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## The Human Rights Movement and the Prevention of Evil: The Need to Look Inward as Well as Out

Jeffrey A. Brauch

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## The Human Rights Movement and the Prevention of Evil: The Need to Look Inward as Well as Out

### Cover Page Footnote

Professor and Executive Director, Center for Global Justice, Human Rights, and the Rule of Law, Regent University School of Law.

THE HUMAN RIGHTS MOVEMENT AND THE  
PREVENTION OF EVIL: THE NEED TO LOOK  
INWARD AS WELL AS OUT

*Jeffrey A. Brauch*<sup>+</sup>

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“Never Again!” It was the overwhelming cry of those who looked upon the death and devastation brought about by World War II. Together the nations of the world worked to implement a system that would prevent similar atrocities from happening again. Quickly in the war’s aftermath those nations created the United Nations, whose main purpose was to protect international peace and security, and prevent aggressive wars.<sup>1</sup> In a similar vein, they tasked the United Nations with protecting human rights. The Preamble to the United Nations Charter that entered into force on October 24, 1945 begins:

We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small . . . .<sup>2</sup>

The modern human rights movement was birthed in this post-war attempt to start anew. World War II had seen atrocities committed throughout the world,

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1. U.N. Charter art. 1, para. 1.  
2. *Id.* at 1035.

including the massacre of six million Jews, nearly two-thirds of the Jewish population living in Europe before the war.<sup>3</sup> The death toll of the war was an almost unfathomable twenty million soldiers and forty-five million civilians.<sup>4</sup> The movement reacted to this evil, and the promotion of human rights was one of the crucial tools to protect the dignity and rights of all humans, and to confront and prevent this evil from resurging.

One of the first fruits of this movement was the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the United Nations General Assembly and opened for signature on December 9, 1948.<sup>5</sup> In it, states declared genocide to be a crime and committed themselves to working to prevent genocide and to punish individuals responsible, should it occur again.<sup>6</sup> One day later, the General Assembly—remarkably, without dissent—approved the Universal Declaration of Human Rights.<sup>7</sup> The Universal Declaration proclaimed that “[a]ll human beings are born free and equal in dignity and rights.”<sup>8</sup> In its thirty articles, the Declaration identified fundamental rights that belong to all humans regardless of race, national origin, sex, power, or wealth.<sup>9</sup> These rights range from the right to life, to freedom from arbitrary arrest, to the right to work.<sup>10</sup>

The Universal Declaration was a historic achievement. Harvard Law School Professor Mary Ann Glendon has called it “the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today.”<sup>11</sup> In the decades that followed, states committed themselves to many human rights treaties. Some treaties were created through the United Nations and others arose through the work of regional human rights organizations such as the Council of Europe, the Organization of American States, and the African

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3. DAVID WEISSBRODT, FIONNUALA NÍ AOLÁIN, JOAN FITZPATRICK & FRANK NEWMAN, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 9 (4th ed. 2009).

4. Fred R. Nadis, *World War II, World History: The Modern Era*, ABC-CLIO, <https://worldhistory2.abc-clio.com/Topics/Display/33> (last visited Feb. 22, 2019).

5. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1951 U.N.T.S. 278 [hereinafter *Genocide Convention*].

6. *Id.* at 280.

7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) [hereinafter *Declaration of Human Rights*]; *History of the Document*, U.N., <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (last visited Jan. 30, 2019).

8. *Declaration of Human Rights*, *supra* note 7, at art. 1.

9. *See id.*

10. *Id.* at arts. 3, 9, 23.

11. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 *NOTRE DAME L. REV.* 1153, 1153 (1998).

Union.<sup>12</sup> Some treaties, such as the International Covenant on Civil and Political Rights (ICCPR),<sup>13</sup> address a wide number of rights; others, like the Convention Against Torture,<sup>14</sup> focus on one particular right.

Beyond the drafting and ratifying of conventions, since 1945 the human rights movement has created a complex human rights enforcement structure. The United Nations boasts a number of offices and entities created pursuant to the U.N. Charter, such as the Human Rights Council and the High Commissioner for Human Rights.<sup>15</sup> It also deploys additional human rights enforcement bodies tasked with enforcing specific treaties, such as the Human Rights Committee that exists only to give effect to the ICCPR.<sup>16</sup> The regional systems likewise have established bodies to enforce human rights, including commissions and even human rights courts that have jurisdiction to adjudicate claims of human rights violations.<sup>17</sup>

In significant ways, this system of declarations, conventions, and enforcement bodies has successfully promoted human dignity and restrained evil. The human rights movement should be justly proud of progress it has made on challenging issues like enforced disappearances of individuals in South America<sup>18</sup> and the protection of religious liberty in Europe.<sup>19</sup> Human rights standards are openly discussed and violations are tracked and reported. Historically, some western nations have conditioned the grant of international aid on compliance with human rights standards.<sup>20</sup> Many former Eastern Bloc states have abandoned totalitarianism and are now evaluated as “free” in Freedom House’s annual assessment of the protection of civil and political rights around the world.<sup>21</sup> This transition to states that protect civil and political rights, and the rule of law was

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12. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3; Statute of the Council of Europe, May 5, 1949, E.T.S. No. 1; African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter].

13. G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

14. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter Convention on Torture].

15. See, e.g., G.A. Res. 60/251, Human Rights Council (Mar. 15, 2006).

16. *Human Rights Committee*, OHCHR, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Feb. 27, 2018).

17. Charter of the Organization of American States, *supra* note 12; Statute of the Council of Europe, *supra* note 12; Banjul Charter, *supra* note 12.

18. *Enforced Disappearances: Progress and Challenges in South America*, OHCHR (Aug. 31, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/Enforced-Disappearances-progress-and-challenges-in-South-America.aspx>.

19. JEFFREY A. BRAUCH, *FLAWED PERFECTION* 87 (2017).

20. See generally The Law Library of Congress, Regulation of Foreign Aid in Selected Countries 2011/2012 10, <https://www.loc.gov/law/help/foreign-aid/regulation-foreign-aid.pdf> (providing a collection of reports detailing how countries around the world handle foreign aid).

21. *Freedom in the World 2018: Democracy in Crisis*, FREEDOM HOUSE, <https://www.freedomhouse.org/report/freedom-world/freedom-world-2018>.

greatly aided by the European Union conditioning membership on states' commitment to protecting basic human rights.<sup>22</sup>

This story about confronting evil cannot end here, however. While the human rights movement sees and confronts evil "out there," it often fails to recognize that evil affects all of us, including those of us dedicated to promoting human rights. Like all humans and human-created institutions, we, and the entities we establish, are tempted to engage in self-dealing and assert authority without accountability. At times, individuals and states use human rights language and institutions to disguise or even achieve evil ends.

The human rights movement is particularly susceptible to the vice of hubris. Hubris is "excessive pride or self-confidence."<sup>23</sup> While pride can have positive aspects—for example, the human rights movement can appropriately take pride in the number of states around the world that have banned human trafficking—hubris is a vice. It is a form of pride that can cause harm. Yale Professor Donald Kagan defines hubris as "a kind of violent arrogance which comes upon men when they see themselves as more than human and behave as if they were divine."<sup>24</sup> Kagan highlights the Greek origins of the concept, noting that the great temple of Apollo at Delphi featured these inscriptions: "Know Thyself," and "Nothing in Excess."<sup>25</sup> He says that together these warned ambitious Greeks: "[k]now your own limitations as a fallible mortal and then exercise moderation because you are not divine, you are mortal."<sup>26</sup> Kagan likewise describes the Greek view this way: "[m]an is potent and important, yet he is fallible and mortal, capable of the greatest achievements and the worst crimes."<sup>27</sup>

Such hubris infects—and threatens—the human rights movement. The movement recognizes there is evil in the world; that is why the movement exists. But it fails to recognize that we ourselves—like all humans—are flawed. This hubris particularly shows itself in two ways. First, the movement has embraced a utopian expansion of rights to be protected. The view resembles that from the movie *Field of Dreams*: if we build it they will come. If we simply identify something as a fundamental human right, that right will be promoted and enforced. Second, the movement has a utopian view of the bodies created to

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22. Edwin Rekosh, *Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 55, 71–73 (2008); *European Neighbourhood Policy and Enlargement Negotiations*, EUR. COMMISSION, [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en) (last visited Jan. 10, 2019).

23. *Hubris*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/hubris> (last visited Jan. 19, 2019).

24. Donald Kagan, *Ancient Greek History Course: Lecture 1*, at 21:17 (Nov. 20, 2008) (downloaded using iTunes).

25. *Id.* at 11:24.

26. *Id.* at 11:35.

