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### Review of *Human Rights: Between Idealism and Realism*

Steven R. Ratner

University of Michigan Law School, [sratner@umich.edu](mailto:sratner@umich.edu)

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## BOOK REVIEWS

Tomuschat, Christian. *Human Rights: Between Idealism and Realism*. Oxford: Oxford University Press, 2003. Pp. 333. \$72.00 (cloth).

For centuries, moral philosophers have regarded ethics and justice in the international plane as part of their domain. The move from the personal to the societal or national to the global seems effortless. In recent years, philosophers in ethics have devoted considerable attention to the ethical significance of nationality and patriotism, asking whether an impartial morality permits better treatment of an individual's co-nationals; while those in politics have revisited issues of international justice through, for instance, works on human rights and just war theory. These two bodies of work both address what constitutes a just world and what role the individual should play in furthering it. They correspond in many ways to the interactional versus institutional conceptions of morality and justice identified by Thomas Pogge.

Yet over the years, remarkably few in international ethics have taken account of the actual structure of the international order and, in particular, the norms that have developed over centuries into what we now call international law. International lawyers analyze and seek the construction of an international order with a normative component, and the norms and processes they study and appraise cannot be set aside in asking about personal duties and justice. They and their field represent a sort of middle ground between the description of the world emanating from much of political science and the ideal theorizing of a just world offered by philosophers. Attention to international law is key not only to making international ethics stronger within philosophy but, equally important, to making it convincing to those concerned with operationalizing ethical theory—political scientists, legal academics, governmental and nongovernmental elites, and the educated public. Of equal concern, when philosophers purport to take account of international law, their vision can be limited, misconceived, or anachronistic. To mention just one prominent example, John Rawls in *The Law of Peoples* grounds much of his work on an unargued summary of international law based on a selective reading of a forty-year-old treatise (J. L. Brierly, *The Law of Nations: An Introduction to the Law of Peace*, 6th ed. [Oxford: Clarendon Press, 1963]).

Fortunately for those philosophers interested in understanding international law in the critically important area of human rights, Christian Tomuschat's new monograph offers an insightful guide to both the substance of that law and the complex processes for its implementation. Tomuschat, professor of constitutional and international law at Humboldt University, is well positioned to write this tome. His experience includes not only decades of scholarship but also membership on two key UN international law bodies—the International Law Commission, which studies and helps codify law in numerous subject areas, and the Human Rights Committee, which monitors compliance with the 1966 In-

ternational Covenant on Civil and Political Rights—as well as chairmanship of Guatemala’s truth commission in the 1990s. In one volume, Tomuschat is able to paint a picture of international law that can aid philosophers seeking to critique or improve the system built thus far.

Tomuschat’s book is organized into fourteen chapters. The first four address the substance of human rights law, including its history; the categorization of rights into “generations” by governments, international organizations, and scholars alike; and the ongoing global debates about whether human rights are universal or culturally relative. Eight of the next nine chapters address the implementation of human rights through domestic and international mechanisms. These include the transformation of a state’s obligations into domestic law; the work of political organs of international organizations, including the United Nations and the European Union; the procedures of panels of experts created under treaties to examine state behavior; international courts, notably those in Europe and Latin America; interstate enforcement through diplomacy, economic sanctions, and military force; criminal prosecution of human rights violators domestically and internationally; and civil suits to obtain reparations. Misplaced among these chapters is a nice chapter on international humanitarian law—the law of war—an area of law that has developed fairly independently of human rights law until recently but which is meant, among its various goals, to offer minimal protections to civilians during armed conflict.

Tomuschat’s writing is clear and to the point, and, although the book is probably targeted at a legal audience, it will not prove too technical for non-lawyers. The book combines both description of the law and mechanisms and the author’s appraisal, though at many times I wished he had elaborated upon his reasoning when offering his opinions. The book is also quite comprehensive and now stands as the best English-language legal treatise on the subject. Like many scholars, he focuses a bit too much on developments in Europe, though part of that is due to the sophistication of the enforcement mechanisms and case law in Europe—principally the European Court of Human Rights—compared to other regions.

