rights against racial and sexual discrimination are primarily concerned to regulate private behavior (Okin 1998). Still, governments are directed in two ways by rights against discrimination. They forbid governments to discriminate in their actions and policies, and they impose duties on governments to prohibit and discourage both private and public forms of discrimination.

Second, **human rights exist as moral and/or legal rights**. A human right can exist as a shared norm of actual human moralities, as a justified moral norm supported by strong reasons, as a legal right at the national level (here it might be referred to as a "civil" or "constitutional" right), or as a legal right within international law. The aspiration of the human rights movement is that human rights will come to exist in all four ways. (See Section 2. The Existence of Human Rights.)

Third, **human rights are numerous (several dozen) rather than few**. John Locke's rights to life, liberty, and property were few and abstract (Locke 1689), but human rights as we know them today address specific problems (e.g., guaranteeing fair trials, ending slavery, ensuring the availability of education, preventing genocide.) They are the rights of the lawyers rather than the abstract rights of the philosophers. Human rights protect people against familiar abuses of people's dignity and fundamental interests.

Because many human rights deal with contemporary problems and institutions they *are not transhistorical*. One could formulate human rights abstractly or conditionally to make them transhistorical, but the fact remains that the formulations in contemporary human rights documents are neither abstract nor conditional. They presuppose criminal trials, governments funded by income taxes, and formal systems of education.

Fourth, **human rights are minimal standards**. They are concerned with avoiding the terrible rather than with achieving the best. Their focus is protecting minimally good lives for all people (Nickel 2006). Henry Shue suggests that human rights concern the "lower limits on tolerable human conduct" rather than "great aspirations and exalted ideals" (Shue 1996). As minimal standards they leave most legal and policy matters open to democratic decision-making at the national and local levels. This allows them to accommodate a great deal of cultural and institutional variation and to leave a large space for democratic decisionmaking at the national level.

Fifth, **human rights are international norms covering all countries and all people living today**. International law plays a crucial role in giving human rights global reach. We can say that human rights *are universal* provided that we recognize that some rights, such as the right to vote, are held only by adult citizens ; that some human rights documents focus on vulnerable groups such as children, women, and indigenous peoples; and that some rights, such as the right against genocide, are group rights.

Sixth, **human rights are high-priority norms**. Maurice Cranston held that human rights are matters of "paramount importance" and their violation "a grave affront to justice" (Cranston 1967). This does not mean, however, that we should take human rights to be absolute. As James Griffin says, human rights should be understood as "resistant to trade-offs, but not too resistant" (Griffin 2001b). The high priority of human rights needs support from a plausible connection with fundamental human interests or powerful normative considerations.

Seventh, **human rights require robust justifications that apply everywhere and support their high priority**. Without this they cannot withstand cultural diversity and national sovereignty. Robust justifications are powerful but need not be understood as ones that are irresistible.

Eighth, **human rights are rights, but not necessarily in a strict sense**. As rights they have several features. One is that they have rightholders, a person or agency having a particular right. Broadly, the rightholders of human rights are all people living today. More precisely, they are sometimes all people, sometimes all citizens of countries, sometimes all members of groups with particular vulnerabilities

(women, children, racial and religious minorities, indigenous peoples), and sometimes all ethnic groups (as with rights against genocide.) Another feature of rights is that they *focus on a freedom, protection, status, or benefit for the rightholders* (Brandt 1983, 44). When we talk about a right to freedom of speech, for example, the focus is on a generally beneficial freedom that the rightholders are to have available.

Rights also *have addressees* who are assigned duties or responsibilities. A person's human rights are not primarily rights against the United Nations or other international bodies; they primarily impose obligations on the government of the country in which the person resides or is located. The human rights of citizens of Belgium are mainly addressed to the Belgian government.

International agencies, and the governments of countries other than one's own, are secondary or "backup" addressees. International human rights organizations provide encouragement, assistance, and sometimes criticism to states in order to assist them in fulfilling their duties. The duties associated with human rights typically require actions involving respect, protection, facilitation, and provision.

Finally, rights are usually mandatory in the sense of imposing duties on their addressees, but they sometimes do little more than declare high-priority goals and assign responsibility for their progressive realization. It is possible to argue, of course, that goal-like rights are not real rights, but it may be better simply to recognize that they comprise a weaker notion of a right.