27. *Id.* at 31:35.

enforce human rights. The assumption is that if we set up an organization with a noble purpose, it will achieve noble aims. Both assumptions are false. Our expansion of rights claims—both in the number and scope of these claims—has begun to dilute the significance of rights and at times even diminish their enforcement. And we have too often established human rights enforcement bodies lacking proper checks and balances.

Despite its many successes, in its hubris, the human rights movement has not fulfilled its promise to restrain evil—and, indeed, its future ability to do so is endangered—because it fails to recognize these flaws within itself. This article tells the story of that failure.

At the Regent University Center for Global Justice, Human Rights, and the Rule of Law<sup>28</sup> our mission is to help train the next generation of advocates to protect the poor, oppressed, and enslaved around the world, and to serve those already doing this important work.<sup>29</sup> Every year our students and graduates are deployed in internships and fellowships around the globe, working with organizations that do outstanding work to prevent human trafficking, promote religious liberty, and protect the land rights of vulnerable populations.<sup>30</sup> Alumni are currently prosecuting sexual abusers and protecting widows from land grabbing.<sup>31</sup>

It is affection for and a commitment to protecting human rights that prompts this Article. This Article will first explore the ways hubris has hindered the protection of rights, both by looking at the utopian expansion of rights claims and by looking at the lack of accountability and transparency in human rights organizations. It will then offer suggestions for how we can, with humility and proper expectations, achieve the goal of protecting the rights and dignity of all humans, and effectively confront and prevent evil.

## I. UTOPIAN EXPANSION OF HUMAN RIGHTS CLAIMS

### A. *Extent of the Expansion of Human Rights Claims*

One of the most striking developments in the world of human rights since 1945 has been the breathtaking expansion in the number and scope of asserted rights. The idealism fueling this expansion should not have been a surprise. From the beginning, the notion of protecting human rights was visionary and idealistic. Indeed, Yale professor Samuel Moyn insists that protecting human rights is inherently utopian:

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28. The author serves as the executive director of the University's Center for Global Justice, Human Rights, and the Rule of Law. *Faculty*, REGENT U., <https://www.regent.edu/school-of-law/faculty/jd-jeffrey-a-brauch/>.

29. *Mission & Vision*, REGENT U. SCH. OF L., CTR FOR GLOBAL JUST., HUM. RTS, & THE RULE OF L., <https://www.regent.edu/acad/schlaw/globaljustice/> (last visited Jan. 11, 2019).

30. *Id.* at *Internship and Fellowship Programs*.

31. *Id.* at *Alumni Profiles*.

The phrase [“human rights”] implies an agenda for improving the world, and bringing about a new one in which the dignity of each individual will enjoy secure international protection. It is a recognizably utopian program: for the political standards it champions and the emotional passion it inspires, this program draws on the image of a place that has not yet been called into being. It promises to penetrate the impregnability of state borders, slowly replacing them with the authority of international law. It prides itself on offering victims the world over the possibility of a better life.<sup>32</sup>

Idealism can be good. It can inspire hope and motivate action. The idealism of human rights is partly what attracted many to engage with the human rights movement. But that idealism becomes hubris when we make the unjustified assumption that by simply asserting something as a human right, it will naturally be embraced and enforced. Professor Eric Posner highlights this distinction and argues that the human rights movement has indeed crossed the line from noble and helpful idealism to hubris. He writes:

With the benefit of hindsight, we can see that the human rights treaties were not so much an act of idealism as an act of hubris, with more than a passing resemblance to the civilizing efforts undertaken by western governments and missionary groups in the 19<sup>th</sup> century, which did little good for native populations while entangling European powers in the affairs of countries they did not understand. A humbler approach is long overdue.<sup>33</sup>

The Universal Declaration consists of 30 articles proclaiming a variety of rights. Some are broad, such as the right to work, the right to rest and leisure, and the right to education.<sup>34</sup> Such rights are referred to as economic, social, and cultural rights—or sometimes second generation (human) rights.<sup>35</sup>

Most, though, are civil and political rights: rights to life, to be free from arbitrary arrest, to not be enslaved, and to have freedom of religion and expression.<sup>36</sup> These are sometimes referred to as first generation (human) rights.<sup>37</sup> In general terms, first generation rights typically impose limits on government power as opposed to second generation rights, which mandate an expansion of government roles or power for their enforcement.<sup>38</sup>

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32. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 1 (2010).

33. Eric Posner, *The Case Against Human Rights*, *THE GUARDIAN* (Dec. 4, 2014, 1:00 PM), <http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights>.

34. Declaration of Human Rights, *supra* note 7, arts. 23–24, 26.

35. H. VICTOR CONDÉ, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 133–34 (David P. Forsythe et al. eds., 2d ed. 1999).

36. *See* Declaration of Human Rights, *supra* note 7.

37. CONDÉ, *supra* note 35, at 46.

38. Burns H. Weston, *Human Rights*, *ENCYCLOPEDIA BRITANNICA* (Jan. 24, 2019), <https://www.britannica.com/topic/human-rights>. This is not always the case. For example, Article

Since 1948, the number and types of rights enumerated in human rights declarations and treaties has greatly expanded. The Freedom Rights Project calculates that a European state has the option to ratify 27 different treaties created under the auspices of the United Nations and another 37 treaties created under the auspices of the Council of Europe.<sup>39</sup> Professors Jacob Mchangama and Guglielmo Verdirame, two of the founders of the Freedom Rights Project, calculate that this results in 1377 different obligations to which a European state may commit itself.<sup>40</sup> Of course, some of these obligations are duplicative, but nonetheless, the number of potential commitments is large.

In recent years, the expansion of human rights has not simply been a matter of mathematics; many of the rights being articulated are themselves much more expansive in their scope and reach. And while there has been general agreement for many years over the nature of core civil and political rights, such as the right to life and the right to be free from slavery, there is much less agreement about the scope of some rights being advocated currently.

Today, for example, there is much more emphasis on a third category of human rights that is significantly different from those described above. This generation of rights consists of what is known as “collective” or “group rights.”<sup>41</sup> Group rights, which have been largely advanced by nations emerging from colonialism, extend entitlements to not just individuals but “peoples.”<sup>42</sup> The name of the primary African human rights convention, the African (Banjul) Charter on Human and Peoples Rights, reflects this perspective.<sup>43</sup>

Group rights tend to make very broad claims. African Charter Article 24 states for example: “All peoples shall have the right to a general satisfactory environment favorable to their development.”<sup>44</sup> While a noble aspiration, its

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8 of the Universal Declaration of Human Rights asserts: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Declaration of Human Rights, *supra* note 7, art. 8. The fulfillment of this right requires governments to establish a justice system to investigate and prosecute criminal offenses.

39. JACOB MCHANGAMA & GUGLIELMO VERDIRAME, FREEDOM RIGHTS PROJECT: HUMAN RIGHTS INFLATION 10–12 (2013), <http://www.freedomrights.info/wp-content/uploads/2013/07/HR-Inflation.pdf>.

40. *Id.* at 12.

41. CONDÉ, *supra* note 35, at 19.

42. See generally Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80, 80 (1988) (discussing how the Banjul Charter departed from contemporary human rights instruments in how it defined “people”).

43. See Banjul Charter, *supra* note 12.

44. *Id.* at art. 24.

breadth and general nature leave very unclear who exercises this right or how it might be enforced.<sup>45</sup>

Group rights are not just an African phenomenon. The U.N. General Assembly, for example, has declared that both individuals and groups have the right to development: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”<sup>46</sup> Note the breathtaking scope of this asserted right. The right to development has broad reaching implications for all political, economic, social, and cultural facets of life.<sup>47</sup>

Many recent expressions of rights claims reflect this tendency to swell the scope of asserted entitlements. While these expanded rights often use idealistic and inspiring language, they can also be vague, utopian, unclear as to what is included in the right, and how that right should be enforced. Professor David Smolin describes it this way: “The language of human rights has in many respects already been reduced to the role of vacuous platitudes which evoke warm feelings and high ideals but are not intended to contribute to the hard work of settling disputes or governing peoples.”<sup>48</sup>

One of the best recent examples of the broad and utopian expansion of human rights is found in the recent Declaration on the Right to Peace, approved on December 19, 2016 by the United Nations General Assembly.<sup>49</sup> The declaration was the culmination of an eight year process that began in 2009 with a workshop to explore the notion of a right to peace.<sup>50</sup> A year later, the United Nations Human Rights Council adopted a resolution tasking an advisory committee with preparing a draft declaration.<sup>51</sup> In 2012, the Council established a working group to specify just what was encompassed within the right to peace.<sup>52</sup>

From the beginning, not everyone agreed that peace should—or could—be enshrined as a human right. Some Western states expressed concern over the

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45. Jack Donnelly, *In Defense of the Universal Declaration Model*, in INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS 20, 32–33 (Lyons et al. eds., 2003).

