

Human Rights for the Twenty-first Century

Whereas it is essential, 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,

Whereas it is essential to promote the development of friendly relations between nations

Universal Declaration of Human Rights (UDHR)

If there is one key to the entire question of war, it is *justice*. A fair world would be a far less conflicted one. Inequality and injustice are ripe causes of social unrest within a society; they have analogues in the international sphere which are heady prompts for conflict.¹

A.C. Grayling

HUMAN RIGHTS AND GLOBAL GOVERNANCE

Set against the backdrop of the shocking and widespread atrocities committed during World War II, those negotiating the Charter in San Francisco settled on the inclusion of the language of “fundamental human rights” and “human rights and fundamental freedoms,” interwoven into important provisions throughout the document.² This included mandates for the UN General Assembly and the Economic and Social Council (ECOSOC) to pursue studies and to conduct broader work on the theme. And, importantly, echoing the quotes at the beginning of this

¹ Grayling, A.C. 2017. *War: An Enquiry*, New Haven, CT, and London, Yale University Press, p. 234.

² This inclusion, building on the very passing reference to human rights in the Dumbarton Oaks Proposals, came after some debate among negotiating states (including a range of Latin American states and the Philippines arguing for stronger human rights provisions) and consultation with civil society representatives, advising in particular the US delegation. See, e.g., Burgers, Jan Herman. 1992. “The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century.” *Human Rights Quarterly*, Vol. 14, No. 4, p. 476.

chapter, the new Charter intimately linked the promotion of universal respect for human rights to the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations,” and placed them under one of the several core “Purposes” of the United Nations: “[t]o achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”³ ECOSOC was given the responsibility to form “commissions in economic and social fields and for the promotion of human rights.”⁴ It promptly convened a Commission on Human Rights in 1946, chaired by Eleanor Roosevelt, which pursued the successful work on the 1948 Universal Declaration on Human Rights (UDHR), laying strong foundations for the modern international human rights landscape we know today. John Foster Dulles, US Secretary of State in the 1950s, who had been engaged in Charter negotiations, called the Human Rights Commission the “soul” of the Charter.⁵

The Charter itself could be considered to be, among many other things, a watershed international human rights treaty, establishing clear and universal commitments for all states that choose to ratify the instrument – which today includes virtually every nation in the world.⁶ This should be heartening to realize, as it serves as a basis for substantial further work that is badly needed to strengthen the current international human rights system. The Charter’s preamble, moreover, “reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women” (emphasis added), seemingly embracing a natural law or preexisting inherent basis for the rights to which it refers, as did prominent precursor national constitutional documents, such as the French and American declarations of the late eighteenth century. On the international plane, the 1919 League of Nations Covenant only included references to several specific human rights concerns, such as labor conditions, treatment of minorities (“native inhabitants”) and traffic in women and children.⁷

Regardless of how one might label the moment of Charter adoption along a trajectory of the international human rights “project,” it is clear from its text that the promotion of and respect for fundamental human rights, due to the frequency with which it is mentioned, is a central “system characteristic” of the new international order established out of the debris of World War II. Very importantly, according to

³ Articles 55(c) and 1(3) of the UN Charter, respectively.

⁴ Article 68 of the UN Charter.

⁵ Quoted in Boyle, Kevin. 2009. “The United Nations Human Rights Council: Origins, Antecedents, and Prospects,” in Kevin Boyle (ed.), *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, pp. 11–47, 21.

⁶ Subedi argues that, pursuant to the relevant provisions of the Charter, the UN has “an obligation to promote, protect and fulfil the rights of the people worldwide.” Subedi, Surya P. 2017. *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights*, London and New York, Taylor & Francis, p. 222.

⁷ See Article 23 of the Covenant of the League of Nations.

the Charter's own plain wording, such respect was considered necessary to assure a sustainable international peace. From our vantage point, it would be hard to argue that respect for universal human rights would not continue to be a fundamental system characteristic of an updated, modern international order, as was already clear in 1945. The difference today, however, is that we would expect significantly greater intensification, sophistication and progression of these commitments by the international community. Contemporary notions of "good governance" also commonly include indices of accountability, respect for human rights and rule of law, among other things (see Chapter 20 for discussion on this theme).⁸ Integrating the notion of human rights into a modality of good governance also implicitly answers the question "for whom" the governance is meant – indicating a governance system that is sincerely meant to promote the interests of and protect the generality of the population. We indeed argue in this book that the international community should strive toward such a goal of competent and values-based global governance, aiming to deliver a level of governance excellence, rather than acquiescing to the lowest common dominator and/or significantly flawed international institutions, which has too often been the case.

It is also difficult to envision a significantly strengthened UN and global governance system without also establishing in parallel a much strengthened international human rights architecture beyond what exists today. As with tackling the issue of corruption at the international level in a meaningful way (see Chapter 18), a shift to more widespread and regularized respect for fundamental human rights at the international level goes to the heart of governance functions across a wide range of issue areas, and speaks to a crucial dimension of the quality of governance itself, at all levels. It would seem necessary to put the range of enhanced international cooperation mechanisms suggested in this book, such as a true collective security facility (e.g., an International Peace Force), enhanced international legislative capacity, the updating of the Security Council to an Executive Council, etc., into the context of much firmer observance of and commitment to international human rights standards, so that these institutions and mechanisms would be subject to and function within an environment marked by shared international goals and values (see Chapter 20). If the international community is to draw substantially closer together in unprecedented collaboration at the global level, it will have to *reaffirm* a still greater commitment to the fundamental shared values embedded in core human rights, building a much more effective supporting international architecture for this goal. The current system within the UN for the implementation and "enforcement" of human rights commitments is still largely "political and

⁸ See, e.g., discussion in Sano, Hans-Otto. 2007. "Is Governance a Global Public Good?" in Erik André Andersen and Birgit Lindnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights*, Leiden, Martinus Nijhoff, pp. 217–236.

diplomatic rather than judicial,”⁹ much to its detriment. This deficiency is no longer tenable and should be remedied. We discuss the pathways for such fundamental strengthening later in this chapter, after dealing with some broader background issues relevant to international human rights policy.

CASCADING EFFECTS: THE IMPORTANCE OF HUMAN RIGHTS FOR ONE AND ALL

As with the issue of corruption, spillover effects across borders are seen when there is widespread disrespect for fundamental human rights in another nation.¹⁰ This is made clear in the Charter and the UDHR, with the link expressed between respect for human rights and conditions of international stability and peaceful relations among nations, with the “resort to rebellion” referenced in the UDHR when rights are not protected by rule of law. If we look at the individual rights enshrined in the “International Bill of Human Rights” (commonly understood to include the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)), it can readily be seen how – in addition to embodying a basic social contract notion of “good governance” between leadership and the general population of a given country – there are a range of obvious (and by now well-documented) cascade effects resulting from the respect of fundamental human rights. Respect for rights helps to ensure wider governance integrity and broader social benefits across a given national system, and increasingly also across the international system, due to the extreme forms of interdependence brought by globalization.

To take just a few examples, the right to freedom of opinion and expression (as enshrined in Article 19 of the ICCPR), bearing on journalistic and civil society freedom and safety, is crucially important to protect against government and private sector corruption and abuses of power, to uphold the rule of law and to assist in ensuring the accountability of public leaders to governance quality standards, among other things. With current levels of transnational commercial and business activity, for example in the multinational enterprise (MNE) sector, populations (and regulators) need to stay informed about the nature of business activity abroad, including in relation to any connections with human rights abuses or corrupt government actors (for example, relevant to standards set by the OECD Guidelines for MNEs).¹¹ Reliable and thorough information provided by a robust civil space and critical press across the world is crucial to set local and international governance priorities, to ensure responsible business operations and to hold to account

⁹ Subedi, *The Effectiveness of the UN Human Rights System*, p. 222.

¹⁰ See Chapter 18, which also notes the common linkage between corrupt government actors and systemic human rights abuses, which, however, is not highlighted frequently enough in policy circles.

¹¹ www.oecd.org/corporate/mne/.

powerful actors who may be undermining the public good, at the national and international levels.

