

# Human Rights in the Context of International Relations

Written by Bas de Gaay Fortman

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BAS DE GAAY FORTMAN, JUL 30 2011

Sixty-six years after the founding of the United Nations, human rights looks like an insular world unto itself: A system with its own standards, institutions and mechanisms, a world of experts still far from being intrinsically connected to people's daily life worlds. Insofar as the mass media pay attention to human rights questions and issues, their focus is primarily on international relations and foreign policy. This would not give any reason for concern if the emphasis were just on human rights as an end to be achieved. What permeates international relations is, however, human rights as an instrument to uplift a state's own credibility while undermining that of other states. In that respect two distinctive ways of twisting human rights may be discerned: *Offensive* and *defensive* human rights.

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

This could happen only very rarely as international governance is extremely weak in practice. Consequently, state sovereignty – also a UN foundational principle (UN Charter Article 2) – has remained a crucial obstacle to the enforcement of international human rights law. Thus, in practice, the states participating in Treaty-based mechanisms can refrain from submitting country reports as well as ignoring conclusive observations that require a clear follow-up, and in the Charter-based bodies they can disregard motions and resolutions requesting essential changes in their human rights policies and practices, while even denying access to UN-mandated representatives seeking entry into the country under scrutiny.

The point is that while international standards and mechanisms have been created as a legal venture, implementation has always been dominated by international relations. Thus, there is no world court of human rights comparable to the European Court of Human Rights in Strasbourg, whose judgments are executed as standard practice. As mentioned, membership of the Charter-based bodies is through state representation, implying that states are involved in judging their own cases.

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

### Defects in international human rights

The UN project as envisaged in the Charter was never meant to be legally enforceable by *international* means. The terminology was remarkably weak from the start, with the core expression of "protection and promotion of human rights" as testimony to its "soft law" character. Whereas rights signify abstract commitment to protection of interests

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by law, human rights refer to interests directly connected to human dignity, *viz.* fundamental freedoms and basic entitlements. To “protect human rights,” then means protecting the protection of these interests by law. Such discourse obviously weakens the mission.

(1) Even when country assessments and cases of human rights violations are treated as very serious matters, there is remarkably little attention to the follow-up of cases in which evident violations of human rights were established. This is one explanation why the global human rights deficit – manifested in impunity of state-related perpetrators of gross and systematic violations, structural non-implementation of the rights of the poor, lack of protection of non-dominant collectivities, and domestic violence against women and children – strongly persists.

(2) The juridical nature of the international human rights venture went together with an emphasis on case-by-case approaches. Yet, national non-implementation is often of a structural nature, requiring primarily international political action. Insofar as such action has been forthcoming, it has suffered from the almost inherent double standards in the world of states. Effective action requires decision-making by the UN Security Council and that implies consent on the part of its permanent members, including China, Russia, and the United States. Thus, gross and systematic violations of human rights cannot be effectively addressed in territories such as Chechnya and Tibet.

(3) Effective protection of collectivities requires close co-operation between the UN's political set-up, which deals with international peace and security, and its juridical branch, which is tuned to the “promotion and protection” of human rights. Likewise, the realization of economic, social, and cultural rights needs the full commitment of relevant development-oriented agencies, including the international financial institutions (IFIs). Yet, “mainstreaming” human rights as envisaged in the whole UN system of governance has, above all, resulted in documents that reflect policy briefs, reports and policy guidelines rather than the genuine operationalization of human rights at all levels and layers (Normand and Zaidi 2008).

(4) There has not been much interest in global human rights as a *common* mission of the “United Nations,” as envisaged in Article 1 of the Universal Declaration of Human Rights (Declaration, UDHR). Instead, member states appear to believe in setting up their own human rights mechanisms – not as complementary to the international framework but as an alternative – rather than committing themselves to truly supranational supervision and enforcement. Strikingly, even in academic circles the grounds of human rights, as expressed in the first article of the Declaration, are rarely discussed except for philosophical reflections on human dignity. The downside of that obvious endeavour to avoid discussions that might touch upon the axiom of global universality is that concrete human rights tend to get detached from the fundamental values that lie at the core of each distinct human right. Let us take freedom of opinion and expression as an example here. Its ground – liberty – is often interpreted in such a way that the first part of Article 1 of the Declaration is dissociated from the second: The conception of freedom becomes unhinged from an accompanying conception of people as moral human beings, implying personal responsibility. Consequently, through the above interpretation the grand principle of human dignity loses its significance. Indeed, certain interpretations, which utilize Article 19 of the Declaration as a licence to use offending language and to disseminate dignity-offending material, such as pornography, tend to alienate huge portions of the necessary constituency for the human rights mission, while also contributing towards a political constituency for relativist positions such as “Asian” or “Islamic” human rights.

(5) International human rights are not yet sufficiently focused on the economic, political, social, and cultural aspects of the distinct environments in which these rights have to be realized. As the whole international venture for the protection of human dignity against the abuse of power is based on well functioning legal systems that connect enforceable national law to international law, efforts to realize these rights primarily require the creation of good governance based on the rule of law. In order to overcome the obstacles connected to failing and dictatorially ruled states, well functioning economies and policies to overcome cultural prejudice are essential. That would entail a shift of resources from purely juridical action towards policies supporting political transformation.

(6) Devoid of global governance, economic globalization has increased socio-economic inequality while creating an adverse environment for the realization of economic, social, and cultural rights. Simultaneously, non-state agencies or actors became more relevant in the whole international endeavour for structural protection of human dignity.