Having set out a general idea of human rights with eight elements, it is useful to consider three other candidates which I think should be rejected.

The first is the claim that all human rights are negative rights, in the sense that they only require governments to refrain from doing things. On this view, human rights never require governments to take positive steps such as protecting and providing. To refute this claim we do not need to appeal to social rights that require the provision of things like education and medical care. It is enough to note that this view is incompatible with the attractive position that one of the main jobs of governments is to protect people's rights by creating a system of criminal law and of legal property rights.

The European Convention on Human Rights (Council of Europe 1950) incorporates this view when it says that "Everyone's right to life shall be protected by law" (article 2.1).

And the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1984) imposes the requirement that "Each State Party shall ensure that all acts of torture are offences under its criminal law" (article 4.1). Providing protections is providing services, not merely refraining

A second claim to be rejected is that all human rights are inalienable.

Inalienability does not mean that rights are absolute or can never be overridden by other considerations. To say that a right is inalienable means that its holder cannot lose it temporarily or permanently by bad conduct or by voluntarily giving it up. I doubt that all human rights are inalienable in this sense. If we believe in imprisonment for serious crimes, then people's rights to freedom of movement can be forfeited temporarily or permanently by just convictions of serious crimes.

And the right to freedom of movement can be voluntarily alienated by a person who makes a lifelong commitment to live in a monastery. Human rights are not inalienable but they are hard to lose (for a stronger view of inalienability, see Donnelly 2003:10).

Third, I think we should reject John Rawls' proposal in *The Law of Peoples* that **human rights define where legitimate toleration of other countries ends.** Rawls says that human rights "specify limits to a regime's internal autonomy" and that "their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force" (Rawls 1999, 79-80).

It is a grave oversimplification to suggest that there is a line defined by human rights where national sovereignty ends. There is no need to deny that human rights are helpful in identifying the limits of justifiable toleration, but there are several reasons to doubt that they simply define that boundary.

First, the "fulfillment" of human rights is a very vague idea. No country fully satisfies human rights; all countries have significant human rights problems. Some countries have large human rights problems, and many have massive problems ("gross violations of human rights").

Beyond this, the responsibility of the current government of a country for these problems also varies. The main responsibility may belong to the previous government and the current government may be taking reasonable steps to move towards greater compliance.

Further, defining human rights as norms that set the bounds of toleration requires restricting human rights to only a few fundamental rights. Rawls suggests the following list: "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as pressed by the rules of natural justice (that is, that similar cases be treated similarly)" (Rawls 1999, 65). As Rawls recognizes this list leaves out most freedoms, rights of political participation, equality rights, and social rights. Leaving out any protection for equality and democracy is a high price to pay for assigning human rights the role of setting the bounds of tolerance, and we can accommodate Rawls' underlying idea without paying it.

The intuitive idea that Rawls uses is that *countries engaging in massive violations of the most important human rights* are not to be tolerated, particularly when the notion of toleration implies, as Rawls thinks it does, full and equal membership in good standing in the community of nations.

To use this intuitive idea we do not need to follow Rawls in equating human rights with some radically stripped down list of human rights. Instead we can work up a view, which is needed for other purposes anyway, of which human rights are the most important.

Massive violations of the most fundamental rights can then be used as grounds for non-tolerance.

2. The Existence of Human Rights

The most obvious way in which human rights exist is as norms of national and international law created by enactment and judicial decisions.

At the international level, human rights norms exist because of treaties that have turned them into international law. For example, the human right not to be held in slavery or servitude in article 4 of the European Convention and in article 8 of the International Covenant on Civil and Political Rights exists because these treaties establish it.

At the national level, human rights norms exist because they have through legislative enactment, judicial decision, or custom become part of a country's law. For example, the right against slavery exists in the United States because the 13th Amendment to the U.S. Constitution prohibits slavery and servitude. When rights are embedded in international law we speak of them as human rights; but when they are enacted in national law we more frequently describe them as civil or constitutional rights. As this illustrates, it is possible for a right to exist within more than one normative system at the same time.

3. International Human Rights Law and Organizations

International law now contains many functioning human rights treaties. A number of them have been ratified by more than three-quarters of the world's countries.