Internationally enshrined standards of gender equality, which have been called “a cardinal principle of the human rights ideology,” are “essential for authentic democracy, for political development, for economic development, for population control, and for the preservation of the human environment.”¹² Indeed, the World Bank has affirmed that women’s empowerment is a key to unlocking economic growth potential, and there is a clear link between the education of girls and access to family planning in addressing climate change, among other issues.¹³ On the peace and security front, women’s personal security at the national level has been found to be correlated with international security: “[n]ew research . . . suggests that intimate partner violence may be a predictor of other forms of mass violence, conflict, and state insecurity.”¹⁴ There are also security implications of distorted sex ratios in China, for instance, linked to sex-selection abortion.¹⁵ The protection of very fundamental human rights, as enshrined in existing international human rights instruments, is crucial for solving many of the global crises we confront today.

Recent events and scholarship have shown that serious systemic social problems and large-scale instability have been correlated with the lack of certain human rights protections – making the Charter and the UDHR, indeed, seem prescient. It has been widely observed that the aspirations of citizens for greater general freedoms, economic opportunity and respect for human rights led to the 2011 “Arab Spring” and brought serious and at times bloody instability to many countries.¹⁶ Restrictions on religious freedom have been correlated with greater social instability.¹⁷ The absence of quality education and meaningful economic opportunities can be linked to the erosion or malfunction of democratic forms of government, and the rise of

¹² Henkin, Louis. 1994. “Preface,” in Louis Henkin and John Lawrence Hargrove (eds.), *Human Rights: An Agenda for the Next Century*. Studies in Transnational Legal Policy, No. 26, the American Society of International Law, Washington, DC, p. xv.

¹³ For example, see the ranked solutions to arrest climate change offered by Paul Hawken’s Drawdown Project: www.drawdown.org/solutions.

¹⁴ Sieff, Michelle. 2017. “Violence against Women and International Security: Why Assault by Intimate Partners Deserves Greater Focus.” *Foreign Affairs* (Snapshot), November 28, 2017.

¹⁵ López-Claros, Augusto, and Bahiyiyh Nakhjavani. 2018. *The Disastrous Global Crisis of Gender Inequality: Equality for Women = Prosperity for All*, New York, St. Martin’s Press, pp. 33–34.

¹⁶ See the discussion in Freedman and Houghton, for example, on the lack of treatment of various human rights situations related to the Arab Spring at the Human Rights Council. Freedman, Rosa, and Ruth Houghton. 2017. “Two Steps Forward, One Step Back: Politicisation of the Human Rights Council.” *Human Rights Law Review*, Vol. 17, No. 4, pp. 753–769.

¹⁷ Pew Research Center: Pew Forum on Religion and Public Life (2012, September). *Rising tide of restrictions on religion*, <http://assets.pewresearch.org/wp-content/uploads/sites/11/2012/09/RisingTideofRestrictions-fullreport.pdf>; and Pew Research Center: Pew Forum on Religion and Public Life (February 26, 2016). *Latest Trends in Religious Restrictions and Hostilities*, http://assets.pewresearch.org/wp-content/uploads/sites/11/2015/02/Restrictions2015_fullReport.pdf.

forms of extremism or terrorism.¹⁸ Extremes in economic inequality, linked also to lack of an adequate social safety net, basic social services and adequate employment, lead to an underperforming economy generally, in addition to other societally deleterious effects (see also the discussion on economic inequality in Chapter 14).¹⁹ The absence of sufficient social security, accessible quality education and health care blocks upward mobility, opportunity and entrepreneurial creativity within a society.²⁰

Given such correlations and connections, human rights should, as much as possible, be depoliticized and viewed instead through the lens of social stability, building capacities for rule-based governance, and forward planning for sustainable social and economic well-being, across diverse societies.

That this process of depoliticization has already been occurring in the international governance sphere is evidenced by the Sustainable Development Goals (SDGs) and the UN 2030 Agenda, which were adopted unanimously by governments worldwide. The range of goals and targets are linked with broad policy/governance aims, with various human rights strongly embedded in the goals and targets. To name just a few examples, Goal 4, “Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all,” is a contemporary iteration of ICESCR Article 13. Goal 5, “Achieve gender equality and empower all women and girls,” of course supports a basic principle affirmed in the Charter, the UDHR, the ICCPR, the ICESCR and CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women, among other instruments. Goal 16, “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels,” contains targets related to the combatting of human trafficking, violence and abuse of children, among a range of other concerns, reflecting a number of priority issues in the modern international human rights arena.

The SDGs, indeed, reflect a broader trend in UN policy thinking, where the well-being of the human person is becoming more clearly the focal point and prime beneficiary of governance efforts. A pivotal moment in this evolution occurred when a United Nations Development Program (UNDP) report introduced into the official international discourse the new concept of “human security,” calling for an urgent

¹⁸ Mertus, Julie A. 2005. *The United Nations and Human Rights: A Guide for a New Era*, Global Institutions Series, Abingdon, Routledge, p. 2.

¹⁹ In the US context, Joseph Stiglitz has thoroughly treated this issue, noting the effects of serious inequality on macroeconomic and financial well-being, and on the rule of law and democracy itself. Stiglitz, Joseph. 2012. *The Price of Inequality*, New York and London, W. W. Norton & Company.

²⁰ Sweden, for example, has one of the highest social mobility rates in the world, with European countries generally proving more socially mobile than the United States. See Surowiecki, James. 2014. “The Mobility Myth.” *The New Yorker*, March 3. www.newyorker.com/magazine/2014/03/03/the-mobility-myth.

paradigm shift in the meaning of security away from: “an exclusive stress on territorial security to a much greater stress on people’s security,” and “[f]rom security through armaments to security through sustainable human development.”²¹ Pakistani economist Mahbub ul Haq, who has been credited with introducing the concept, noted that “[w]e need to fashion a new concept of human security that is reflected in the lives of our people, not the weapons of our country.”²² The theme of human security was further advanced at the UN under Secretary-General Kofi Annan and his successors, and has been taken up by, among many others, civil society advocates and Nobel Peace Prize laureates such as Jody Williams.²³

Indeed, beyond the traditional – and highly distracting – struggles for power among jealous sovereigns, these developments can help us start to understand what it now means “to live in a postimperial global society” and how we may find “common cause with the human beings with whom we share this fragile planet.”²⁴ Notions of human security and, more generally, the placing of a human rights agenda at the forefront, across a range of governance concerns, again, answers the question, “for whom is (global) governance”? Human rights norms, alongside norms of constitutionalism, transparency, fairness and the rule of law (including for the meaningful protection of human rights), may be a key to understanding and designing a viable “post-imperial” world.

CULTIVATING A GLOBAL CIVIC ETHIC AND THE MORAL CASE FOR SIGNIFICANT HUMAN RIGHTS REFORM

The 1995 Commission on Global Governance called for “the broad acceptance of a global civic ethic to guide action within the global neighbourhood” and “courageous leadership infused with that ethic at all levels of society.” The Commission added that “without a global ethic, the frictions and tensions of living in the global neighbourhood will multiply; without leadership, even the best-designed institutions and strategies will fail.”²⁵

Indeed, in tandem with an awareness of the more abstract governmental/governance benefits – at the national, regional and international levels – of a stronger, more functional and impartial international human rights system, there is a need for an ethical commitment at the level of culture. This is necessary to build the social

²¹ UNDP. 1994. *Human Development Report*, New York, Oxford University Press, p. 24.

²² Quoted in: Williams, Jody. 2008. “New Approaches in a Changing World: The Human Security Agenda,” in J. Williams, S.D. Goose, and M. Wareham (eds.), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*. Lanham, MD: Rowman and Littlefield, pp. 281–297, p. 281.

²³ *Ibid.*

²⁴ Ignatieff, Michael. 2017. *The Ordinary Virtues: Moral Order in a Divided World*, Cambridge, MA, and London, Harvard University Press, p. 30.

²⁵ Commission on Global Governance. 1995. *Our Global Neighbourhood: Report of the Commission on Global Governance*, Oxford, Oxford University Press, p. 47.

momentum toward intuitive and second-nature responses – across all facets of global society, including but not limited to governments – that put the respect for human rights as a core concern and felt obligation, across our varied societies.²⁶

Eleanor Roosevelt herself famously commented on the extent of the permeation of values throughout a given society that would be necessary in order to truly realize the goals of the UDHR:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.²⁷

Such a vision does not simply leave the issue of application and implementation of human rights in the hands of government officials or judges, but re-grounds the “international human rights project” also in the intentions and actions of all people, regardless of what role we play in society.²⁸ The UDHR, in fact, under its provisions on education, affirms the necessity of general education, in all nations, in furtherance of respect for human rights, as well as of the key international values enshrined in the Charter:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (Article 26(2))

Clearly, there has been little systematic follow-through by various governments on this UDHR obligation, which in fact, one can affirm with reasonable confidence, has been greatly overlooked in the designing of national curricula since 1948. The importance of such basic education on human rights should not be disregarded and

²⁶ See, e.g., an examination of the concept of “global civics” – the rights and responsibilities or ethical obligations we might assume, given our global interdependence, drawing from contributions with scholars and policy-makers in Chile, China, Egypt, India, Ireland, Turkey, the United Kingdom, Spain, South Africa, Bulgaria, Russia and the United States, in: Altinay, Hakan (ed.). 2011. *Global Civics: Responsibilities and Rights in an Interdependent World*, Washington, DC, Brookings Institution Press.