46. G.A. Res. 41/128, annex, Declaration on the Right to Development, art.1, para. 1 (Dec. 4, 1986).

47. *Id.*

48. David M. Smolin, *Church, State, and International Human Rights: A Theological Appraisal*, 73 NOTRE DAME L. REV. 1515, 1535 (1998).

49. See G.A. Res. 32/28, annex, Declaration on the Right to Peace (July 1, 2016).

50. Christian Guillermet-Fernández & David Fernández Puyana, *The General Assembly Adopts the Declaration on the Right to Peace*, 2 ERUDITIO 39, 44 (2017), <http://eruditio.worldacademy.org/files/vol2issue3/reprints/Eruditio-v2-i3-right-to-peace-cfernandez-dpuyana-reprint.pdf>.

51. *Id.* at 44–45.

52. *Id.* at 45.

breadth and vagueness of the proposed right. Early on, representatives of the European Union objected that there is no agreed upon definition of peace nor an agreement as to who would be the right-holders and duty-bearers of such a right.<sup>53</sup> The United States also argued: “The proposed right is neither recognized nor defined in any universal, binding instrument, and its parameters are entirely unclear. Nor is there any consensus, in theory or in state practice, as to what such a right would entail.”<sup>54</sup>

Nonetheless, a more utopian impulse prevailed. Some delegations opined that the

current initiative on the right to peace could become a great opportunity to stop wars and armed conflicts in the world and consequently, to avoid all human rights violations . . . [This initiative is] also a means [to an agreement as to who would be the rights-bearers and duty-bearers of such a right] to eliminate all kinds of violence against people.<sup>55</sup>

The Declaration’s text certainly reflects this utopian vision. It sets forth a very broad definition of peace: “*Recognizing* that peace is not only the absence of conflict but also requires a positive, dynamic, participatory process where dialogue is encouraged and conflicts are solved in a spirit of mutual understanding and cooperation, and socio-economic development is ensured.”<sup>56</sup>

The Declaration’s prefatory language very much ties the right to peace with the fulfillment of group rights: “Acknowledging that the fuller development of a culture of peace is integrally linked to the realization of the right of all peoples . . . to self-determination . . . .”<sup>57</sup>

The Declaration’s operative language, though short, is likewise broad:

Article 1. Everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized.

Article 2. States should respect, implement and promote equality and non-discrimination, justice and the rule of law, and guarantee freedom from fear and want as a means to build peace within and between societies.<sup>58</sup>

The Declaration is eloquent. It lays out a noble vision. But that eloquence and nobility do not somehow transform the declared right into something with a clear meaning that is attainable or enforceable.

53. *Id.* at 43.

54. Karima Bennoune, *A Peace of Her*, 19 *UCLA J. INT’L L. & FOREIGN AFF.* 63, 65 (2015).

55. Guillermet-Fernández & Puyana, *supra* note 50, at 46.

56. G.A. Res. 71/189, annex, Declaration on the Right to Peace, at 3 (Dec. 19, 2016).

57. *Id.* at 2.

58. *Id.* at 5. By referencing a right to be free from fear and want, the Declaration consciously associates itself with President Roosevelt’s historic World War II call for the world to embrace four essential freedoms: freedom of expression, freedom of worship, freedom from want, and freedom from fear. CONDÉ, *supra* note 35, at 47.

The Declaration on the Right to Peace reflects a view that is becoming more commonplace: if something is good for human flourishing it must be declared to be a human right. Professor S. Matthew Liao displays this view when he advocates for recognition of the right of children to be loved:

[T]he right of children to be loved is a human right. Specifically, my argument is that human beings have human rights to the fundamental conditions for pursuing a good life. As human beings, children therefore have human rights to the fundamental conditions for pursuing a good life. Being loved is a fundamental condition for children to pursue a good life. Therefore, children have a right to be loved.<sup>59</sup>

Only the most heartless among us could quarrel with the virtue of children being loved. But that does not mean that this should be articulated as a human right subject to international promotion and enforcement.

This sweeping expansion of what is meant by human rights is not just a matter of academic discussion. It animates the day-to-day work of key human rights institutions and officials. For example, in February 2014, the Office of the U.N. High Commissioner for Human Rights announced with fanfare that the U.N. Special Rapporteur in the field of cultural rights was launching a new study on the effect of advertising on cultural rights, including “the right of people to choose their way of life.”<sup>60</sup> Specifically, the Special Rapporteur, Farida Shaheed, expressed concern over the effect that billboards and public screens were having on viewers world-wide. She insisted that “[o]ne underlying problem relates to the impact that advertising and marketing practices may have on cultural diversity and the right of people to choose their way of life.”<sup>61</sup>

### *B. Problems with the Proliferation of Rights*

Why should we be concerned with the expansion in the number and scope of asserted rights? First, simply asserting more rights—and even convincing states to embrace those rights in treaties—does not actually lead to greater protection of rights. Second, and worse, the proliferation of rights may at times interfere with the protection of human rights.

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59. S. MATTHEW LIAO, *THE RIGHT TO BE LOVED* 7 (2015).

60. *U.N. Expert Kicks off New Study on the Impact of Advertising and Marketing on Cultural Rights*, OHCHR (Feb. 7, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14227&LangID=E>.

61. *Id.* In a further example of Shaheed’s broad focus, she warned of the threat posed to cultural rights in Vietnam by tourists seeking to hear the Cong drum. Shaheed said [the Cong drum] is “being played on demand for tourists in some places, thus clearly losing its original cultural significance.” Pedro Pizano, *The Human Rights that Dictators Love*, FOREIGN POL’Y (Feb. 26, 2014, 3:45 PM), <http://foreignpolicy.com/2014/02/26/the-human-rights-that-dictators-love/>.

*1. The Proliferation of Rights Does Not Lead to Greater Protection of Rights*

For nearly twenty years, researchers studied the impact declarations and treaties had on human rights compliance. The results demonstrate that the existence of more treaties—and more states ratifying them—does not mean real compliance and protection for human rights. In 1999, political science professor Linda Camp Keith analyzed the relationship between states ratifying the ICCPR and their respect for the rights included in it.<sup>62</sup> In 2002, Yale Law Professor Oona Hathaway performed a similar analysis on the effect that ratifying a variety of human rights treaties had on compliance with the rights covered within them.<sup>63</sup> “Both studies find no statistically significant relationship, and Hathaway argues that the relationship in some cases is actually negative.”<sup>64</sup>

More recent data affirms this conclusion. In 2013, Professor Emilie Hafner-Burton published the results of her study on the impact that ratifying the ICCPR had on the levels of government-sponsored murder, torture, political imprisonment, and forced disappearances. She found that the fact that a country has ratified the ICCPR has little to do with whether the country will actually comply with it. Some comply, others do not. On average, though, “there is little change—for better or worse—even decades after most countries ratify . . . . [T]he vast majority of countries keep acting the way they did before they ratified.”<sup>65</sup>

Perhaps the most disheartening conclusion from Hafner-Burton’s research is “the evidence that participation in some treaties correlates with worse human rights behavior. That is, some countries that ratify some treaties actually engage in violations of those rights more frequently after they ratify than countries that do not ratify.”<sup>66</sup>

Some of the worst human rights abusers are regular endorsers of human rights documents. For example, North Korea has ratified both the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>67</sup>

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62. See generally Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 J. OF PEACE RES. 95, 95 (1999) (suggesting that parties to this international covenant may not produce an observable impact on the state party’s actual behavior).

63. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1939 (2002) (suggesting that noncompliance with treaty obligations appears to be common among parties).

64. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 121 (2006).

65. EMILIE M. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* 73 (2013).

66. *Id.* at 75. Law Professor Eric Posner notes that “[e]ach of the six major human rights treaties has been ratified by more than 150 countries, yet many of them remain hostile to human rights. This raises the nagging question of how much human rights law has actually influenced the behaviour of governments.” Posner, *supra* note 33.

67. See Status of Ratification Interactive Dashboard, OHCHR, <http://indicators.ohchr.org/> (last visited Jan. 9, 2019).

Sudan has ratified these conventions as well as the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>68</sup> Of course, these ratifications did not deter Sudan from committing genocide against Africans in the Darfur region of the country in the century's first decade.<sup>69</sup>

It is clear that if we want human rights to be concretely protected, much more is needed than creating declarations or treaties, or even ratifying them.<sup>70</sup> Idealistic and utopian aspirations are not enough.

### *2. Human Rights Proliferation Can Actually Be Harmful*

Much more concerning than the conclusion that the proliferation of human rights does not help is that it may actually hurt. In significant ways, human rights may be more poorly protected as we continue to expand the number of rights affirmed or treaties ratified.