Tomuschat’s conception of human rights, while adequate for lawyers, may not satisfy moral philosophers. He begins the book by asserting that human rights for purposes of international law are distinct from rights that might be developed by a philosopher, in that the former are part of a legal system, which includes both secondary rules (rules of recognition) and an enforcement system (1–2). A few pages later, however, he says that the individual enjoys “true rights” not merely when a government has a duty to act according to a certain rule, but only when the rights can “be invoked by their holders before any bodies vested with decision-making authority” (4). Many philosophers will question whether an individually initiated remedy is necessary for the existence of a right. This view is certainly different from both the Hohfeldian conceptions as well as the more minimal jurisprudential meaning developed by Joseph Raz in *The Morality of Freedom* (Oxford: Clarendon Press, 1986). (Indeed, many lawyers will disagree with his corresponding emphasis on individual petitioning procedures at the international level, which Tomuschat insists are the sine qua non for individuals to be “subjects of international law” [160]. That way of understanding so-called international legal personality, still dear to European scholars, has been

shown to be anachronistic, e.g., in Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," *Yale Law Journal* 110 [2001]: 443–545, 475–77.) Then, Tomuschat suggests that the enforcement process is central to human rights as law, noting that his real focus is upon "the mechanisms designed to translate human rights as legal propositions into a living reality" (5). Yet, as the rest of the book makes clear, the enforcement process is larger than individual remedies; and, moreover, a significant portion of the book is devoted—as it should be—to the substantive norms rather than enforcement. To his credit, Tomuschat explicitly discusses the concept of different duty holders, although I believe he misstates extant law in saying that "little if anything has materialized" regarding duties on corporations (91).

In the chapters on generations of rights and the universality of human rights law, he brings to light all the major debates in a nonpolemical fashion. He finds civil and political rights both more coherent and more important than economic, social, and cultural rights. He discusses several reasons for this, though philosophers will probably wish that the relationship among them were clearer. One reason seems to be that the former place more precise obligations on states than do the latter (39); another is that most of the former but few of the latter are "so essential for a human life in dignity" as to be "true individual rights" (41). For a third reason, he states, "The bulk of the obligations incumbent upon a state under the heading of civil and political rights can be discharged just by adopting an attitude of passivity" (47). Yet the negative right/positive right distinction is, as he himself discusses, too facile: civil and political rights cannot be achieved by passivity if the police force consists of people with a proclivity to torture suspects; only positive governmental action in the form of police training will work. Others have offered more systematic treatment of these important distinctions, for example, in Henry Steiner and Philip Alston's *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. [Oxford: Oxford University Press, 2001], 242–75). Still later the author offers a more practical (and in my view persuasive) reason for his preference: "A human rights concept confined to constraints limiting governmental action has much better chances of universal recognition than a more comprehensive concept which considers human rights as public order elements for state and society alike" (82).

Similarly, Tomuschat seems to follow the European tradition of positivism, as he properly notes the dangers in eliding the philosophical ought with the legal ought (2); indeed, he is overall very cautious in recognizing the existence of new norms of human rights. Nonetheless, in justifying the 1999 NATO action in Kosovo, which most positivist lawyers considered illegal under well-accepted norms on the use of force, he admits that under exceptional circumstances, law must resort to morality and allow recourse to "extraordinary remedies" (228). Readers will probably have preferred an explanation of when such conditions arise (need it be genocide?) or which remedies then become permissible.

Tomuschat is in his element when he appraises the domestic, regional, and global mechanisms for the protection of human rights. On domestic implementation, he astutely notes that governmental bureaucracies, including judges, are often an impediment to making treaties effective (104), and he makes no illusions that a state's ratification of a treaty is a sufficient step for protecting rights. Yet he wisely does not put all the burden or blame on governments,

noting that bureaucracies cannot just impose norms on a population through treaties (61) if societal values are not in tune with the treaties, concluding that “the intellectual frame of society conditions its practices in the field of human rights” (320).

Included in the chapter on domestic implementation is a very cogent discussion of the territorial reach of human rights treaties, an issue that should be central to the debates in ethics about impartiality and special duties owed to fellow nationals. Tomuschat points out that the duties of a state in the area of human rights extend to all its residents, to others under its effective jurisdiction (e.g., residents of an occupied territory), and even to prisoners who are captured by a state. This extension suggests that international law does not countenance the idea that a state has special duties toward its citizens alone, but rather that it must extend human rights to all those over whom a state exercises control. However, it does not suggest that states must protect the human rights of everyone equally, including those beyond their jurisdiction and control.