²⁷ Quoted in Church Peace Union. 1958. “In Your Hands: A Guide for Community Action on the 10th Anniversary of the Universal Declaration of Human Rights,” New York.

²⁸ SDGs and the 2030 Agenda, indeed, take such an approach, underlining the necessity of the comprehensive action and engagement of all stakeholders, including private actors and individuals, for the realization of the SDGs.

should form part of all future efforts to secure a more viable international order (see Chapter 19, Education for Transformation).

Regardless of the gap in general public and professional education on human rights, the modern proliferation of civil society groups around the world speaks to the internalization of the international human rights mandate as a lived ethic of many people – and as a necessary instrument of survival for various communities. It is a validation of the universality, soundness and importance of international human rights norms, felt by citizens across the world at the grassroots level. For example, the number of nongovernmental organizations (NGOs) globally with ECOSOC consultative status (only ECOSOC-accredited NGOs can in turn apply to participate in the UN Human Rights Council's sessions as Observers) currently stands at 5,163 across all fields, with 24,000 entries included in a wider global civil society database sponsored by the UN Department of Economic and Social Affairs (DESA); a simple search on an independent NGO aggregator/volunteer connection search engine puts the number of civil society organizations dealing with human rights topics around the world at 3,508, which undoubtedly is an incomplete number.²⁹

But beyond pockets of activists and dedicated professionals working in the human rights advocacy field in various countries, there may be a question of why other citizens and professionals should care about the international human rights project, in particular when one may have a relative place of privilege in a jurisdiction with established protections for various rights. Why should relatively privileged actors (including, e.g., businesses) care about something as abstract as improving the international institutional architecture for the protection of human rights? Why now, in a seemingly cynical world where the aspirations of the Charter or the UDHR may seem quaint in comparison with contemporary economic and technocratic globalized pursuits that have largely made amoral bargains or engaged in various trade-offs on human rights issues for balance of power, geopolitical stability or trade concerns?

There are the ethical imperatives that arise from simply knowing about the various types of human rights abuses that are occurring around the world. We are an information- and media-rich international society, with by now well-developed human rights reporting and monitoring mechanisms, both (inter)governmental and private; for example, well-supported international organizations such as Human Rights Watch and Amnesty International (both created post-1945), which have unprecedented reporting and citizen engagement capacity. At the time of writing, we need only look at the daily news to see the range of dramatic and ongoing human rights crises around the world, across regions, including in Yemen, Myanmar, Syria and Venezuela, to name a few. Moreover, recent reports by the UN Special Rapporteur on extreme poverty and human rights in relation to the United States

²⁹ See: ECOSOC and UN DESA databases, <https://esango.un.org/civilsociety/>, and the search engine of Idealist, www.idealists.org, respectively.

and the United Kingdom, underlining the gravity of these issues for both countries, have highlighted the relevance of UN human rights oversight to every country, even those with the greatest wealth and well-developed legal systems. As Michael Ignatieff has commented, “[i]n a globalized world, we do not have the luxury of moral closure.”³⁰ We cannot say in the contemporary, almost instantaneous, information environment that “we did not know.” Against this informational backdrop, there are new opportunities to assert collective and community values at the international level, to lift our standards and build credible new institutions.

As an international community we currently run serious moral risks, as well as very basic coherence and consistency risks, if we leave the international human rights system as it is, continuing, in practice, to largely take at face value the national and international statements of governments who officially claim to support human rights values. The international community to date has implemented a very strong system of financial and economic globalization, but has yet to move further toward what Richard Falk has labeled a “just new constitutionalism” or a “humane global governance” where international human rights, democratic and rule of law values are effectively implemented and upheld.³¹ Neutrality in the face of the current system can reasonably be seen as a form of appeasement, and support for staying at the current weak level of international oversight and implementation of human rights may be considered a form of mere “therapeutic governance.”³² Amartya Sen notes that because we do not have an organization with the responsibility to actually deliver to people the noble principles of the UDHR, human rights as currently practiced are merely “heart-warming sentiments.”³³ Exerting continued pressure, working hard to secure adequate funding and advocating systematically for more rational, technically sound, impartial international implementation mechanisms within the human rights architecture seems a small price to pay for those in a position to undertake such advocacy.

In addition to basic ethical imperatives, there are also arguments for significantly strengthening the international human rights infrastructure based on enlightened self-interest of all states and populations. Our collective inaction at least tacitly condones harm to others and facilitates various types of harm that will inevitably

³⁰ Ignatieff, *The Ordinary Virtues*, p. 23.

³¹ Falk, R. 2014. “New Constitutionalism and Geopolitics: Notes on Legality and Legitimacy and Prospects for a Just New Constitutionalism,” in S. Gill and A.C. Cutler (eds.), *New Constitutionalism and World Order*, Cambridge, Cambridge University Press, pp. 295–312.

³² Sarah Nouwen uses this phrase in the context of lack of Security Council enforcement action, but it applies equally to the absence of human rights enforcement mechanisms: “For the Security Council, international criminal tribunals are instruments of therapeutic governance, providing an acceptable compromise between despicable apathy and authorisation of military interventions that UN members are unwilling or unable to carry out: if not peace, then justice.” Nouwen, S. 2012. “Justifying Justice,” in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law*, Cambridge, Cambridge University Press, pp. 327–351, p. 343.

³³ Sen, Amartya. 1999. *Development as Freedom*, Oxford, Oxford University Press, p. 228.

come to all nations. As noted, the cross-border and cascade effects of systemic human rights abuses are very real, no matter where they may take place.

One dramatic example is the current “Refugee Crisis” in Europe (so-named by institutions of the European Union)³⁴ and the more general global displacement crisis, where in recent years more than 65 million people have been forcibly displaced from their homes – more people than in any period since World War II. The 1951 Refugee Convention, currently with 146 parties, indeed anticipates an uneven landscape in upholding human rights across the world, defining a refugee as:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁵

Leaving aside the general social and economic benefits that can flow from cross-border migration (e.g., benefits for economies with an aging population, the relaxation of labor market constraints, reductions in the cost of living; for a fuller discussion see Chapters 14 and 17), there are challenges – real and perceived – to welcoming and caring for such volumes of displaced persons who are looking for refuge under the 1951 Convention, or searching for fundamental economic and social well-being.³⁶ There is also the deep suffering of those forced to flee their home countries because of war, persecution, or economic hardship. Given the sheer volume of persons currently displaced for a variety of reasons (which will only grow in the foreseeable future given the effects of climate change), the diverse countries welcoming refugees should have a very strong interest in ensuring better human rights protections abroad, including with respect to social and economic rights, both in the direct interest of displaced persons, and also in the national interest if domestic resources are being overstretched. Various nations are having to deal with the governance weaknesses and insufficiencies of foreign states in the protection of human rights, and governments – often those with more functional systems – must often absorb challenges and costs related to these problems. It would seem logical that there would be a dramatic collective interest in ensuring much stronger global compliance with international human rights norms, certainly investing in international mechanisms that *should* be significantly advanced since 1951, with the intention of “working the 1951 Convention out of a job.”

³⁴ See: <https://ec.europa.eu/echo/refugee-crisis>.

³⁵ Article 1(A)(2) of the Refugee Convention, as amended by the 1967 Protocol. UN General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, United Nations, Treaty Series, Vol. 189, p. 137.

³⁶ See Chapters 13–17 in this book which share perspectives on addressing international economic governance issues, and other global risks that may drive mass migration, which is crucial to ensuring a workable world.