The reason expansion of human rights may actually thwart rights enforcement relates to the hubris discussed in the introduction. With excessive and unwarranted self-confidence, the human rights movement implicitly assumes that when states choose to ratify human rights conventions, they act out of good faith, with at least the intention to comply with convention terms. But states do not always engage in good faith. Some regularly ratify human rights instruments with no intention of complying with their terms.<sup>71</sup> And sometimes they use human rights language and institutions to disguise or even achieve evil ends.<sup>72</sup> And this becomes easier to do as the number of human rights norms increases.

Why would nations ratify conventions with no intention of compliance? At a basic level, it is relatively easy to ratify a convention, gaining international political capital for doing so, while it is rare that a state will face serious consequences for failing to comply. This is especially true given that the human rights enforcement system is quite stretched in its resources. Professor Hafner-Burton notes the likely consequence: "Expansion [of rights], especially in the context of an already thinly stretched bureaucracy, probably will lead to more lawbreaking, and further erode the credibility and legitimacy of the system."<sup>73</sup>

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68. *Id.*

69. BRAUCH, *supra* note 19, at 95–97, 101.

70. Posner, *supra* note 33; *see also* STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS 142 (2013) (defining "Hubris: pride, arrogance, an overestimation of one's capabilities. The humanist metanarrative gives the impression that the success of norms lies in their inherent justness; that is, the norms are their own best advocates, their inner demand for justice persuasive in and of itself. But mobilization politically requires a lot more.").

71. Joshua Keating, *Why Countries Make Human Rights Pledges They Have No Intention of Honoring*, SLATE (Oct. 21, 2014, 3:13 PM), <https://slate.com/news-and-politics/2014/10/why-countries-make-human-rights-pledges-they-have-no-intention-of-honoring.html>.

72. Pizano, *supra* note 61.

73. HAFNER-BURTON, *supra* note 65, at 130. The principle that multiplying unenforceable legal prohibitions actually leads to lawlessness has been acknowledged for centuries. Thomas Aquinas famously urged that human law should not prescribe all virtues or proscribe all vices.

More troubling is that ratifying numerous human rights instruments can become a tool to intentionally thwart meaningful human rights enforcement. States with a history of violating basic civil and political rights can turn to their track record of supporting expansive or vague group or cultural rights and show a “good human rights record.” Pedro Pizano, Strategy and Development Associate for the Human Rights Foundation, describes the dynamic:

Yet, it is precisely because of this proliferation that states can cherry-pick the rights whose obligations they promise to fulfill sometime in the future—and thus, show off a “good” human rights record, even as they fail to uphold even the most basic civil and political rights. Desirable outcomes like housing or health care—better understood as political goals—were cloaked in rights language to make them seem more legitimate.<sup>74</sup>

Professor Jacob Mchangama similarly argues:

When everything can be defined as a human right, the premium on violating such rights is cheap . . . . By presenting themselves as the champions of these third-generation rights, illiberal states seek to both remove the moral high ground from civil and political rights and to achieve political legitimacy. Rights proliferation is being abused by dictatorships to praise each other, and is diminishing the moral clarity that human rights once enjoyed.<sup>75</sup>

Mchangama compares human rights to a currency that

has been seriously devalued through the process of rights inflation taking place in international organizations. And in its devalued state the currency of human rights is sometimes more likely to buy cover and legitimacy for dictatorships than purchase protection against the abuse of citizens by such states and thereby undermine the core values of liberty and the rule of law that underpin human rights.<sup>76</sup>

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Instead, “human law does not prohibit all vices from which the virtuous abstain but only the more serious ones from which it is possible for the majority to abstain . . . .” SAINT THOMAS AQUINAS, *THE TREATISE ON LAW* 316 (R. J. Henle ed., 1993).

74. Pizano, *supra* note 61.

75. *Id.*

76. Freedom Rights Project, *International Human Rights: Problems & Solutions*, YOUTUBE 1:09–1:36 (Jan. 30, 2014), <https://www.youtube.com/watch?v=NTtCa3eNDfw&list=PLTOiPFXv5mili1YyvVUhAmk44OV9ho0oj&index=3>. This is not a new phenomenon. In 1991, Phillip Allott warned:

[I]n all societies governments have been reassured in their arrogance by the idea that, if they are not proved actually to be violating the substance of particularized human rights, if they can bring their willing and acting within the wording of this or that formula with its lawyerly qualifications and exceptions, then they are doing well enough. The idea of human rights should intimidate governments or it is worth nothing. If the idea of human rights reassures governments it is worse than nothing.

These expressions of concern are not idle speculation. There is ample evidence that some states use the language or institutional structure of human rights to protect themselves from scrutiny or criticism. Professors Rosa Freedman and Jacob Mchangama conducted a study of how states respond to proposals for special procedures at the United Nations Human Rights Council.<sup>77</sup> The Human Rights Council uses special procedures to empower independent human rights experts to report and advise on the human rights situation relating to a specific country or to a particular right. Freedman and Mchangama compared the behavior of nations evaluated as “free” by Freedom House with that of states evaluated “not free” and found a wide disparity between how free and non-free states support or oppose special procedure mandates depending on the type of right at stake.<sup>78</sup>

Non-free states “rarely” supported the creation of mandates dealing with civil and political rights, which were more focused and where violations could be clearly identified and adjudicated.<sup>79</sup> But they regularly supported creating mandates dealing with broader and more aspirational—and less obviously enforceable—people’s, and economic and social rights.<sup>80</sup> Significantly, free states acted in just the opposite way.<sup>81</sup>

In the same way, states with poor records of enforcing basic civil and political rights frequently support the recognition of broader, vaguer, and less enforceable rights. A good example occurred in 2008 in conjunction with a working group on an optional protocol to the ICESCR entitled, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.”<sup>82</sup> Notes from the working committee report the following: “252. The Islamic Republic of Iran stated that the protocol provided an opportunity to reiterate the equal status of all human rights.”<sup>83</sup> Contrast Iran’s enthusiastic response to such a broad rights affirmation with the more cautious response from the United Kingdom: “246. The United Kingdom reserved its position on the draft. It remained sceptical about the practical benefits of the protocol, considering that economic, social and cultural rights

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PHILIP ALLOT, *EUNOMIA: NEW WORLD ORDER FOR A NEW WORLD* 288 (1991).

77. See Rosa Freedman & Jacob Mchangama, *Expanding or Diluting Human Rights?: The Proliferation of United Nations Special Procedures Mandates*, 38 *HUM. RTS. Q.* 164, 165 (2016).

78. *Id.* at 171.

79. *Id.* at 181.

80. *Id.* at 180–81.

81. *Id.*

82. Rep. of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fifth Session, U.N. Doc. A/HRC/8/7 (May 6, 2008).

83. *Id.* at 30.

did not lend themselves to adjudication in the same way as civil and political rights.”<sup>84</sup>

Why might states that abuse basic civil and political rights want to expand the collection of human rights norms? They leave more room to hide. A year after this working group, Iran held an election that was widely viewed as rigged.<sup>85</sup> The government used violence to put down demonstrators who spoke out in opposition.<sup>86</sup> Although denying basic rights of expression and association, when questioned on its human rights record, Iran could point to its strong record on the right to development.

Iran is not alone. Less than a year before its bloody civil war began, Syria invited special rapporteurs on the right to food and health to visit the nation. The special rapporteurs:

generally praised the human rights record of Syria but were silent on the repressive nature of the regime. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health stated that: “Syria’s commendable work in the last three decades to improve the health system as a whole, and its commitment to ensure access to healthcare for all” with regard to concerns the Special Rapporteur “noted with dismay that smoking is still highly prevalent in Syria.”<sup>87</sup>

While Syria embraced these investigations, Syria had ignored multiple requests from special rapporteurs on torture and treatment of human rights defenders, and from working groups on forced disappearances and arbitrary detention.<sup>88</sup> Within months the Syrian government would use military force against its own people, even using chemical weapons in 2013.<sup>89</sup> Since 2011, the civil war has killed over 400,000 Syrians.<sup>90</sup> While Syria blatantly violated basic

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84. *Id.* at 29.

85. See, e.g., Simon Robinson, *Was Ahmadinejad’s Win Rigged?*, TIME (June 15, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1904645\\_1904644\\_1904643,00.html#](http://content.time.com/time/specials/packages/article/0,28804,1904645_1904644_1904643,00.html#).

86. *Violence Grips Tehran Amid Crackdown*, N.Y. TIMES (June 20, 2009), [www.nytimes.com/2009/06/14/world/middleeast/14iran.html](http://www.nytimes.com/2009/06/14/world/middleeast/14iran.html).

87. Freedman & Mchangama, *supra* note 77, at 191 (quoting U.N. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Visit to Syria, 6-14 Nov. 2010. Preliminary observations, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10532&LangID=E>).