The efforts to protect human rights through international treaties began in 1919 in the League of Nations and expanded after World War II in international organizations such as the United Nations, the Council of Europe, the Organization of American States, and the African Union.

The international promotion and protection of human rights complements the legal protection of human rights at the national level.

4. United Nations Human Rights Treaties

International human rights treaties transform lists of human rights into legally binding state obligations. The first such United Nations treaty was the Genocide Convention, approved in 1948 — just one day before the Universal Declaration.

The Convention defines genocide and makes it a crime under international law.

The Convention requires states to enact national legislation prohibiting genocide, to try to punish persons or officials who commit genocide, and to allow persons accused of genocide to be transported to countries capable of trying the charge.

It also calls for action by UN bodies to prevent and suppress acts of genocide (Genocide Convention, articles 5, 7, 9).

Currently the Genocide Convention has more than 130 parties (1948).

The **International Criminal Court**, created by the Rome Treaty of 1998, is authorized to prosecute genocide at the international level, along with crimes against humanity and war crimes.

After the creation of the Universal Declaration, the Human Rights Commission proceeded to try to create treaties that would make the rights in the Universal Declaration into norms of international law. Because of the Cold War, the effort went ahead at a glacial pace.

To accommodate the ideological division between those who believed in the importance of social rights and those who did not, or who thought that social rights could not be enforced in the same way as civil and political rights, the Commission ultimately decided to create two separate treaties. Drafts of the two International Covenants were submitted to the General Assembly for approval in 1953, but approval was much delayed. Almost twenty years after the Universal Declaration, the United Nations General Assembly finally approved the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (both 1966).

The Civil and Political Covenant contains most of the civil and political rights found in the Universal Declaration. The Social Covenant contains the economic and social rights found in the second half of the Universal Declaration. These treaties embodying Universal Declaration rights received enough ratifications to become operative in 1976 and have now become the most important UN human rights treaties. To date, these treaties have been ratified by about 75 percent of the world's countries.

5. The International Criminal Court

Once human rights norms are established internationally, the question arises about what should be done by way of punishment and accountability for political, military, and ethnic leaders who have organized and carried out severe human rights violations.

The International Criminal Court (ICC) is designed to prevent impunity for human rights crimes, genocide, war crimes, and crimes against humanity. The ICC was based on the models and experience of the Nuremberg Tribunal, the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.

The ICC was created in 1998 when 120 States adopted the Rome Statute of the International Criminal Court setting forth the jurisdiction and functions of the Court.

By April 11, 2002 the Rome Statute obtained the requisite number of ratifications, and entered into force on July 1, 2002 (Broomhall 2003).

Within fifteen months the state parties to the Rome Statute adopted the Rules of Procedure and Evidence, Elements of Crimes, and Agreement on Privileges and Immunities, and elected the Court's 18 judges (McGoldrick *et al.* 2004).

The ICC is intended to be complementary to States' national systems for prosecuting war crimes and human rights violations and its jurisdiction is limited to "the most serious crimes of concern to the international community as a whole" (Rome Statute, article 1).

The Statute sets forth the following four crimes over which the ICC may exercise jurisdiction:

- (1) genocide;
- (2) crimes against humanity;
- (3) war crimes; and
- (4) the crime of aggression against another state.

The ICC may not, however, exercise jurisdiction over crimes of aggression until members of the Court adopt a satisfactory definition of the crime and set out conditions for the Court's exercise of jurisdiction for this crime (article 5.2). Until this is accomplished the ICC's jurisdiction is limited to 1-3.

The Rome Statute creates an independent Office of the Prosecutor who is responsible for receiving petitions, conducting investigations, and prosecuting the gravest international crimes (articles 34, 42). The Prosecutor may accept referrals made by State Parties or by the United Nations Security Council, and may also accept information about crimes from individuals and nongovernmental organizations.

Furthermore, the ICC may only exercise its authority when either "the State in which the crime was committed (the 'territorial State') or the State of which the accused is a national (the 'State of nationality') is a party to the Statute or has specifically accepted the jurisdiction of the Court" (Cameron 2004).

The United States has refused to ratify the ICC, and it is unclear whether this will prevent the ICC from being fully effective. Both the Clinton and George W. Bush administrations had reservations about turning decisions to prosecute international crimes over to an independent prosecutor rather than keeping such decisions within the Security Council. The underlying worry, no doubt, was that U.S. officials and soldiers would be possible targets of politically motivated prosecutions.