There are other striking examples that are touching the lives and affecting the basic stability – social, economic and otherwise – of citizens in nations where it was thought that standards of human rights and constitutional democracy were well established. Current cross-border meddling through social media and cyberattacks, for example, in the elections of democratic nations, a sort of cross-border infection of autocratic or democratically weak foreign systems where human rights abuses may be widespread, may pose an existential threat to those countries in which citizens have secured hard-won human rights protections over centuries. It is now clearer than ever that the protection of the rights of all, at the international level, is a safeguard, an insurance policy, for the well-being of all.

In such a landscape, moral closure is indeed a luxury. The various predicaments in which we currently find ourselves invite the “analysis of virtues at work in an unjust, dangerous, and uncertain world, a study of how people reproduce virtue – and moral order – in arduous circumstances”;³⁷ our shared human rights values, affirmed widely and repeatedly at the international level, serve as a solid foundation for the international moral order in dangerous and uncertain times. As one author notes: “[e]specially today, when an imbalance of power prevails, strong international human rights institutions are needed,” and “only the states that are disciplined to follow international human rights precepts will have the moral authority to lead.”³⁸

ON THE UNIVERSALITY OF HUMAN RIGHTS

No doubt repressive, illegitimate regimes will continue to invoke cultural relativism and state “sovereignty” to support their resistance to effective human rights enforcement. Overcoming that resistance is a standing item on the human rights agenda at the turn of the century and beyond.³⁹

– Louis Henkin

A range of authors have very capably refuted the assertion that international human rights norms are an imposition of Western morality or philosophy. For example, the debate initiated in the 1990s by several governments asserting that international human rights norms contradict “Asian values” and are a Eurocentric imposition has been prominently tackled by Amartya Sen.⁴⁰ As Sen and others have noted, types of authoritarianism are not “especially Asian in any significant sense,” and while the West may have “skeletons in its cupboards” and may be no stranger to hypocrisy on the topic of human rights (like other regions), this is not an excuse to compromise

³⁷ Ignatieff, *The Ordinary Virtues*, p. 30.

³⁸ Mertus, *The United Nations and Human Rights*, pp. 164–165.

³⁹ Henkin, “Preface,” p. ix.

⁴⁰ Sen, Amartya. 1997. *Human Rights and Asian Values*, Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy, May 25, Carnegie Council. www.carnegiecouncil.org/publications/archive/morgenthau/254.

the rights of Asians. The case for rights, according to Sen, “turns ultimately on their basic importance and on their instrumental role,” in Asia and elsewhere.⁴¹ He also notes the various strands of philosophical thought in Asian social and intellectual history that assert the values of tolerance and respect for individual freedom; the grand dichotomy between Western civilization and “Asian values,” “African cultures,” etc., is a false one, Sen asserts, and moreover is unhelpful and distracting to an understanding of the actual cultural and historical complexity of our global society.⁴²

Indeed, Chinese academic and Vice-Chair of the Human Rights Commission Peng Chun Chang played an influential role in the drafting of the UDHR. Along with other diverse members of the Commission (e.g., notably, from Lebanon, the Philippines and Chile), he very consciously wished to make the Universal Declaration relevant to all of humanity across philosophical traditions. Chang, for example, regularly drew on the thought of Confucius and Mencius in formulating his contributions and was reportedly helpful in finding compromise language across traditions at particularly difficult points in the discussions.⁴³ Charles Habib Malik from Lebanon likewise drew from his Greek Orthodox Christian background in his advocacy for and contributions to the development of the UDHR. Another expert from the Middle East, M. Cherif Bassiouni, has more recently deployed Islamic teachings for the development of clear international norms and binding accountability regimes for egregious international crimes such as genocide and crimes against humanity, in service of the development of modern international criminal law – affirming that Shari’a and Islamic law are not incompatible with contemporary international human rights law and international humanitarian law norms.⁴⁴

Also in more recent times, philosophical concepts from diverse cultural traditions have achieved prominence in important national developments and beyond, also gaining international currency. For example, the moral philosophy of “Ubuntu,” as interpreted by former Archbishop Desmond Tutu, was closely associated with the South African Truth and Reconciliation Commission (TRC). After having chaired the TRC, Tutu described Ubuntu in the following words: “It is not ‘I think therefore I am.’ It says rather: ‘I am human because I belong.’ I participate, I share.”⁴⁵ The

⁴¹ *Ibid.*, p. 30.

⁴² For a treatment of the “culture question” in relation to the universal rights of women, see López-Claros and Nakhjavani, *Equality for Women = Prosperity for All: The Disastrous Global Crisis*.

⁴³ See, e.g., the anecdotes relayed in: Humphrey, John P. 1984. *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, NY, Transnational Publishers, p. 23.

⁴⁴ See, e.g., Bassiouni, M. 2013. “Islamic International Law and International Humanitarian Law,” in M. Bassiouni (ed.), *The Shari’a and Islamic Criminal Justice in Time of War and Peace*, Cambridge, Cambridge University Press, pp. 150–248.

⁴⁵ Tutu, Desmond. 1999. *No Future without Forgiveness*, London, Sydney, Auckland and Johannesburg, Rider.

concept of Ubuntu, as employed by Tutu, speaks to Roosevelt's conviction that human rights form a part of concrete community commitments and processes.

Subsequent to the 2015 Paris Agreement addressing the existential planetary threat of climate change, the application of local and traditional techniques of community-building and decision-making have resulted in the Talanoa Dialogue, which blends substantive and "process/procedural" values (e.g., norms of participation and communication). The Dialogue is described as follows:

Talanoa is a traditional word used in Fiji and across the Pacific to reflect a process of inclusive, participatory and transparent dialogue. The purpose of Talanoa is to share stories, build empathy and to make wise decisions for the collective good. The process of Talanoa involves the sharing of ideas, skills and experience through storytelling.

During the process, participants build trust and advance knowledge through empathy and understanding. Blaming others and making critical observations are inconsistent with building mutual trust and respect, and therefore inconsistent with the Talanoa concept. Talanoa fosters stability and inclusiveness in dialogue, by creating a safe space that embraces mutual respect for a platform for decision making for a greater good.⁴⁶

Among the world's major religious traditions, multiple interfaith declarations and statements, involving leaders of the various traditions, have affirmed the shared ethical core of all religions. An interfaith declaration entitled "Towards a Global Ethic," drafted at the 1993 Parliament of the World's Religions in Chicago by an assembly of religious and spiritual leaders from essentially every major world religion and spiritual movement, states:

We affirm that a common set of core values is found in the teachings of the religions, and that these form the basis of a global ethic ... There already exist ancient guidelines for human behaviour which are found in the teachings of the religions of the world and which are the condition for a sustainable world order.⁴⁷

These examples show that the diversity of cultural, religious and philosophical traditions need not be a barrier to the application of human rights and can indeed be a source of richness and a supplement to – and, indeed, a strong validation of – what has been agreed in official international documents. Moreover, there are a host of non-religious bases, including a purely legal positivist basis (e.g., international human rights have been agreed at the highest levels of political representation of national governments), as well as those offered by modern philosophers such as John Rawls, with his "original position" doctrine, that provide an ethical or social basis for

⁴⁶ United Nations. 2018. United Nations Framework Convention on Climate Change (UNFCCC), *Talanoa Dialogue Platform*. <https://unfccc.int/topics/2018-talanoa-dialogue-platform>.

⁴⁷ "Towards a Global Ethic," drafted at the 1993 Parliament of the World's Religions in Chicago, IL. <https://parliamentofreligions.org/parliament/global-ethic/about-global-ethic>.

the universal application of human rights. More generally, the capacity for empathy and the instinct for justice have been found to be indigenous to all of us: psychologists have found the human capacity for empathy and reactions to injustice to be universal. Our shared psychological nature “shape[s] the human response to justice and love – as well as to injustice, cruelty, trauma and violence.”⁴⁸

However, while *good faith*, principled adaption and cultural contexting of international human rights norms is positive, it must not preclude the clear delineation of “red lines” as to what should be considered, for example, as “harmful traditional practices” across various cultures.⁴⁹ For instance, practices such as female genital mutilation, son preference and female infanticide, early and forced marriage and so on have been found by international expert groups to violate international human rights, as they are harmful and undermine the dignity and well-being of certain group members, and should be stopped. Such principled and good faith dialogues are a part of group learning across every society, as we evolve cultures that better enable humans to flourish.