88. *Id.*

89. ‘Clear and Convincing’ Evidence of Chemical Weapons Use in Syria, U.N. Team Reports, U.N. NEWS (Sept. 16, 2013), <https://news.un.org/en/story/2013/09/449052-clear-and-convincing-evidence-chemical-weapons-use-syria-un-team-reports>.

90. John Hudson, *U.N. Envoy Revises Syria Death Toll to 400,000*, FOREIGN POL’Y (Apr. 22, 2016, 4:14 PM), <http://foreignpolicy.com/2016/04/22/u-n-envoy-revises-syria-death-toll-to-400000/>.

civil and political rights of its own people, it was able to hide behind its “good human rights record.”

There are in fact many such examples of nations sheltering themselves or their allies from human rights scrutiny by embracing the expansion of human rights—especially the expansion of second and third generation rights:

[A]t its Universal Periodic Review (UPR) before the UN Human Rights Council in December 2011, the criticism of Zimbabwe by democratic countries was accompanied by acclaim from the likes of Angola, Sri Lanka, and North Korea for its efforts to promote socio-economic rights. Likewise at its 2010 UPR North Korea was praised by Iran, Cuba, Syria and Russia for, inter alia, working ‘to consolidate a socialist and just society, which guarantees equality and social justice.’<sup>91</sup>

States not only protect themselves by sheltering under the ever-expanding treaty system, certain nations at times claim the “right” to engage in behavior that actually thwarts basic civil and political rights.

China cites “the right to development” to explain why the Chinese government gives priority to economic growth over political liberalisation. Many countries cite the “right to security,” a catch-all idea that protection from crime justifies harsh enforcement methods. Vladimir Putin cited the rights of ethnic minorities in Ukraine in order to justify his military intervention there . . . .<sup>92</sup>

A particularly destructive form of using rights language to actually restrict rights is seen in the rise of prohibitions of what is known as “defamation of religion.”<sup>93</sup> Freedoms of religion and expression have been embraced from the beginning of the human rights movement as foundational, core rights. For example, the Universal Declaration on Human Rights proclaims:

Article 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>94</sup>

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91. Mchangama & Verdirame, *supra* note 39, at 18. Similarly, “China has repeatedly undertaken considerable efforts to avert, through procedural means, the adoption of a critical resolution on its own human rights situation.” GERD OBERLEITNER, GLOBAL HUMAN RIGHTS INSTITUTIONS 9 (2007). While the expansion of rights can provide cover for a repressive regime to shield its own record, it also can provide a platform from which to attack the moral failings of others. For example, North Korea insisted before the Human Rights Council that “it is a well-known fact that the US is the worst human rights violator in the world.” ROSA FREEDMAN, FAILING TO PROTECT: THE U.N. AND THE POLITICISATION OF HUMAN RIGHTS 76 (2014).

92. Posner, *supra* note 33.

93. *Id.*

94. Declaration of Human Rights, *supra* note 7, art. 18.

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>95</sup>

These rights are also enshrined in the ICCPR and specified in greater detail.<sup>96</sup>

Despite these venerable protections, an influential group of states has sought to restrict the freedom of religion and expression, and it has done so in the very name of human rights. It has been led by the Organisation of the Islamic Cooperation, an organization consisting of 57 states that seek to restrict speech that it deems critical of Mohammed, Islam, or Muslims.<sup>97</sup> Many such states place strong restrictions on speech and religion domestically, generally prohibiting conversion to religions other than Islam and banning proselytizing.<sup>98</sup>

These states have also turned to the international community—and human rights institutions in particular—to restrict proselytizing and speech deemed critical of Muslims in non-Muslim nations. The Organization of Islamic Cooperation (OIC) has been particularly successful in its efforts before the Human Rights Council. In 2008, with strong OIC backing, the Human Rights Council passed a resolution condemning speech that is critical of Islam<sup>99</sup> and declared that such speech actually undermines human rights: “Defamation of religions is among the causes of social disharmony and instability, at the national and international levels, and leads to violations of human rights.”<sup>100</sup> The resolution likewise asserted: “[R]espect of religions and their protection from contempt is an essential element conducive for the exercise by all of the right to freedom of thought, conscience and religion.”<sup>101</sup>

The resolution “urges” nations to restrict the freedom of expression to stop the spread of critical expression. Article 8 “[u]rges States to take actions to prohibit the dissemination, including through political institutions and organizations, of racist and xenophobic ideas and material aimed at any religion

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95. *Id.* at art. 19.

96. ICCPR, *supra* note 13, at arts. 18–19.

97. *History*, ORGANISATION OF ISLAMIC COOPERATION, [https://www.oic-oci.org/page/?p\\_id=52&p\\_ref=26&lan=en](https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en) (last visited June 30, 2019); Robert C. Blitt, *Defamation of Religion: Rumors of Its Death are Greatly Exaggerated*, 62 CASE W. RES. L. REV. 347, 352 (2011).

98. *See generally* U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 1 (2017) [hereinafter USCIRF ANN. REP. 2017]; *see also infra* text accompanying note 107.

99. While this resolution speaks of defamation of religion in general, it addresses the increase in Islamophobia, in particular, following the events of September 11, 2001. Human Rights Council Res. 7/19 (Mar. 27, 2008).

100. *Id.*

101. *Id.* at para. 10.

or its followers that constitute incitement to racial and religious hatred, hostility or violence.”<sup>102</sup> The resolution passed 21 to 10 (with 14 abstentions).<sup>103</sup>

In 2010, the Human Rights Council passed another resolution condemning the defamation of religions (this time including Judaism and Christianity by name).<sup>104</sup> The vote on this resolution was closer (20 to 17, with 8 abstentions).<sup>105</sup>

These resolutions were passed by what is described as the U.N.’s principal body dedicated to the protection of human rights.<sup>106</sup> The Council framed its findings and recommendations in human rights affirming language. But the resolutions are hostile to the real protection of human rights. They severely restrict the freedoms of expression and religion. They can be used to justify bans on any critical discussion of religion as well as mission work.

The hypocrisy of these resolutions and efforts is evident when examining the religious freedom records of nations supporting these efforts. For example, China, Saudi Arabia, and Pakistan supported both of these resolutions and are all recognized as major violators of religious freedom. At the time these resolutions were passed, the U.S. Commission on International Religious Freedom recommended that the State Department designate each of these nations as “countries of particular concern,” being engaged in serious violations of religious freedom under the International Religious Freedom Act.<sup>107</sup>

In 2010, the same year the Human Rights Council passed its second Defamation of Religions resolution, the Commission on International Religious Freedom found the following regarding China:

In China, the government continues to engage in systematic and egregious violations of the freedom of religion or belief . . . . The government continues its campaign to “transform” unregistered Christian groups and “strike hard” against “evil cults,” leading to the arrest, imprisonment, and mistreatment of religious adherents. Thousands of “house church” Protestants have been detained in the past two years.<sup>108</sup>

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102. *Id.* at para. 8.

103. *Id.*

104. Human Rights Council Res. 13/16, U.N. Doc. A/13/16, at 2 (Apr. 15, 2010).

105. Again, it urged “all States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from defamation of religions and incitement to religious hatred in general, and to take all possible measures to promote tolerance and respect for all religions and beliefs.” *Id.* at para. 14.

106. Freedman & Mchangama, *supra* note 77, at 164–65.

107. Press Release, U.S. Comm’n on Int’l Religious Freedom, *USCIRF Eleventh Annual Report on Religious Freedom in the World Released* (Apr. 29, 2010), <https://www.uscirf.gov/newsroom/press-releases/uscirf-eleventh-annual-report-religious-freedom-in-the-world-released>. See International Religious Freedom Act, 22 U.S.C. §§ 6401–6481 (1988).

108. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT 9 (2010) [hereinafter USCIRF ANN. REP. 2010]. The Commission has found that China continues to violate religious liberty in significant ways. See USCIRF ANN. REP. 2017, *supra* note 98, at 32.

In the same year, the Commission found the following with regard to Saudi Arabia:

Systematic, egregious, and ongoing religious freedom violations continue in Saudi Arabia . . . . [T]he Saudi government persists in banning all forms of public religious expression other than that of the government’s own interpretation of one school of Sunni Islam, and interferes with private religious practice of both Muslims and non-Muslim expatriate workers.<sup>109</sup>

Again in 2010, the Commission made the following findings regarding religious freedom in Pakistan:

Serious religious freedom concerns persist in Pakistan, where religiously discriminatory legislation has fostered an atmosphere of intolerance . . . . A number of Pakistan’s laws abridge freedom of religion or belief . . . . Blasphemy laws have been used to silence members of religious minorities and dissenters within the majority Muslim community, and frequently result in imprisonment on account of religion or belief and/or vigilante violence.<sup>110</sup>

In the end, defending “defamation of religion” prohibitions as promoting human rights is hypocritical. Supporting nations employ the doctrine to “promote human rights” while they deny citizens religious liberty and freedom of expression. It is just another example of how states use the language of human rights to thwart human rights.