6. Promotion of Human Rights by States

Perhaps the most important role that states play in international human rights law is in defining and establishing that law by creating and ratifying human rights treaties. Treaties are generally authored by committees of state representatives, and they are ratified by executive and legislative consent at the national level. Once a treaty is established, states help give it life by creating domestic legislation to implement it, conforming their conduct to its norms, and using it as a standard for domestic and international evaluation and criticism.

Article 56 of the United Nations Charter obligates member states to take "joint and separate action" for the achievement of United Nations purposes of observance of human rights and fundamental freedoms for all. Individual efforts take several forms, including the incorporation of international human rights documents into domestic law and state actions attempting to resolve human rights crises in other countries.

Within a country, means of promoting international human rights include incorporating international norms into a state's constitution and criminal law; creating limits on federalism, such as subordinating localities to the federal government; and, promoting human rights through propaganda and education. Perhaps the most basic method is enforcement through law at the national level. For example, to comply with the Genocide Convention a country must make genocide a crime within its own legal system.

7. Nongovernmental Organizations

Nongovernmental organizations such as Human Rights Watch and Doctors without Borders are extremely active at the international level in the areas of human rights, war crimes, and humanitarian aid. Nongovernmental organizations (NGOs) allow for collaborations between local and global efforts for human rights by "translating complex international issues into activities to be undertaken by concerned citizens in their own community" (Durham 2004).

The functions of international NGOs include investigating complaints, advocacy with governments and international governmental organizations, and policy making. Local activities including fundraising, lobbying, and general education (Durham 2004).

Conclusion

According to international law such as the Universal Declaration of Human Rights (UDHR), states are responsible to protect the human rights of its individual citizens. Therefore, human rights obligations generally impose duties upon the state rather than private individuals and entities.

- 1- To make human rights part of the national laws of the country, people must have legal access and remedies for the implementation and protection of their human rights
- 2- To make human rights part of the public systems of the country, people must have protection, security and safety etc.
- 3- To make human rights part of the social, economic, or political policies of the country, people must have adequate food, water, shelter, homes, education, health, etc

Human rights are universal.

Yet on the other hand state responsibility for violations of human rights is *limited* by:

- (a)territoriality and
- (b)citizenship.

The *consequence* of this limited state responsibility is that

- individuals cannot hold a state other than their own responsible for violating their rights
- state responsibilities to citizens of other states are weak.

States do not only have an obligation to observe and uphold their own human rights responsibilities but also have in certain cases, assure that the conduct of private actors is consistent with human rights.

Unfortunately, no country fully satisfies human rights; all countries have significant human rights problems. Some countries have large human rights problems, and many have massive problems ("gross violations of human rights").

In the past half-century there have been enormous advances in the development of human rights law and the instruments to implement it. States are no longer "free" to do as they will in the domestic sphere. Instead, they are bound by provisions in international law that are aimed at protecting individuals from oppressive practices. Notwithstanding this, however, millions of people are victims of human rights abuses each year. One reason for this pathetic record is that human rights enforcement measures are nowhere near developments in the law.

As a consequence, states are still able to commit human rights abuses with near impunity.

But even when operating within their own domestic sphere, states seldom act alone. Rather, there is constant intercourse with other countries: weapons are purchased from foreign manufacturers; joint military maneuvers are carried out with foreign troops; security personnel are trained in other countries. While international law has tended to recognize how one state can directly harm another state, it has been slow in understanding how one state can indirectly harm, not so much another state, but the citizens of another state. Let us be clear, *this* is how states harm people in other lands: They do so by feeding oppressive governments their means of repression; they do so by turning a blind eye to the brutalities committed by their friends and allies; and finally, they do so by hiding behind the sovereignty of other nation-states.

The whole notion of human rights will be a tragic farce without a fuller understanding of transnational responsibilities. Interestingly enough, international law has already codified certain kinds of transnational duties, but this codification has occurred in the context of the enforcement of human rights violations committed in or by "other" countries. What is missing is an interpretation of the duties states take on when they assist and allow offending governments to operate—and in so doing become offending states themselves.

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