international human rights law

RETURNING TO UNIVERSAL PRINCIPLES

mark gibney

second edition

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INTERNATIONAL HUMAN RIGHTS LAW

To Rita,
the kids
and, of course, the grandkids

PREFACE

The Nightmare

Darwin's Nightmare is an Oscar-nominated documentary that examines life-and-death issues in Tanzania. The film's story line can be summarized as follows: European concerns remove tons of Nile perch from Lake Victoria each day and ship these fish to restaurants and shops back home. This goes on at the same time that there is a massive famine in Tanzania—although no one in the movie seems to make any connection between these two things. However, it is unclear how long these trading practices will continue because the Nile perch are so aggressive they are eating every other kind of fish, which is killing the lake itself. Finally, toward the end of the movie, the viewer learns that the airplanes flying to Tanzania from Europe are not arriving empty after all but are bringing massive amounts of small arms that are being used to fight the various civil wars in this area of Africa.

As one might imagine, *Darwin's Nightmare* is a stunning and distressing movie. It is stunning and distressing for its scenes of children sniffing glue and sleeping on the streets, attempting to live through horrors unconsciously that could not be imagined by many of us on this side of the world. But the movie is also stunning and distressing in that it clearly shows a connection between the West and people who we previously had thought existed a world apart from us.

But what should be even more stunning and distressing is that it is by no means clear that anyone has done anything wrong or illegal, or at

least wrong or illegal under present international law. Take the shipping of arms to Africa. Of all the things that Africans need—food, schools, medicine, clothing, roads, building materials, and so on—the very *last* thing would be weapons, which will only serve to fuel the incredible levels of violence that already exist there. The sending states—and here it has to be said that the five permanent members of the Security Council are among the largest exporters of military weapons—most certainly know this (Yanik 2006).

But what Western states also know is that until the Arms Trade Treaty (ATT) went into effect in late December 2014, under international law there was nothing wrong or illegal about selling weapons to another state, even if the sending state was fully aware that these weapons were to be used to target civilians or to commit widespread human rights violations. In the parlance of international law, this is known as the law on state responsibility. However, as I will explain in more detail, what we are really speaking about is the law on state (non)responsibility, and with respect to arms sales specifically, let it also be said that there is very little prospect that the ATT will fundamentally change any of this.

The same can be said for taking food away from Tanzanians, or at least most of the food. Some of the most wrenching scenes from *Darwin's Nightmare* are those showing local people trying to scavenge something—anything—from the fish skeletons that are thrown away and left behind. According to the International Covenant on Economic, Social and Cultural Rights, one leg of the so-called International Bill of Rights, states obligate themselves to "take steps, individually and through international assistance and cooperation," to achieve "progressively the full realization of the rights recognized in the present Covenant." However, the only "international assistance and cooperation" evident in the film is that which *deprives* Tanzanians of their human rights, rather than that which *protects* human rights.

The lament of those who watch *Darwin's Nightmare* will be that something has to be done. Invariably, this "something" will be a call for our compassion and our money. These things are fine, but they do not take us anywhere near as far as we have to go. Money is always in short supply, and our compassion has a funny way of eventually deserting other people. What must be done instead is to change our understanding of human rights.

International Human Rights Law situates itself at the juncture between the great promise of human rights and a reality where hundreds of millions (if not billions) of people in the world are without human rights protection. The overarching theme of this book is that the primary reason for this criminal state of affairs is that there has been a systematic and fundamental misreading of international human rights law itself. Notwithstanding near-universal declarations of the universality of human rights, there has been almost nothing that is "universal" or even "international" about international human rights law. Rather, states have (universally) come to interpret international human rights law in purely domestic terms, seeing their human rights obligations as beginning—but, more importantly, as ending—at their own territorial borders, and they have been given license to interpret international law in this way by some of the leading judicial bodies in the world, most notably the International Court of Justice, the European Court of Human Rights, and the U.S. Supreme Court.

This book is fueled by a general disgust with the failure of human rights law but also by the hope that international human rights law might actually achieve what it was supposed to do in the first place, namely, protect human beings.

REFERENCE

Yanik, Lena K. 2006. "Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations." *Human Rights Quarterly* 28:357–88.