In sum, the unquestioned push of the human rights movement to expand the number and scope of human rights—and the use of rights talk—is an act of hubris. This expansion will not inevitably lead to greater protection for human rights, despite our greatest hopes and intentions. States do not always engage in human rights-related activities in good faith. Some ratify human rights instruments with no intention of complying with their terms. Some use human rights language and institutions in ways that infringe human rights. The expansion of human rights and rights talk is not just fruitless, it can be dangerous.

## II. LACK OF ACCOUNTABILITY AND LIMITATIONS ON POWER IN HUMAN RIGHTS ENFORCEMENT BODIES

The second manifestation of the human rights movement’s hubris is its creation of enforcement bodies that lack critical checks, limitations, and accountability. This is an odd phenomenon. Human rights advocates of all

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109. USCIRF ANN. REP. 2010, *supra* note 108, at 11. The Commission has found that Saudi Arabia continues to violate religious liberty in significant ways. See USCIRF ANN. REP. 2017, *supra* note 98, at 76.

110. USCIRF ANN. REP. 2010, *supra* note 108, at 11. The Commission has found that Pakistan continues to violate religious liberty in significant ways. See USCIRF ANN. REP. 2017, *supra* note 98, at 60.

people know how crucial limitations on power and accountability are. The importance of such limitations flows through our human rights conventions, especially those dealing with civil and political rights. One example is Article 9 of the ICCPR:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law . . . .

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>111</sup>

Accountability and checks on authority—issues central to the rule of law—are among the most important topics of discussion for human rights enforcement bodies when they address the enforcement of human rights within the individual nations.<sup>112</sup> Why? We know from painful experience that unaccountable rulers and regimes hold themselves above the law and abuse others, especially the most vulnerable among us.

When the American framers drafted and defended the United States Constitution, they were particularly mindful of the importance of not consolidating power in the hands of one office or official. With a realistic view of human nature, they vigorously championed the need for checks and balances. Consider the following language from THE FEDERALIST NO. 51:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.<sup>113</sup>

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111. ICCPR, *supra* note 13, at art. 9 paras. 1, 4.

112. *Id.* Similarly, the Council of Europe, created to promote human rights, has as one of its main purposes—promotion of the rule of law. THE COUNCIL OF EUR., 800 MILLION EUROPEANS 3 (2011).

113. THE FEDERALIST NO. 51, at 316 (James Madison) (Garry Wills ed., 1982).

It is universally accepted that the rule of law is essential to protecting human rights.<sup>114</sup> States can have elegant and well-tailored laws. They can ratify comprehensive and clear human rights conventions. But absent on-the-ground enforcement, the benefits of those laws and conventions will not be experienced by the average citizen.

Importantly, the rule of law is just as crucial to the just operation of human rights enforcement bodies as it is to the states they monitor. Human rights enforcement bodies will only be effective and act with justice if they too act through law and under the law. As Gisela Hirschmann argues: “[A]chieving global accountability for human rights violations would mean to establish accountability checks for global governance institutions and non-state actors as well.”<sup>115</sup> The human rights movement cannot just promote checks, balances, and accountability; it must model them.

#### A. International Institutions Generally

Too often, the attributes of transparency, accountability, and limitations on power are lacking in our international bodies. Speaking of the United Nations two decades ago, one commentator declared: “The United Nations has become a Kafkaesque bureaucracy beset by inefficiency, systematic corruption, and misconceived programs. Numerous diplomatic efforts to encourage UN reform have failed.”<sup>116</sup>

Why would this be? The answer returns us to human nature as discussed in the introduction. Though we see evil that must be confronted, we have an overly optimistic view of human nature in general—and certainly of the individuals and institutions dedicated to promoting human rights. In our hubris, we assume that if we create a body to enforce something as noble as human rights, that body will act nobly to do so—without the need to impose significant checks, limitations, and accountability. But we are wrong. Good intentions are not enough.

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114. The preamble of the Universal Declaration of Human Rights insists: “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.” Declaration of Human Rights, *supra* note 7. The United Nations similarly declares: “The rule of law and human rights are two sides of the same principle, the freedom to live in dignity. The rule of law and human rights therefore have an indivisible and intrinsic relationship.” *Rule of Law and Human Rights*, U.N., <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> (last visited Jan. 18, 2019).

115. Gisela Hirschmann, *Global Governance and Human Rights—A Fruitful Relationship*, GLOBAL POL’Y J., <https://www.globalpolicyjournal.com/projects/global-audit/global-governance-and-human-rights-%E2%80%93-fruitful-relationship> (last visited Jan. 18, 2019).

116. STEFAN HALPER, *Systemic Corruption at the United Nations, in DELUSIONS OF GRANDEUR: THE UNITED NATIONS AND GLOBAL INTERVENTION* 127 (Ted Galen Carpenter ed., 1997).

Professor Jan Klabbers, Dutch Academy Professor at the University of Helsinki reviewed the presence of checks and balances in international organizations and concluded:

[T]here are few, if any, general rules in international institutional law concerning checks and balances. Partly, this may be a variation perhaps on James Madison's "melancholy reflection" that no government would be necessary if men were angels. International organizations were, for a long time, supposed to do only good, be angelic in nature, and thus checks and balances were hardly even discussed.<sup>117</sup>

The impact of the failure to insist upon accountability is significant. Our enforcement bodies are too often embroiled in scandal and corruption, and the rights of the vulnerable are at times trampled upon.<sup>118</sup> Frequently, these bodies shelter wrongdoers rather than calling them out.<sup>119</sup>

The U.N. is obviously central to the promotion of human rights. It has generated some of the most important human rights documents, including the Universal Declaration of Human Rights and important treaties such as the ICCPR and the ICESCR. It manages some of the most significant human rights enforcement bodies in the world such as the Human Rights Council and the Human Rights Committee, which is the body tasked with enforcing the ICCPR.<sup>120</sup> Additionally, the U.N. regularly affirms the rule of law and the values of transparency and accountability. For example, in 2015, in its concluding observations regarding Venezuela's compliance with the ICCPR, the Human Rights Committee urged Venezuela to:

(b) Ensure that all human rights violations, including those that may have been committed by private individuals with the acquiescence of State officials, are investigated promptly, thoroughly, independently and impartially and that the perpetrators are brought to justice and, if found guilty, are punished in accordance with the gravity of their acts;

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117. Jan Klabbers, *Checks and Balances in the Law of International Organizations*, in 1 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON L. & JUSTICE 161–62 (Mortimer Sellers ed., 2008), [https://law.ubalt.edu/centers/cicl/publications/docs/Ius\\_Gentium\\_Autonomy.pdf](https://law.ubalt.edu/centers/cicl/publications/docs/Ius_Gentium_Autonomy.pdf).

118. *See generally* Symposium Report, Harvard Kennedy Sch. Carr Ctr. for Human Rights Policy, Corruption and Human Rights: The Linkages, the Challenges, and Paths for Progress (Apr. 25, 2018), [https://carrcenter.hks.harvard.edu/files/cchr/files/corruption\\_symposium\\_report.pdf](https://carrcenter.hks.harvard.edu/files/cchr/files/corruption_symposium_report.pdf) (discussing the connection between corruption and human rights violations).

119. *Id.*

120. *See, e.g.*, ICCPR, *supra* note 13, art. 28 ("There shall be established a Human Rights Committee.").

(d) Ensure that no one is detained arbitrarily and that all persons who are charged with an offence have access to a fair and impartial trial.<sup>121</sup>

Despite its public support for the values of transparency and accountability, the United Nations has also demonstrated considerable failures to achieve these values. One of the most egregious has come to the fore in the last two years regarding the deployment of U.N. peacekeepers around the world. The United Nations has engaged in more than seventy peacekeeping operations since its inception, deploying hundreds of thousands of soldiers and tens of thousands of civilians and law enforcement officials from more than 120 participating countries.<sup>122</sup>

In April 2017, the Associated Press revealed the results of a comprehensive investigation of U.N. peacekeeping efforts in twenty-three nations over twelve years between 2004 and 2016.<sup>123</sup> It found widespread evidence that peacekeepers frequently acted as predators of the populations they were sent to protect.<sup>124</sup> It found over 2,000 allegations of sexual abuse by peacekeepers; 300 of those involved children.<sup>125</sup>

Similarly, Human Rights Watch in 2016 reported that U.N. peacekeepers in the Central African Republic had “killed more than a dozen people, including women and children . . . [between] December 2013 [and] June 2015.”<sup>126</sup> Furthermore, peacekeepers were accused of “rampant sexual abuse, including against more than 100 girls in a single prefecture in the Central African Republic.”<sup>127</sup>

How could such abuses be perpetrated by the very people who were sent to protect the poor, vulnerable, and oppressed? The U.N. is largely left to self-police its activities and personnel. Miranda Brown, who monitored peacekeeper abuses while working at the U.N.’s Office for the High Commissioner for

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121. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the Bolivarian Republic of Venezuela, at 4–5, U.N. Doc. CCPR/C/VEN/CO/R.4 (Aug. 14, 2015). *See also* Human Rights Comm., Concluding Observations on the Initial Report of Indonesia, U.N. Doc. CCPR/C/IDN/CO/1 (Aug. 21, 2013); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/CAF/CO/2 (July 27, 2006).