International actors, including the media, also need to become more knowledgeable about the seeds of doubt and confusion that may be sown by those threatened by the assertion of new systems that seek to protect human rights and vulnerable persons, as has been seen, for example, with the International Criminal Court and the public relations campaigns related to some of the indictees (see Chapter 10). There should be a more sophisticated diagnosis of the “cultural” argument and the concerns raised about imperialism. For example, an analysis as to whether such arguments: a) are a distraction or deflection from accountability, deployed by a certain group or individual within a society that benefits from *not* having a right or rights upheld; or b) indeed do raise an issue of genuine cultural tension or a relevant historical (or current) experience of imperialism or the imposition of double-standards that should be addressed;⁵⁰ or c) manifest a combination of both of these forces.

Beyond sensitivity to and genuine incorporation of cultural and civilizational diversity – which, as Sen notes, is simply a reality of our international society – Henkin has delivered a scathing rebuke to cultural relativist arguments:

⁴⁸ Penn, Michael, Maja Groff, and Naseem Koroush. 2019. “Cultivating Our Common Humanity: Reflections on Freedom of Thought, Conscience, and Religion,” in *The Cambridge Handbook of Psychology and Human Rights*, Cambridge, Cambridge University Press.

⁴⁹ See, e.g., United Nations, Department of Economic and Social Affairs, Division for the Advancement of Women and United Nations Economic Commission for Africa, *Good Practices in Legislation on “Harmful Practices” against Women: Report of the Expert Group Meeting*, May 26–29, 2009.

⁵⁰ Paupp has generally highlighted the necessity of further “regionalization and intercivilizational dialogue” in the global human rights project, as well as a reorientation of international law to put the human rights to peace, security and development at the forefront, in furtherance of the (largely overlooked) legitimate aims and needs of the Global South. Paupp, Terrence E. 2014. *Redefining Human Rights in the Struggle for Peace and Development*, New York, Cambridge University Press, p. 82.

“Cultural relativism” will doubtless continue to be a battle cry into the next century. That may reflect the fact that, despite a half-century of the human rights movement, governments not yet committed to constitutionalism at home remain reluctant to be monitored and judged, and are particularly sensitive to international embarrassment.

...

The political representatives of all mankind have repeatedly committed themselves to the human rights idea and to its expression in the Universal Declaration of Human Rights. No political or cultural representative has purported to justify slavery, torture, or unfair trial as culturally legitimate. If in some few, isolated respects cultural hangovers run afoul of contemporary international standards – forms of slavery, female genital mutilation, amputation as punishment – the international community has declared them no longer acceptable and has demanded their termination as the price of living in international society in the 20th/21st centuries. That was the lesson the world unanimously taught to successive regimes in the Republic of South Africa when they sought to maintain systemic racial discrimination (apartheid).⁵¹

THE “UNFINISHED TASK”

Upon the adoption of the UDHR in 1948, while taking the opportunity to commemorate and embrace the extraordinary achievement of the completion of the Declaration, Eleanor Roosevelt called on the international community to, “at the same time, rededicate ourselves to the unfinished task which lies before us.”⁵² She described this work as including the completion of the international covenant on human rights (the two binding instruments that were ultimately adopted in 1966, forming part of the “International Bill of Human Rights”) and “*measures of implementation of human rights*” (emphasis added). Unfortunately, such measures for the implementation of international human rights continue to fall far short of what is needed for something approaching a functional global system.

The disjunction between the very wide range of sound and widely accepted human rights norms and their meaningful implementation was described in the following way in the mid-1990s: “[d]espite the divisions of the Cold War, the international system developed fine human rights standards; it has not done well in achieving respect for those standards. All states have committed themselves to respect human rights standards, but they have not been prepared to see them implemented or enforced, to accept communal scrutiny of the condition of human

⁵¹ Henkin, “Preface,” pp. viii–ix; López-Claros and Nakhjavani note that in the human rights versus culture debate the same states that often insist on being “let alone” in relation to the gender issue, “[w]hen it comes to matters of military and economic aid, for example, there has been little or no such demand for independence” (*Equality for Women = Prosperity for All*, p. 146).

⁵² See, e.g., discussion of Eleanor Roosevelt and the adoption of the UDHR in: Klug, F. 2015. *A Magna Carta for All Humanity: Homing in on Human Rights*, London, Routledge.

rights in their own countries, to scrutinize others, to establish monitoring bodies, or to welcome and respond to non-governmental monitoring.”⁵³ Henkin goes on to note that this latter deficit in implementation and enforcement is “the major human rights task facing the international system.” We agree with this assessment.

Contemporary critiques continue to echo this basic concern, with commentators calling for the gap between enforcement mechanisms and the existence of substantive rights to be closed,⁵⁴ and critics noting that the current system is based on a belief in something “that no longer exists . . . that enforcement would always be a matter of state discretion.”⁵⁵ The relative impotence of international society to hold specific states to account that Henkin noted still essentially holds true today: “[i]nternational human rights are rights within national societies and the obligation to respect and ensure rights must fall on every society in the first instance. The international community can only observe, cajole, shame and otherwise induce governments and societies to respect and ensure those rights.”⁵⁶ Observing, cajoling and shaming, although better than no scrutiny, has its limitations as an enforcement technique. It has also been noted that in recent decades a disproportionate amount of international attention has been focused on “mass atrocity crimes” (e.g., genocide, crimes against humanity, war crimes) with too little attention paid to the “continuous atrocities” of all-to-common systemic human rights abuses across societies;⁵⁷ such a diversion of attention “masks the harder questions” of how a stronger, more effective general international human rights system might be effectuated.

It is true that in recent decades greater numbers of states have joined the nine core international human rights treaties (with some correlation noted between becoming party to a given treaty and improvements in human rights standards in a given jurisdiction),⁵⁸ and a range of new individual complaint mechanisms, although optional, have been put in place under the various treaties or their protocols.⁵⁹ But the decisions issued under these individual complaint mechanisms are not binding on governments, and there is not much that the committees can do to

⁵³ Henkin, “Preface,” p. xvii.

⁵⁴ See, e.g., Paupp, *Redefining Human Rights*, p. 96.

⁵⁵ Mertus, *The United Nations and Human Rights*, p. 162.

⁵⁶ Henkin, “Preface,” p. xvii.

⁵⁷ Alston, Philip. 2014. “Against a World Court for Human Rights.” *Ethics & International Affairs*, Vol. 28, No. 2, pp. 197–212.

⁵⁸ For example, World Bank research shows that within five years of countries accepting the obligations of CEDAW, there is a significant drop in the number of legal discriminations against women embedded in the laws of such countries. See Hallward-Driemeier, M., T. Hasan, and A. Rusu. 2013. “Women’s Legal Rights over 50 Years: Progress, Stagnation or Regression?” Policy Research Working Paper No. 6616. See also Iqbal, Sarah. 2015. *Women, Business, and the law 2016: Getting to Equal (English)*, Washington, DC, World Bank Group.

⁵⁹ Pillay, N. 2012. “Strengthening the United Nations Human Rights Treaty Body System. A Report by the United Nations High Commissioner for Human Rights,” United Nations Human Rights Office of the High Commissioner, p. 17. www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBSstrengthening.pdf.

ensure compliance, beyond applying their moral authority. Although it is highly praiseworthy that these procedures have been developed, they are piecemeal and still do not represent effective outcomes for the individuals around the world who have had their most fundamental rights violated – nor are they a sufficient deterrent for states to not repeat problematic behaviors.

In a 2012 report, then UN High Commissioner for Human Rights Navi Pillay outlined chronic problems of state engagement with the treaty bodies, noting, for example, that only 16 percent of states parties to human rights treaties were reporting on time, in line with their obligations.⁶⁰ Even more symptomatically, Pillay has observed that “even though human rights is one of the UN’s three pillars, it remains so poorly funded, receiving only around 3% of the overall UN budget.”⁶¹ In a rebuke of the general and long-term neglect by the international community of the whole international human rights system, she has noted that:

by resigning ourselves to the “inevitability” of noncompliance and inadequate resources, the system was left to suffer a long history of benign neglect to the point where, today, it stands on the verge of drowning in its growing workload, even when leaving aside the shocking fact that on average 23 per cent of States parties to one treaty have never engaged in the review procedure of that treaty.⁶²

Zeid Ra’ad Al Hussein, Pillay’s successor and the sixth United Nations High Commissioner for Human Rights (serving 2014–2018), has been even more pointed in his critique of the lack of global progress made on human rights, citing decades of “mediocre leadership,” and noting that:

too many summits and conferences held between states are tortured affairs that lack profundity but are full of jargon and tiresome clichés that are, in a word, meaningless. What is absent is a sincere will to work together, though all will claim—again, under the lights and on camera—that they are wholly committed to doing so . . . [T]he international community has been too weak . . . to privilege human lives, human dignity, tolerance—and ultimately, global security—over the price of hydrocarbons and the signing of defence contracts.⁶³

Echoing the warnings and admonitions contained in the UN Charter and the UDHR, Al Hussein calls for new thinking on human rights, marked by a sense of urgency, linking deteriorating human rights situations with fractures in various societies that set up dangerous “trip wires” for greater conflicts in the international system:

⁶⁰ *Ibid.*, p. 9.