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INTRODUCTION

Although this might be difficult to fathom, until a relatively short time ago the manner in which a state treated its own citizens—no matter how savagely it behaved or the levels of political violence and terror it carried out—was not considered a proper "concern" of any other country. Rather, this issue was treated as a purely "domestic" matter, beyond the purview of the international community and international law itself. Or to use an example from this period, if Nazi Germany had not invaded other countries but had simply sought to eliminate the entire Jewish population within its own territorial borders, this would not have constituted a violation of international law, as incredible as this now seems.

Thus, one of the great advances of the human rights revolution—the international human rights law and institutions that came into existence following World War II—was to eliminate this enormous blind spot. And at the present time, how a state treats its own citizens is most certainly a concern of the entire international community—at least in theory. Countries that abuse their own citizens and violate their human rights are no longer allowed to hide behind the principle of state sovereignty as they did in the past.

Where international human rights law has largely failed, however, is in coming to terms with the fact that human rights violations occur not only at the hands of one's own government but also through the actions (or inactions) of other states, as well as institutions such as transnational corporations and even international organizations. Consider, then, a

hypothetical situation also from the Nazi era. Say that before the United States entered the war against Germany and Japan in December 1941, the American government had been selling gas ovens to Germany, with full and complete knowledge that these ovens were being used to kill Jews. One would think, quite naturally, that in doing so the U.S. government would be violating international law. After all, the United States would be supplying the Nazis with the very means of extermination. This, however, would not be correct. Yet more incredible is that such actions would almost certainly not constitute a violation of international law even today.

For centuries, the notion of "state sovereignty" was used as a shield by oppressive governments. Fortunately, since the end of World War II, we are well past this kind of thinking, and states are no longer able to hide behind this principle—at least as it relates to their own domestic populations. However, the notion of sovereignty still serves to protect against other forms of state responsibility, only now it is far more likely that countries will be able to hide behind the sovereignty of another state in order to remove themselves from any and all responsibility in assisting an outlaw state. Because of this, while international law is (now) capable of understanding "wrongs" committed by a state against its own population, it remains almost completely incapable of addressing "wrongs" that a state has carried out against people in foreign lands. Essentially, what we explore here are all these "other" wrongs—especially those carried out by Western states.

This book, then, provides a vastly different vision of human rights than is currently in use, in terms of both the *responsibility* for violating human rights and the *protection* of human rights. Human rights has evolved into something that it was never intended to become. Rather than being based firmly on universal principles and values, "human rights" has instead become parochial, territorial, and ultimately self-serving. Much worse, and in large part as a result of this approach, "human rights" has offered almost none of the protection that it promises or that its framers intended.

What is called for here is a return to core, universal principles. What universality means, quite simply, is that, while states are responsible for the human rights violations they carry out within their own domestic borders, they can also be responsible for violating human rights outside their own borders (in places like Guantanamo Bay, Cuba, for example).

Furthermore, while international human rights law creates certain domestic human rights obligations, this same law also creates international or extraterritorial obligations that countries are also bound by. This return to universal principles should not be read to mean that all states (particularly Western states) are responsible for all things for all people. But what also has to be rejected is the dominant thinking that a state has absolutely no human rights obligations outside of its own borders. Thus, what is needed is a completely new way of thinking about these issues concerning the extent of a state's human rights obligations, and it is hoped that this book serves this purpose.

WHAT ARE HUMAN RIGHTS?

Human rights are a core set of rights that human beings possess by the simple virtue of their humanity. These rights are best spelled out in a number of international human rights instruments, most notably, the so-called International Bill of Rights consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (Economic Covenant), and the International Covenant on Civil and Political Rights (Political Covenant). Without attempting to provide an exhaustive list, human rights include the following:

- the right to life, liberty, and security of the person (UDHR, Art. 3)
- the right to be free from torture or cruel, inhuman, or degrading treatment or punishment (UDHR, Art. 5)
- the right to an effective remedy by competent national tribunals for violations of human rights (UDHR, Art. 8)
- the right to work (UDHR, Art. 23)
- the right to education (UDHR, Art. 26)
- the right to social security (UDHR, Art. 22)

Human rights are universal—that is, every person has human rights. What does not matter is a person's nationality, where a person resides, how much money a person has (or does not have), or even whether one's government has become a state party to any particular human rights treaty or not. In that way, although the United States is not a

party to the International Convention on the Rights of the Child—in fact, it is one of only two countries in the world (Somalia is the other one) that have not signed and ratified this treaty—this does not mean that American children do not have human rights. Rather, all that this means is that the U.S. government has decided (as it has every right to decide) that it will protect the human rights of American children by domestic, rather than by international, means.