122. *Our History*, U.N. PEACEKEEPING, <http://peacekeeping.un.org/en/our-history> (last visited Jan. 8, 2019).

123. Paisley Dodds, *AP Exclusive: U.N. Child Sex Ring Left Victims but no Arrests*, ASSOCIATED PRESS (Apr. 12, 2017), <https://apnews.com/e6ebc331460345c5abd4f57d77f535c1>.

124. *Id.*

125. Bethany Allen-Ebrahimian, *U.N. Peacekeepers Ran a Child Sex Ring in Haiti*, FOREIGN POL’Y (Apr. 14, 2017), <https://foreignpolicy.com/2017/04/14/un-peacekeepers-ran-a-child-sex-ring-in-haiti/>.

126. Dionne Searcey, *U.N. to Investigate Peacekeepers Suspected of Killing Women and Children in Africa*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/world/africa/central-african-republic-united-nations.html>.

127. *Id.*

Human Rights, declares: “The real problem is that the UN’s leadership are only accountable to themselves.”<sup>128</sup>

Brett Schaefer, the Jay Kingham Fellow in International Regulatory Affairs for the Heritage Foundation, insists that the U.N. fails in this effort at self-policing: “The United Nations and its employees enjoy broad immunities that insulate them from external accountability. This places a heavy responsibility on the U.N. to self-police and self-correct. Unfortunately, it has instead earned a reputation for opacity and retaliating against those who report misdeeds by U.N. officials and peacekeepers.”<sup>129</sup>

The U.N. has been notoriously slow in responding to allegations of misconduct. After a review of leaked internal U.N. documents, Bloomberg reported that “damaging accounts keep surfacing, not only of abuse but of failure to investigate and act.”<sup>130</sup> Peter Anthony Gallo worked from 2011 to 2015 with the Office of Internal Oversight Services (OIOS), the office tasked with investigating allegations of U.N. “mismanagement, misconduct, waste of resources and abuses of authority.”<sup>131</sup> Gallo worked eighteen years as an investigator in the private sector before coming to the United Nations.<sup>132</sup> He testified to the House Committee on Foreign Affairs: “The UN has an incentive to misrepresent the number of misconduct cases—particularly Sexual Exploitation and Abuse cases that are reported. To do otherwise would be to discredit their own peacekeeping activities and to admit to the ineffectiveness of their own prevention activities.”<sup>133</sup> Gallo likewise reported: “There is also a willingness to close cases—including sexual exploitation and abuse cases - rather than investigate them fully.”<sup>134</sup>

While the OIOS exists to hold U.N. officials accountable and ensure that investigations are done, Gallo insists it does not work that way:

Beholden to senior management for political patronage and other favours, OIOS management has been able to select which reports

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128. Kambiz Foroohar, *Rape Scandal of U.N. Peacekeepers Festers as Reports of Abuse Grow*, BLOOMBERG (June 16, 2016, 7:00 PM), <https://www.bloomberg.com/news/articles/20160616/rape-scandal-of-un-peacekeepers-festers-as-reports-of-abuse-grow>.

129. Brett D. Schaefer, *To Clean Up the U.N., We Need to Put Muscle Behind Whistleblower Support*, HERITAGE FOUND. (Apr. 18, 2017), <http://www.heritage.org/global-politics/commentary/clean-the-un-we-need-put-muscle-behind-whistleblower-support>.

130. Foroohar, *supra* note 128.

131. *Hearing on U.N. Peacekeepers: Abuse and Accountability Before the H. Comm. on Foreign Affairs Subcomm. on Afr., Glob. Health, Glob. Human Rights, & Int’l Orgs.*, 114th Cong. 1 (2016) (statement of Peter Anthony Gallo, Office of Internal Oversight Services), <https://docs.house.gov/meetings/FA/FA16/20160413/104766/HHRG-114-FA16-Wstate-GalloP-20160413.pdf>.

132. *Id.* at 3.

133. *Id.* at 5.

134. *Id.*

should be investigated and which should be referred to another department (and conveniently lost or buried). Potentially embarrassing cases have been closed in the face of evidence of fraud, sexual abuse or other misconduct. There is a toxic working environment; some investigators have been harassed, experienced retaliation and encouraged to resign while serious misconduct complaints against some others have been ignored.<sup>135</sup>

At times it appears that the U.N. is more concerned with protecting its reputation than actually addressing criminal acts by peacekeepers. In 2015, frustrated with a lack of action by the Office of High Commissioner in response to allegations of peacekeeper abuse, Anders Kompass, field operations director at the Office of the U.N. High Commissioner for Human Rights, leaked a report about alleged sexual abuse by peacekeepers in the Central African Republic, some of whom were French diplomats in Geneva.<sup>136</sup> The U.N.'s response was to suspend Kompass.<sup>137</sup> In 2016, Kompass resigned. He expressed dismay at "the complete impunity for those who have been found to have in various degrees abused their authority . . . This makes it impossible for me to continue working there."<sup>138</sup>

The scope of and outcry over the peacekeeper scandal has naturally caused U.N. leadership to call for reform.<sup>139</sup> But we have been here before. Over a decade ago the world was stunned by similar allegations of sexual abuse by peacekeepers.<sup>140</sup> In 2005, responding to both allegations of abuse by peacekeepers and mismanagement of the Iraq Oil for Food program,<sup>141</sup> Deputy Secretary General of the United Nations Louise Fréchette declared:

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135. *Id.* at 9.

136. Foroohar, *supra* note 128.

137. *Id.*

138. *Id.*

139. See Alexandra Olson, *Pence Applauds U.N. Resolution on Peacekeeping Reform*, ARMY TIMES (Sept. 20, 2017), <https://www.armytimes.com/news/pentagon-congress/2017/09/20/pence-applauds-un-resolution-on-peacekeeping-reform/>.

140. Louise Fréchette, *The United Nations: Adapting to the Twenty-First Century*, in IRRELEVANT OR INDISPENSABLE? THE UNITED NATIONS IN THE TWENTY-FIRST CENTURY 14 (Paul Heinbecker & Patricia Goff eds., 2005).

141. The program was designed in 1996 to support the Iraqi people and protect them from a humanitarian disaster after international sanctions were imposed in 1990. It permitted the Iraqi government to engage in some oil sales so long as the proceeds were used for food, medicine and infrastructure. However, Saddam Hussein manipulated the program to receive billions of dollars in kickbacks and illegal surcharges from oil sales. See Sharon Otterman, *Iraq: Oil Food Scandal*, COUNCIL ON FOREIGN REL. (Oct. 28, 2005), <https://www.cfr.org/background/iraq-oil-food-scandal> ("Wide-scale mismanagement and unethical conduct on the part of some UN employees also plagued the program, according to the UN Independent Inquiry Committee."). The Office of Internal Oversight Services (OIOS) was designed to prevent such corruption. The OIOS was created in 1994 after the United States withheld its contribution to support the U.N.'s work until the U.N. established an Inspector General to monitor and audit U.N. operations. Unfortunately, the

We are gravely concerned at the failures brought to light in the Oil-for-Food Program, and appalled at the allegations of sexual abuse by UN staff and peacekeepers in the Democratic Republic of the Congo and elsewhere. When problems come to light, you must act aggressively to fix them—and that’s what we’re doing. The Secretary General is moving swiftly on issues within his own purview—for instance, new protections for whistleblowers, wider access to information, higher standards to avoid conflicts of interest or corruption by senior officials, and action to hold managers to account.<sup>142</sup>

Without fundamental changes between 2005 and now, it is tempting to consider current U.N. assurances that reform is forthcoming with skepticism. However, the broader U.N. is not alone in a display of a lack of checks, transparency, and accountability. Some of the most important human rights enforcement organizations suffer these same deficiencies. We will look at two of these organizations.