⁶¹ The Global Justice Monitor. 2014. “Interview with Navi Pillay: ‘Africa Has Benefited Most from the ICC.’” *Journal of the Coalition for the International Criminal Court*, Vol. 46, pp. 18–19.

⁶² Pillay, “Strengthening the United Nations Human Rights Treaty Body System,” p. 94.

⁶³ Al Hussein, Zeid Ra’ad. “Open Voices Grassroots Leaders Provide the Best Hope to a Troubled World,” *The Economist*, August 30, 2018.

A fracture within society is often shorthand for human suffering or the existence of burning grievances. Before conflicts begin, suffering stems from three types of human rights violations. One is the denial of fundamental freedoms, such as of opinion, expression and peaceful assembly, creating a situation where life and fear of the state become inseparable. A second is the deprivation of basic services, such as legal and social protections or rights to education and healthcare, which often only confirms the hold of political elites over others. And third, feeding the first two, discrimination, structural and deep, propped up by racism, chauvinism and bigotry.⁶⁴

Again, it seems artificial and naïve to think that thwarted human rights aspirations abroad would somehow not have cross-border and unpredictable global knock-on effects.

REFORM PROPOSALS: STRENGTHENING EXISTING MECHANISMS

As an integral part of establishing strong cultures that instinctively further human rights norms, and various forms of human rights leadership across sectors, strong national and international institutions are an imperative, as “good institutions, when supported by citizens of virtue, can stop the elites’ downward spiral into predatory self-dealing.”⁶⁵ International institutions that are strong, aspiring to standards of legitimacy, transparency and excellence, should be a clear aim in the contemporary international order; aspirations should rise far above Pillay’s warning of resignation to a seeming inevitability of scarce resources and noncompliance. That institutions are worth investing in fits with the “institutional turn” in current development economics:⁶⁶ robust, inclusive, modern and rules-based institutions, including at the international level, create the conditions necessary for social and economic prosperity.⁶⁷

Within the UN system, there have been progressive waves of limited reforms to the international human rights architecture, notably in 1993, with the creation of the Office of the High Commissioner for Human Rights (OHCHR), and in 2006, with the transition from the Commission on Human Rights (CHR), overseen by ECO-SOC, to the Human Rights Council (HRC), elected by the General Assembly. However, the HRC is still plagued by a range of issues that previously beset the CHR, namely, but not limited to, issues of legitimacy, independence, impartiality and election of Council members.⁶⁸ Despite the transition toward the regularized

⁶⁴ Ibid.

⁶⁵ Ignatieff, *The Ordinary Virtues*, p. 30.

⁶⁶ Ibid., p. 29.

⁶⁷ See, e.g., the hypotheses on state “success” set forth in: Acemoglu, Daron and James A. Robinson. 2013. *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, London, Profile Books.

⁶⁸ See recent discussion in Freedman and Houghton, “Two Steps Forward, One Step Back.”

“Universal Periodic Review” (UPR) system (the periodic review of the human rights records of all UN member states, also established in 2006), and efforts to ensure greater system coherence, the challenges and inefficiencies in the current institutional arrangements and capacities are many and are well documented. These include, for example: lack of implementation mechanisms; noncompliance of states with decisions regarding individual complaints; failure of states to fulfil reporting duties (on time, if at all); inadequate resources and chronic under-resourcing; backlogs of reports and communications and overloading of the treaty bodies; the system’s reliance on unpaid experts and on experts who may not have sufficient background to make quasi-judicial determinations on compliance; inadequate attention given to the independence of some human rights experts; insufficient support for and from the office of the UN High Commissioner for Human Rights; and complexity of and intransigent fragmentation within the system.⁶⁹ It has been noted that the current system may be “effective in promoting human rights, but not in protecting them.”⁷⁰ Moreover, on the issue of legitimacy and credibility, it would be progress if the international human rights system could in the first instance aim to have adequate checks and balances on independence of oversight bodies and those comprising them so that headlines such as the following would be a thing of the past: “Same old scam: The UN Human Rights Council’s lousy election.”⁷¹

A range of authors have made worthwhile suggestions to improve the current system, based around the HRC and the existing treaty bodies, which, however, fall short of further key structural changes. These include, for example: strengthening the reporting procedure through improved report preparation and interaction between treaty bodies and states parties/other stakeholders; seeking a binding nature for findings of treaty bodies as well as better follow-up procedures and the strengthening of individual communications; strengthening the role of civil society in operations and procedures; and enhancing the Special Procedures of the HRC, and so on.⁷²

⁶⁹ See, e.g., Broecker, Christen. 2014. “The Reform of the United Nations’ Human Rights Treaty Bodies,” *American Society of International Law*, Vol. 18, No. 16, www.asil.org/insights/volume/18/issue/16/reform-united-nations%E2%80%99-human-rights-treaty-bodies; Lhotsky, Jan. 2016. “The UN Mechanisms for Human Rights Protection: Strengthening Treaty Bodies in Light of a Proposal to Create a World Court of Human Rights,” *Journal of Eurasian Law*, Vol. 9, No. 1, pp. 109–122; Abashidze, Aslan. 2016. “The Process of Strengthening the Human Rights Treaty Body System,” *Journal of Eurasian Law*, Vol. 9, No. 1, pp. 1–13; Bassiouni, M. Cherif and William A. Schabas (eds.), 2011. *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* Cambridge, Antwerp and Portland, OR, Intersentia.

⁷⁰ Subedi, *The Effectiveness of the UN Human Rights System*, p. 222.

⁷¹ *The Economist*, October 17, 2018.

⁷² See, e.g., the range of reforms suggested in: Cherif and Schabas. *New Challenges for the UN Human Rights Machinery*.

More substantial suggestions for various structural reforms have been proposed by others, in particular “for determining the make-up of a credible HRC.”⁷³ Schwartzberg has suggested, for example, that to ensure efficiency, the number of HRC members should be further reduced from 47 to 36; in addition to seats reserved for representatives of 12 specified regions (reflecting “current global realities”), a substantial number of seats should be filled by a slate of *at large* members (decoupled from national political pressures) to encourage truly competitive elections of high-quality candidates; to preserve freedom of speech and independence of judgment, HRC members must be guaranteed legal immunity for any acts taken in the performance of their HRC duties (and, if necessary, asylum); membership should have gender balance; and the special status of indigenous peoples should be recognized through the reservation of two HRC seats for their designated representatives. Subedi has likewise made recommendations to reform and “empower” the HRC, suggesting ways to credibly depoliticize the composition of the Council and suggesting the possibility of elevating its status yet further within the current UN Charter system, giving it a range of new powers to refer situations to existing bodies with enforcement powers such as the Security Council and the International Criminal Court.⁷⁴

Suggestions such as these would no doubt significantly improve the credibility, efficacy and legitimacy of the current international human rights system, and should be implemented. Additionally, if we are seeking to craft a genuine international legal system, with a more authentic system of rule by law (for all the reasons set out in Chapter 10), there is the need to move also, in parallel, to court-based international legal mechanisms and judicial oversight of states’ human rights obligations.

REFORM PROPOSALS: INTERNATIONAL HUMAN RIGHTS TRIBUNAL

As has been shown by well-established regional human rights courts – African, Inter-American and European – supranational judicial oversight of national human rights obligations can now be said to be relatively widespread and “popular” at the international level. Regional human rights commissions or committees in Asia and the Middle East/North Africa (e.g., under the auspices of the Association of Southeast Asian Nations (ASEAN) and the League of Arab States) have also been established within the last decade, laying the normative and institutional

⁷³ Schwartzberg, Joseph E. 2013. “A Credible Human Rights System,” in Joseph E. Schwartzberg (ed.), *Transforming the United Nations System: Designs for a Workable World*, Tokyo and New York, United Nations University Press, pp. 110–128.