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Effective check on human rights-affecting actions by multinational corporations (MNCs) is primarily the duty of states under whose responsibility these companies operate. While at the level of states an increased focus on MNC violations of human rights is clearly noticeable, international regulation will have to follow if violations reach a globally intolerable level (Ruggie 2008). Notably, even international governmental organizations such as the World Trade Organization (WTO) distance themselves from responsibilities for human rights implementation.

(7) In the aftermath of 11 September 2001 (9/11) the world has seen a strong revival of “exceptionalism” in respect to international law. Exceptionalism is a term generally used to describe the ways and means by which states exempt themselves from the international legal and political order. The United States is the most obvious example of state-based exceptionalism. Within the setting of the problematique that concerns us here, the phrase “exceptionalism” may be used to describe any attempt to exempt citizens and institutions from democratic public-political authority and its laws, policies and actual decisions, based on assumed incompatibility with national principles. In the wake of the “Global War on Terror” as the Pentagon termed the United States’ response to 9/11, even rights very close to the core of human dignity such as due process and the prohibition of torture have been grossly and systematically violated. Highly problematic from a human rights perspective is the exceptionalist spillover to the rest of the world, including countries like Israel and Iran, too.

## Positive perspectives

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

(1) The global “faith” in universal dignity and inalienable rights that was mentioned in the preamble of both the UN Charter and the UDHR is implicit in the strong moral-political rhetoric of the Declaration as exemplified in the articles specifying the various rights beginning with “all,” “everyone” or “no one.” Indeed, everybody counts and no one is to be submitted to treatment violating their basic human dignity. In what way the declaration may have finally been drafted – “written in two days in a hotel room in San Francisco by Eleanor Roosevelt and two assistants” (Korzec: 1993) – it is a simple fact that these words have a universal appeal. While this may not be the case in regard to all those who rule, it certainly applies to those who are ruled. In fact, just like Holy Scriptures such as the Bible, the Qur’an and the Bhagavad Gita, the UDHR appeals to a much wider circle of people than the cultural context in which it originated. Those who have ever carried copies of the Universal Declaration to countries with tyrannical regimes know that, in a cultural context entirely different from “the West,” there can be an overwhelming demand for this document.

(2) Notably, the whole venture is of a programmatic rather than an immediately conclusive nature. In fact, it all started with a Universal *Declaration* of Human Rights. This does not mean, however, that the term “rights” as used here is meant in the sense of a moral category as if these “moral rights” could be distinguished from “legal rights.” Rights signify interests protected by law, meaning a public-political responsibility towards their protection, and in this sense, human rights are not distinct from other rights. It should be noted that rights are never simply self-executing. Indeed, realization of one’s rights under the law always requires action and this applies to declared rights in particular. Hence, although the “downstream” basis of the international human rights standards is rather weak, “upstream” action may well serve to actually secure the fundamental freedoms and entitlements that are meant to be protected.

(3) Although UN General Assembly declarations do not routinely qualify as international law, through periods of customary state practice and guided by a strong *opinio iuris* (established legal opinion) these may well result in customary international law, in certain instances even regarded as *ius cogens* (non-derogable provisions of international law). This applies, for example, to the right to life, liberty and bodily integrity (prohibition of torture) and due process. Yet, even to get *ius cogens* enforced through effective judicial remedies remains a huge challenge. Hence, the downstream venture will always need linkages to upstream action on the part of those whose rights are at stake and the agencies that support them.

(4) The international human rights project was never intended as a separate venture, aside from regional and national mechanisms. Europe has created a very strong regional system through the European Convention on

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Human Rights and the adjoining European Court of Human Rights in Strasbourg. The regional mechanisms in Africa and in the Americas are gradually being reinforced. Even more importantly, national human rights institutions – supervisory commissions and institutes – play an increasing role. Moreover, as will be illustrated below, national legislators and particularly national judiciaries often manifest an activist attitude when it comes to human rights implementation.

(5) Despite its flaws from the legality perspective, international human rights law has created a strong notion of global legitimacy, based on common standards of justice and injustice. This implies that no use of power is considered legitimate if it violates international human rights standards. It is particularly in the absence of a reliable global instrument for human rights enforcement that the international standards behind human rights play an important part in the real civilizing mission.

(6) Particularly through the support of international civil society, linked to national NGOs in distinct contexts, international mechanisms for supervision of human rights compliance serve to bring concrete violations out into the open. *Quidquid latet apparebit* (whatever is hidden is to be revealed) as Thomas of Celano put it in his peroration on the final judgment *Dies Irae, Dies Illa*.

(7) Although the original language of most documents originating in the international human rights venture is juridical and protective, in actual practice the project is at least as political and transformational. Indeed, while the history of civil and political rights is tuned in particular to the *protection* of citizens against sovereigns who want to rob them of their possessions, in a “Third World context” the declaration functions as a basis for the *emancipation* of the have-nots.

Thus, in the struggle for public justice, international human rights provide not just legal resources as based on positive law, but also political means anchored in public legitimacy. Additionally, human rights function not merely to protect people with regard to the freedoms and entitlements they have already acquired, but in their emancipatory struggles for socio-political transformation as well. Hence, the whole picture offers a multifaceted perspective based on a civilizational commitment of utmost importance. In the absence of reliable global mechanisms for the enforcement of human rights, international human rights laws and principles have to be connected, first and foremost, to national institutions and mechanisms with power to enforce these standards. Indeed, while from an international legal perspective, state sovereignty may well be seen as an obstacle, in a national context it might well constitute a basis for effective implementation. This does, however, require a functioning rule of the law in the first place.

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