Human rights are not complicated, nor should they be made to be complicated. Human rights are sometimes derided for being a utopian wish list of human desires; however, the exact opposite is true. Human rights are not about luxuries, and they are certainly not about mere desires either. Rather, human rights are better thought of as the basic minimum that each individual has to have in order to live a human (rather than an inhuman) existence. Even with these modest and achievable aims, and despite the repeated promise in every single international human rights treaty that human rights are to be enjoyed by "everyone" and denied to "no one," vast numbers of people are left without human rights protection. In terms of economic rights alone, Thomas Pogge and Krishen Mehta have compiled this partial list of human rights violations:

> Of the $7^{1}/_{4}$ billion people alive today, 805 million are officially counted as chronically undernourished, well over 1 billion as lacking adequate shelter, 748 million as lacking safe drinking water, 1.8 billion as lacking adequate sanitation, over 1.2 billion as lacking electricity, more than one-third as lacking reliable access to essential medicines, 781 million over age 14 as illiterate, and 168 million children (aged 5 to 17) as doing wage work outside their household—often under slavery-like and hazardous conditions: as soldiers, prostitutes or domestic servants, or in agriculture, construction, textile or carpet production. (Pogge and Mehta forthcoming, citations omitted)

THE OBLIGATION TO PROTECT HUMAN RIGHTS

Who is responsible for this colossal failure? Without question, the primary responsibility for protecting human rights lies with those states where these individuals who are being denied human rights protection

live. Thus, if there are children in Uganda who are not receiving an education, this represents a human rights violation on the part of the Ugandan government because this state has the primary responsibility for protecting this right (and all other human rights) for all those who reside in Uganda (whether they are Ugandan citizens or not). Unfortunately, this is as far as our thinking has gone—and "primary" responsibility has come to be interpreted as "sole" responsibility. This view is not only seriously deficient in ethical terms, but it also represents a perversion of international human rights law itself.

In my view, the single best treatment on the nature and extent of human rights obligations is Henry Shue's short (but elegant) article "Mediating Duties" (Shue 1988). Shue's analysis differs from my own approach in two significant ways, although we end up arriving at much the same place. The first is that Shue is speaking of moral obligations while my ultimate concern is with legal obligations. The second difference is that Shue's primary focus is individual responsibility, while my concern is with the obligations of states. Still, Shue tends to blend these two together by devoting much of his analysis to the need for establishing an institutional framework in order to carry out the obligations that individuals possess. As I will spend much of the book explaining, I believe this framework already exists in the form of international human rights law.

Moral Obligations

To purposely simplify his approach, Shue divides obligations into two basic categories: negative and positive. If an obligation is negative it requires us not to do things, but if it is positive it requires us to do things. Although these might seem to be mutually exclusive categories, they are not. Rather, there will oftentimes be gradations between what is a "negative" obligation or a "positive" obligation. Consider the scenario depicted in the documentary *Darwin's Nightmare* where European concerns (businesses and states alike) are engaged in shipping tons of Nile perch to Europe each day in the midst of a famine in Tanzania. If European states were to respond to the famine by providing food assistance, this would be a clear case of a positive obligation. If, on the other hand, the European response was simply to halt any further shipment of fish from Tanzania during the famine (which, by the way, was not

done), it is not clear how this would be categorized. To some extent this could be viewed as a positive obligation because the European parties concerned would be doing something—they would be halting their trading practices, which they might have a "right" to do (at least in one sense) according to some trade agreement. On the other hand, not removing fish seems to be considerably different than actually providing food. In that way, this begins to look more like a negative obligation. The larger point is that the differences between these two categories might not be as separate and distinct as they might first appear.

The more pertinent question is how far each of these obligations extends. Shue posits that negative obligations are universal, meaning that every person has an obligation to the rest of mankind not to cause harm. What does not matter, or at least what should not matter, is who these people are and where they live. Thus, negative obligations cover all grounds: they are territorial and extraterritorial alike. Yet, despite their universal nature, negative obligations should not prove to be a terrible burden to meet, or as Shue puts it, "I can easily leave alone at least five billion people, and as many more as you like" (Shue 1988: 690).