⁷⁴ Subedi also argues for referral power to a new International Court of Human Rights, a proposal that we would support. Subedi, *The Effectiveness of the UN Human Rights System*, pp. 247–255.

groundwork for further development and future individual complaint mechanisms and/or judicial oversight in these regions as well.

The existing regional human rights courts – in particular the longer-standing courts in Europe and the Americas – have already demonstrated the capacity of supranational courts to play a strong role in developing the respective regional human rights systems, within the frame of binding regional human rights treaties. The courts have seen progressively increasing caseloads (indeed, showing the strong “demand” side for human rights relief), and a significant role in clarifying the law, contributing to its progressive development. Such jurisprudence is important for any eventual international human rights court, which should be sensitive to regional and cultural diversity and conditions, and more generally to the progressive development and organic evolution of international human rights law within the frame of evolving societies across the world, driven by the facts of specific cases that come before tribunals.

We propose that an International Human Rights Tribunal should be established, and there are indeed a range of particular benefits to be gained through the establishment of a court-based oversight system for states’ human rights obligations.⁷⁵ Prime among the arguments for such oversight is that the normal definition of a “rule of law” system includes the opportunity for the meaningful enforcement of established legal norms; legal norms established at the international level that are considered to be binding should therefore also be enforceable at the international level. There is a risk that the international human rights obligations will not be deemed credible or – indeed – binding, if there is not such a system whereby courts can issue impartial and enforceable decisions, with international oversight of this enforcement. One can certainly see this “risk” realized in the current state of affairs, judging from the human rights reports issued by a range of actors, both within and external to the UN, on various states’ behaviors.⁷⁶

The unique nature of judicial oversight would be another important benefit gained from an additional international layer to the global human rights “system.” The independence and impartiality of judges, if well established and safeguarded,⁷⁷ has the potential to diffuse politicized situations at the national, regional and international levels, without reliance on a “name and shame” system where, for example, individual states may risk rupture of economic or diplomatic relations if

⁷⁵ See, e.g., those set out by Bilder and Subedi. Bilder also sketches various potential drawbacks. Subedi, *The Effectiveness of the UN Human Rights System*; Bilder, Richard B. 1994. “Possibilities for Development of New International Judicial Mechanisms,” in Louis Henkin and John Lawrence Hargrove (eds.), *Human Rights: An Agenda for the Next Century*. Studies in Transnational Legal Policy, No. 26, the American Society of International Law, Washington, DC, pp. 317–346.

⁷⁶ Subedi, *The Effectiveness of the UN Human Rights System*.

⁷⁷ This is why, for example, we are proposing additional, enhanced “rule of law” institutions at the international level, including an international judicial training institute and a system-wide office of Attorney General; see Chapter 10.

they criticize another state's human rights abuses too vigorously.⁷⁸ Certain situations bearing on human rights violations, which may have implications for international peace and security, can also be objectively assessed, according to neutral principles of law, forming a basis for further collective action or support of the international community and/or allowing national political actors to "save face" by yielding to the decision of an impartial tribunal in a situation that might otherwise be politically sensitive.⁷⁹

More generally, courts should have unique abilities and skills to determine facts and apply the law in human rights cases, devising appropriate remedies for any violations found, and playing a crucial role in leveling the playing field among actors who may have immensely different levels of power. One criticism of the existing international human rights individual complaints mechanisms is in fact the need for greater "judicial" expertise to be deployed in such mechanisms to address individual cases.

Finally, one of the primary complaints about the current international landscape with respect to international human rights norms is the persistent hypocrisy of state actors, and the gap between rhetoric and action, as noted by Commissioner Al Hussein. A clear and effective way for governments to demonstrate *actual* commitment to international human rights standards would be to subject themselves to international judicial oversight of human rights obligations. This is perhaps one of the strongest arguments for the establishment of international juridical mechanisms. International law has been criticized as perennially vacillating between postures of "apology and utopia,"⁸⁰ with high "utopian" moral ideas espoused by state actors, which serve, however, primarily or often as manipulative facades for what government actors perceive to be "state interest" or power. A commitment to a well-designed and adequately funded international human rights court would be a substantial step toward overcoming this vicious circle and moving to an international order genuinely based on "human security."

At the international level, the establishment of an international human rights court has been mooted for a number of years, with some proposals being more prominent than others, and none yet gaining significant practical traction. Proposals date from early in the postwar era, with Australia calling for the creation of a stand-alone international human rights court in 1947, and the United Kingdom at the same time making a counter-proposal that the International Court of Justice (ICJ) be mandated to give advisory opinions on human rights; the idea of an International

⁷⁸ Part of the justification of shifting to the HRC was to usher in a new era of dialogue and cooperation, beyond "name and shame" techniques. Freedman and Houghton, "Two Steps Forward, One Step Back," p. 756.

⁷⁹ Bilder, "Possibilities for Development," pp. 326–328.

⁸⁰ See, for example, Koskeniemi, M. 1990. "The Politics of International Law," *European Journal of International Law*, Vol. 1, pp. 4–32, p. 8.

Human Rights Tribunal was subsequently raised in international fora in the later 1960s and in 1993 at the Vienna World Conference on Human Rights.⁸¹

A high-profile proposal was put forth by the Swiss government in 2011 that a permanent, specialized World Court of Human Rights (WCHR) be created, generally based upon, but also improving, the current model of the European Court of Human Rights (ECtHR). Such an independent court would be established by way of treaty and would be “competent to decide in a final and binding manner on complaints of human rights violations committed by state and non-state actors alike and provide adequate reparation to victims.”⁸² This ambitious proposal drew the backing of a high-level “Panel on Human Dignity” that included former UN High Commissioner for Human Rights Mary Robinson; Theodor Meron, who served at the International Criminal Tribunal for the former Yugoslavia as president for multiple terms; independent experts from the UN Human Rights Council; and well-known human rights activists from, among other places, Austria, Brazil, Egypt, Finland, Pakistan, South Africa and Thailand. It also attracted the attention of various international organizations and scholars.

Despite the support for such a court from a broad range of influential actors, the 2011 proposal was seen by some at the time as too ambitious and too expensive. It was criticized, for example, for a number of the novel features suggested in the proposed blueprint of the court,⁸³ and more generally based on concerns about its complexity, the challenges of cultural diversity and the “distraction” from other projects or investments, in particular given an increased unwillingness among states to invest in “large-scale” international human rights initiatives.⁸⁴

The issue of complexity of the international treaty-based human rights system, with potentially overlapping obligations among treaties, is a well-known problem, and exists whether or not an international court is established; rather, the establishment of such a body would provide an important opportunity for the consolidation

⁸¹ Subedi, *The Effectiveness of the UN Human Rights System*, p. 239.

⁸² *Protecting Dignity: An Agenda for Human Rights*, 2011 Report, Conclusions and Recommendations, p. 40. www.udhr60.ch/.

⁸³ Such as the fact-finding powers of the proposed court, the expansion of the range of situations in which recourse to the court might be had, the ability of the court to impose strong interim measures; much expanded advisory opinion powers on human rights treaties given to the ICJ, and the fact that all judgments would be final and binding. Alston, “Against a World Court for Human Rights.”

⁸⁴ *Ibid.*, p. 202. Alston notes that the ECtHR at the time involved a bill of US\$90 million per annum, with no fact-finding, as was proposed by the international court, and covering “only” 800 million persons – that is, one-ninth of the global population. However, compared with annual global military spending (US\$1.7 trillion), the potential costs of an international court seem modest if it were in fact to assist systemically with compliance with international human rights norms. Alston also correctly notes that “justiciability” of rights (e.g., making them subject to legal action before a judge) at the international level should not always or necessarily be positioned “over all other means by which to uphold human rights,” including in relation to structurally embedded and “complex and contested problems.” It is only one of a range of important tools or techniques for ensuring the promotion of and respect for human rights.

and clarification of various existing human rights norms and how they may interact.⁸⁵ Similarly, the issue of international cultural and legal diversity – another issue of complexity – as Sen has noted, is intrinsic to the nature of our rich and varied global society, and affects all areas of international law and international cooperation. The allocation of resources is an international policy choice and there is no reason that multiple, ambitious human rights investments cannot be undertaken in parallel. Remarkably, much has been accomplished in the international arena already in relation to human rights, in particular with respect to normative foundations and increased monitoring, despite dramatically meagre resources.