Tomuschat is generally balanced and frank in his assessment of the United Nations’ human rights compliance mechanisms, on one of which he served. He wisely points out the double standards of the political bodies, namely, the General Assembly and the Human Rights Commission, though he notes some progress in recent years as they have moved to appraising and criticizing a variety of states and not ridiculously singling out Israel. Tomuschat credits the shift to the work of the expert-composed Human Rights Committee in reviewing the conduct of many states, as the political organs became embarrassed by their silence in the face of numerous human rights problems. The Human Rights Committee’s recommendations to states following the submission of their mandatory (but often delayed) reports can, he notes, form the basis for pressure points on the government by both domestic and international groups. As for the Committee’s review of individual petitions, he highlights the tendency of states to ignore the Committee’s views and, with great understatement, opines that the process “leaves ample room for improvement” (184).

Nonetheless, the book is too often hesitant to examine the many political factors that make human rights enforcement mechanisms (in the United Nations and elsewhere) work or fail. For instance, most states ignore the conclusions of the Human Rights Committee because the net costs of ignoring them are much lower than the costs of following them. The willingness over the last fifteen years of the General Assembly’s members to criticize more states for their human rights practices in fact stems principally from the end of Cold War blockages within the Assembly, not from regard for the model set up by the Human Rights Committee. Thus, a little more political context would have helped the reader understand both the promises and pitfalls of these mechanisms. How did the International Covenants come to emerge from the United Nations? Why did the Europeans agree on a judicial system of enforcement through the European Convention and how did the Court emerge as such a powerful actor? Why did the Latin American dictatorships even agree to a protection scheme on paper after World War II, and what has caused its recent, slow acceptance by governments? Why did the Security Council get into the business of protecting human rights? While one would not expect a rigorous political science model, readers would benefit from a more real-world understanding of how these institutions

evolved and who—which governments, leaders, nongovernmental organizations, and others—are to blame for their shortcomings.

What the philosopher chooses to do with Tomuschat's analysis of the law and procedures (but not so much the politics) of human rights is the next stage in the needed dialogue between international law and ethics. But at least two conclusions are warranted at this stage. First, though human rights law has much in common with a cosmopolitan vision of ethics insofar as both recognize the centrality of human dignity, the law that has emerged diverges sharply from the one strong cosmopolitans prefer. It does not countenance a cosmopolitan view of the world insofar as that term means that the individual is the sole unit of concern and all individuals, regardless of location or nationality, are treated equally. Attempts to ignore the claims of other entities, in particular states, leave a gap between the two disciplines: international lawyers will find them marginal to their enterprise, and ethicists will be shining their light of reason on only one set of international actors. Some moral philosophers will simply find this beside the point; but those cosmopolitans willing to engage in nonideal theory will need to take account of this reality. Indeed, as Tomuschat's work makes clear, the recognition by international law of the claims of the state does not mean that international law is immoral or only about protecting state interests, as some have accused it (e.g., Brian Barry in "Statism and Nationalism: A Cosmopolitan Critique," in *NOMOS XLI: Global Justice*, ed. Ian Shapiro and Lea Brilmayer [New York: New York University Press, 1999], 12–66).

Thus, for instance, even so committed an advocate of human rights protection as Tomuschat has significant misgivings about universal criminal jurisdiction. Under this principle of international law, every state in the world is entitled to prosecute certain grave crimes against human dignity regardless of the state's connection to the events, such as their location, the nationality of the offender, or the nationality of the victim, as long as the state has custody of the accused. Tomuschat is concerned not only with the possibly arbitrary use of universal jurisdiction to the detriment of a defendant's human rights (with which cosmopolitans could sympathize) but equally with the interstate tensions that arise from its use. Thus, he favors immunity for heads of state and foreign ministers from the jurisdiction of foreign courts even when accused of international crimes in order not to "do more harm than good to the international legal order" (316). (For more on this problem, see Steven Ratner, "Belgium's War Crimes Statute: A Post-Mortem," *American Journal of International Law* 97 [2003]: 888–97.)

Second, Tomuschat's work should cause those who prefer to divide the world into liberal and illiberal states to have second thoughts. Human rights law is designed to be a universal law for all peoples, and while its implementation leaves much to be desired, those shortcomings do not justify creating a special set of moral obligations for the liberal states and another for illiberal societies. As Allen Buchanan, Eric Cavallero, and others have discussed in this journal and elsewhere, Rawls's attempt to do so in *The Law of Peoples* fails to take into account the many virtues of a global system for the protection of human rights and gives up on human dignity as a goal for certain types of states.

Tomuschat's book represents the best starting point for both lawyers and

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ethicists seeking a general appraisal of the international system for the protection of human rights. It is a most welcome addition to the literature.

STEVEN R. RATNER  
*University of Michigan*