One problem, of course, is what it means to leave people "alone." It could be that we are actually causing harm to other people (or are a part of an enterprise that is doing so) and yet not have the slightest inkling of this. Certainly, when a European resident purchases Nile perch in his local grocery store, there is no intent to worsen famine conditions in Tanzania. In fact, it is very unlikely that the consumer would even know where the fish came from, never mind the social and economic conditions that exist in that particular country. On the other hand, it is almost certain that his government knows a lot more—and perhaps even played a central role in establishing these trading practices in the first place.

Setting these issues aside, the notion of negative obligations should be a fairly easy and uncontroversial concept to understand and to accept. Most, if not all, would agree that it is wrong to harm other people—whether it is our neighbors, our compatriots, or even people in faraway lands. Yet, as we will see in several of the chapters that follow, states have found a number of ways of minimizing or even ignoring their negative obligations.

Positive obligations are seemingly more problematic but for different reasons. For one thing, positive obligations do not have the same intuitive grounding that negative obligations do. Positive obligations entail giving up something that someone has, and people (as well as states) seem loath to do this—even if the person has no valid claim to possess this "something." What also seems troubling is the fear that there will be no limiting principle. As pointed out earlier, there are literally hundreds of millions of people in the world whose subsistence rights are not being met. The problem is that this "nightmare" has prompted much more fear than action—fear that Western people will be forced to severely change their lives. This, however, grossly overstates the extent of our positive obligations. Unlike negative obligations, positive obligations are not universal, and there are decided constraints on the extent of our positive obligations. Shue explains,

> Universal rights . . . entail not universal duties but full coverage. Full coverage can be provided by a division of labor among duty bearers. All negative duties fall upon everyone, but the positive duties need to be divided up and assigned among bearers in some reasonable way. Further, a reasonable assignment of duties will have to take into account that the duties of any one individual must be limited, ultimately because her total resources are limited and, before that limit is reached, because she has her own rights, which involve the perfectly proper expenditures on some resources on herself rather than fulfilling duties toward others. . . . One cannot have substantial positive duties toward everyone, even if everyone has basic rights. The positive duties of any one individual must be limited. (Shue 1988: 690–91)

No individual has the responsibility to save the world, and no state does either. However, what is demanded is "full coverage." This point is a simple one but a vital one. You cannot proclaim human rights as "universal" but then ignore the fact that enormous numbers of people are left without human rights protection. What is needed is a system of human rights protection. The human rights "system" that presently exists is really no system at all, best evidenced by the empirical evidence mentioned earlier.

Although there is much to commend Shue's approach, where I think his analysis is weaker is in his classification of categories of those we are

responsible to. Shue rejects the concentric-circle model of moral responsibilities and instead adopts a dual-level approach: one for family, friends, and intimates, and then a different set of obligations for all those he terms "strangers." He writes,

> What is wrong with the concentric-circle image of duty is not that it has a center that is highlighted. What is wrong is the progressive character of the decline in priority as one reaches circles farther from the center. What is wrong is the evident assumption that, for example, positive duties to the people who are represented by the fourth ripple out are only half as strong as duties to people represented by the second ripple, and that, in general, positive duties to distant strangers decline, for all practical purposes, to nothing, given limited resources. (Shue 1988: 692)

He continues,

> I can imagine strong reasons for priority to intimates—priority to people at the center. Once the center has been left behind, however, I see insufficient reason to believe that one's positive duties to people in the next county, who are in fact strangers, are any greater than one's positive duties to people on the next continent, who, though they are distant strangers, are not any more strangers than the strangers in the next county: a stranger is a stranger. (Shue 1988: 692–93)

I find this thinking rather, well, strange. Certainly there are people living in the next county (or on our own street, for that matter) whom we do not know any better than a person who lives on a different continent. However, this does not necessarily make our county cousins "strangers" to us. These are, after all, people with whom we share the same national government and people with whom we share the same system of national defense. We might even share some of the same schools, roads, and storm sewer systems with these "strangers." More importantly, our (shared) national government bears the primary responsibility for protecting our human rights. This simply is not true of individuals living on another continent.

On the other hand, I believe that Shue is absolutely correct in his thinking that we have failed to extend the scope of our moral obligations, not only to those a continent away, but even in those instances