Further dialogue among experts and serious conversations should recommence in earnest as to the optimal design for an international human rights court, fit for modern circumstances and not compromising on impartiality and efficacy. Concerns such as those raised in relation to the 2011 proposal should be taken into account in further discussions as to how a future court should be engineered. Prime among these may be ensuring an independent and well-trained international judiciary, if they are to issue binding decisions (see Chapter 10, which proposes an international judicial institute), and the possible cultivation of staged or incremental implementation pathways for the realization of such an international court, while at the same time substantially increasing investment, at the global level, in human rights capacity-building and technical training for relevant system actors, including in relation to issues of cultural sensitivity and diversity.⁸⁶

It is feasible to design an international human rights system that supports the oft-repeated “universality” of international obligations, while still respecting regional and national diversity, as well as the diversity of legal systems and traditions throughout the world; these issues are not beyond the reach of the potential techniques and approaches of an international judiciary that is properly equipped.⁸⁷ Moreover, mechanisms of “complementarity” or “subsidiarity” with national and regional courts or systems, and possible filtering through existing or enhanced regional human rights mechanisms, should be explored so as to empower national and

⁸⁵ Subedi, *The Effectiveness of the UN Human Rights System*, pp. 243–244.

⁸⁶ However, calls for capacity-building support from the international community should not be used as a smoke screen or an excuse for not complying with human rights norms at a national level when there is capacity but a lack of political will. See discussion in Freedman and Houghton, “Two Steps Forward, One Step Back.” However, one could reasonably conceive of a phase-in/managed preparation period, with capacity-building and external reviewers, in the lead-up to a country becoming subject to an international human rights court.

⁸⁷ Intercultural challenges of global human rights adjudication should be kept in mind, but the growing sophistication, in particular among younger scholars who often possess intercultural versatility from a young age, with capacities to mediate between various political and cultural landscapes, should not be underestimated. At the moment there is an excess of international talent, of younger scholars and professionals in particular, who wish to work full time on international human rights issues; they are in need of credible new international tools and institutions where they may channel their commitment, energy and talent.

regional actors as much as possible, while still mapping out relevant hierarchies among courts.⁸⁸

WAYS FORWARD: A NEW ERA FOR INTERNATIONAL HUMAN RIGHTS

As Barrett notes, “[w]hen the world succeeds in supplying global public goods, people everywhere benefit. Our international institutions, however, are clumsily suited to this task [as] they lack the coercive powers that every state uses to supply national public goods.”⁸⁹ The delivery of a social and economic environment in which human rights are respected and upheld, as a key international “public good,” has the official backing of virtually all governments in the world. Yet effective and neutral implementation and enforcement powers to meaningfully deliver such a good have yet to be fully built and this represents a fundamental flaw in the global order. Despite the progress made since 1948, including impressive advancements in the realm of norm creation and consolidation,⁹⁰ we still have a highly imperfect system that allows ongoing abuses on a massive scale.

Influential actors are raising the alarm regarding what they see as an urgent crisis in systemic human rights violations in various parts of the world, which may trigger broader (and additional) international conflagrations or system breakdown; meanwhile there are stunningly ambitious recent proposals for robust new international machinery, backed by prominent legal, human rights and other experts. It is clear from a governance and a cogent international policy perspective, for all the reasons sketched above, that we must fundamentally revamp existing institutions and move to a new era of global human rights implementation. If this important work is not carried forward, it is mistaken to think that any of us will remain immune to the effects of a world where systemic human rights abuses are allowed to flourish.

It is clear that it is time to establish an International Human Rights Tribunal, to give credibility to the international system. Membership in such a court should be made a requirement of UN membership under a revised UN Charter, which should set forth an updated human rights vision, the foundations for which were laid in

⁸⁸ For example, exploring what might be drawn from the ICC principle of “complementarity” in relation to regional or national human rights courts, or some adjusted EU notion of “subsidiarity,” and/or following the ECtHR model to establish a court of “final appeal” after domestic remedies have been exhausted, while still applying a “margin of appreciation” to account for national diversity.

⁸⁹ Barrett, Scott. 2007. *Why Cooperate? The Incentive to Supply Global Public Goods*, Oxford, Oxford University Press, p. 190.

⁹⁰ This normative progress is clearly evident if one surveys the broad range of human rights instruments negotiated by the international community to date: United Nations Treaty Collection, Chapter IV: Human Rights. <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>.

1945.⁹¹ Regardless of the specificities of various individual proposals for the final design of an International Human Rights Tribunal – the 2011 proposal for an international human rights court, or those of scholars or practitioners such as Subedi, Trechsel and others – these proposals should receive careful scrutiny, comparison and further development or amendment, taking into account the range of implementation pathways that have been followed in the incremental strengthening of regional human rights systems (e.g., with respect to the ECtHR).⁹² More nuanced arguments and engineering of the various proposals and suggested configurations would be helpful, as well as the exploration of phases of development. In parallel, there should be substantial reform of the existing HRC and treaty body mechanisms, which would then be followed by the (staged) establishment of judicial mechanisms for the meaningful oversight of international human rights obligations.

One of the repeated arguments against a strengthened international human rights architecture, including an international court, involves funding concerns. Funding is a systemic issue in relation to a whole range of fundamental international institutional initiatives, and it is an issue for which the international community must find solutions, of which there are many (see Chapter 12). Moreover, well-thought-out consolidation and rationalization in the current human rights “system,” with its overlapping functions and duplication, will also allow for economies at the national and international levels. But generally speaking, international legal institutions, such as those at the national level, require investment, and indeed, they should be properly resourced in order to fulfil their very elemental mandates to produce minimal conditions for a functional society. Human rights are supposed to be a part of fundamental citizen entitlements, and also one of the three main pillars of the UN. As noted by Navi Pillay, human rights are currently accorded a truly paltry proportion of the UN budget – about 3.7 percent, according to recent reporting.⁹³ This budgetary allocation alone is a testament to the neglect of the issue of human rights by the international community on the issue, despite clear and urgent

⁹¹ Such a tribunal could also be established through a stand-alone treaty in advance of Charter revision; see Chapter 21, discussing various implementation pathways for the reform proposals contained in this book. Human rights compliance should also be tied systemically to economic incentives, development and other aid in an enhanced international order.

⁹² Trechsel, Stefan. 2004. “A World Court for Human Rights?” *Northwestern Journal of International Human Rights*, Vol. 1, No. 1, pp. 1–18; Subedi, *The Effectiveness of the UN Human Rights System*.

⁹³ The latest information on the OHCHR website at the time of writing, under “Funding and Budget,” states: “And yet, the regular budget only allocates a tiny percentage of the resources to human rights that are extended to the other two pillars. With approximately half of all regular budget resources directed to these three pillars, human rights receives less than eight per cent of those resources. The approved regular budget appropriation for the Office in 2018–2019 is US\$201.6 million, just 3.7 per cent of the total UN regular budget.” UN Office of the High Commissioner for Human Rights, “OHCHR’s Funding and Budget.” www.ohchr.org/en/aboutus/pages/fundingbudget.aspx.

widespread demand for forward movement; human rights are too important and too essential, by definition, to be the subject of such neglect.

The Need for an International Bill of Rights

Finally, with respect to limitations to and safeguards on enhanced UN powers under a potentially revised UN Charter with enhanced institutions (see Chapter 21), people around the world will want to be reassured that basic individual rights will not be violated in the process of the exercise of the UN's strengthened mandate as an international organization. The accountability of both individual states and of international governance bodies with respect to human rights must be strengthened. Following on the proposals of Clark and Sohn, a new Bill of Rights (annexed to a revised Charter) prescribing limits to UN action should be drafted to include fundamental human rights protections. The list developed by Clark and Sohn, for example, includes: the right to a fair trial for persons accused of violating provisions in the revised Charter or subsequent regulations and laws emanating therefrom; protections against excessive bail, cruel or unusual punishment, and unreasonable searches and seizures; prohibition of the death penalty; protections for freedom of conscience or religion, freedom of speech, the press and expression in various forms; and freedom of association and assembly. More recent models, such as the Charter of Fundamental Rights of the European Union (the provisions of which are primarily addressed to EU institutions and to national authorities when they are implementing EU law), could also be studied and drawn from to ascertain the appropriate modern protections at the international level. Application and interpretation of the Bill of Rights could be the responsibility of a new, specialized chamber of the ICJ.