### *B. United Nations Human Rights Council*

The Human Rights Council has been described as the U.N.’s principal body dedicated to the protection of human rights.<sup>143</sup> Yet it is a prime example of an organization that lacks basic checks and limitations. The Human Rights Council was created in 2006 to replace a predecessor organization, the Human Rights Commission.<sup>144</sup> The Commission played a crucial role in the promotion of human rights in the years following World War II.<sup>145</sup> It was the drafter of the Universal Declaration of Human Rights and important conventions, such as the ICCPR and the ICESCR. It also played a role in investigating allegations of human rights violations.<sup>146</sup>

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OIOS lacked true independence and adequate staffing. Brett D. Schaefer, *The Demise of the U.N. Procurement Task Force Threatens Oversight at the U.N.*, HERITAGE FOUND. (Feb. 5, 2009), <https://www.heritage.org/report/the-demise-the-un-procurement-task-force-threatens-oversight-the-un>. In the end it did nothing to discover or prevent this corruption. In the wake of the scandal, the United States convinced the U.N. to create a separate Procurement Task Force (PTF) to investigate allegations of mismanagement and fraud. The body existed successfully for two years, uncovering fraud and waste of more than \$630 million. *Id.* “The evidence unearthed by the [PTF] led to misconduct findings against 17 U.N. officials and the conviction of a senior U.N. procurement official.” *Id.* Regrettably, the PTF did its job too well. As punishment for pursuing cases against Singaporean and Russian nationals, those countries led a successful effort to eliminate the PTF in December 2008. *Id.*

142. Fréchette, *supra* note 140, at 14–15.

143. Freedman, *supra* note 91, at 50.

144. HURST HANNUM, DINAH L. SHELTON, S. JAMES ANAYA, & ROSA CELORIO, *INTERNATIONAL HUMAN RIGHTS, PROBLEMS OF LAW, POLICY, AND PRACTICE* 47 (6th ed. 2018).

145. *Id.* at 46–47.

146. *Id.* at 46–48, 718–19.

In the early 2000's, however, the Commission became the subject of much scrutiny and criticism because of how politicized it had become. The politicization showed itself both in its membership and activities. The organization consisted of 53 member states "elected by the Economic and Social Council."<sup>147</sup> In 2001, the General Assembly voted the United States off the Commission while electing as members Cuba, Libya, Saudi Arabia, Sudan, and Zimbabwe — countries described by some as "a rogues' gallery of human rights abusers."<sup>148</sup> Two years later in a secret ballot election, the Commission named Libya, a persistent human rights abuser, to be the Commission's chair.<sup>149</sup> By 2005, Freedom House named six of the fifty-three member nations — China, Cuba, Eritrea, Saudi Arabia, Sudan, and Zimbabwe — among the world's "worst of the worst" abusers of human rights.<sup>150</sup>

The Commission, as constituted, proceeded to largely ignore major human rights violations in Myanmar and North Korea and even genocide in Sudan.<sup>151</sup> It chose not to look into the suppression of women's rights in Saudi Arabia or journalists in Iran; it decided not to examine the intense political repression in Zimbabwe.<sup>152</sup> One nation, however, was unprotected from criticism and censure: Israel. There were as many country-specific resolutions against Israel as there were against all other nations combined, and the Commission held regular and special emergency sessions devoted to Israel.<sup>153</sup>

Eventually, even U.N. leaders called for the Commission's end. U.N. Secretary General Kofi Annan acknowledged: "[T]he Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against

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147. LOUIS HENKIN ET AL., *HUMAN RIGHTS* 419 (Foundation Press 2d ed. 2009).

148. Thalif Deen, *Politics: U.S. Ouster from Rights Body Reflects Third World Anger*, INTER PRESS SERV. (May 4, 2001), <http://www.ipsnews.net/2001/05/politics-us-ouster-from-rights-body-reflects-third-world-anger/>.

149. *Libya Takes Human Rights Role*, BBC NEWS (Jan. 20, 2003, 2:26 PM), <http://news.bbc.co.uk/2/hi/africa/2672029.stm>.

150. *Worst of the Worst 2005: The World's Most Repressive Societies*, FREEDOM HOUSE (2005), [https://freedomhouse.org/sites/default/files/inline\\_images/Intro%20-%20WOW%202005.pdf](https://freedomhouse.org/sites/default/files/inline_images/Intro%20-%20WOW%202005.pdf).

151. Joseph Locante & Nile Gardiner, *Another Charade at the United Nations*, N.Y. TIMES (Mar. 22, 2006), <https://www.nytimes.com/2006/03/22/opinion/another-charade-at-the-united-nations.html>.

152. HENKIN ET AL., *supra* note 147, at 435.

153. Brett D. Schaefer, *The United Nations Human Rights Council: Repeating Past Mistakes*, HERITAGE FOUND. (Sept. 19, 2006), <https://www.heritage.org/report/the-united-nations-human-rights-council-repeating-past-mistakes>.

criticism or to criticize others.”<sup>154</sup> The General Assembly disbanded the Commission and created the Human Rights Council to take its place.<sup>155</sup>

Given the Commission’s failures, there was much discussion of changes that should be put in place for the newly created Human Rights Council. Many argued that the new body should be smaller and hopefully less unwieldy. Sec. Gen. Kofi Annan proposed that elections for member nations should be done by a two-thirds vote, rather than a simple majority.<sup>156</sup> The United States, a strong critic of the politicized Commission, called for the implementation of membership criteria.<sup>157</sup> It argued that only nations with a track record of protecting human rights—and certainly not those subject to current United Nations sanctions—should be eligible for membership.<sup>158</sup>

In the end, the General Assembly rebuffed most of these efforts. It reduced the number of member states to forty-seven.<sup>159</sup> But membership selection continues to be made by a majority vote and any nation, primarily based on equitable geographic distribution rather than on its human rights record, may be elected.<sup>160</sup> Member states are simply told that they “shall uphold the highest standards in the promotion and protection of human rights.”<sup>161</sup>

Why is membership open to human rights abusing nations? Under-Secretary General Shashi Tharoor explained: “You don’t advance human rights by preaching only to the converted.”<sup>162</sup> Professor Joseph Loconte, responding to Tharoor’s comment, notes the utopian impulse behind such a view: “Here on display is the flawed idealism of the UN’s human-rights agenda, as if having human-rights abusers judging human-rights cases is the way to convert them.”<sup>163</sup>

So how should we assess the Human Rights Council after its first decade of existence? Membership, a critical issue that plagued the predecessor Human Rights Commission, continues to be a problem. Only twice has the majority of member nations been “free,” as evaluated by Freedom House.<sup>164</sup> Blatant human

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154. *Id.*

155. HENKIN ET AL., *supra* note 147, at 434–36; G.A. Res. 60/251, *supra* note 15.

156. Kenneth Roth, *The U.N. Reform Agenda and Human Rights*, in *IRRELEVANT OR INDISPENSABLE? THE UNITED NATIONS IN THE TWENTY-FIRST CENTURY* 138 (Paul Heinbecker & Patricia Goff eds., 2005).

157. HENKIN ET AL., *supra* note 147, at 435–36.

158. *Id.* at 436.

159. G.A. Res. 60/251, *supra* note 15, at 3.

160. *Id.*

161. *Id.*

162. Joseph Loconte, *The United Nations’ Disarray*, CHRISTIANITY TODAY (Feb. 1, 2007), <http://www.christianitytoday.com/ct/2007/february/27.40.html>.

163. *Id.*

164. Brett D. Schaefer, *U.N. Human Rights Council: A Flawed Body that Should be Replaced*, HERITAGE FOUND. (Nov. 19, 2013), <https://www.heritage.org/report/un-human-rights-council-flawed-body-should-be-replaced>.

rights violators such as Cuba, China, and Saudi Arabia continue to judge their own human rights records and those of their friends and allies.<sup>165</sup>

How does this happen? Frequently states allied by a common interest or regional ties will vote in blocs. One of the ways they accomplish this is to have regions submit slates for approval that have only as many candidates as open seats, a practice known as offering a “clean slate.”<sup>166</sup> Ted Piccone, a senior fellow in the Project on International Order and Strategy and Latin America Initiative in the Foreign Policy program at the Brookings Institution, supports the Council and the United States’ participation in it. But he objects to non-competitive slates, concluding: “In particular, the continued election of states like China, Russia, Cuba, and Venezuela, in addition to newer members like Burundi and Ethiopia, is a sad testament to the General Assembly’s willingness to prioritize politics over principles.”<sup>167</sup>

The Council, like the Commission before it, continues to be a highly politicized body. In the first two years, some countries—such as Algeria, Cuba, and China—pushed to end review and scrutiny of the records of individual nations, “except in the case of Israel, which remained the subject of several annually adopted resolutions and mechanisms, and is the subject of the Council’s only country-specific agenda item.”<sup>168</sup>

During the Bush administration, the United States chose not to seek membership in the Human Rights Council or to participate in its activities.<sup>169</sup> The United States changed course during the Obama administration and was voted to membership in 2009.<sup>170</sup> Some feel that this improved the functioning of the organization; there are more country-specific resolutions now and a smaller percentage of those that condemn Israel.<sup>171</sup>

Today, however, Israel continues to be the only nation singled out for scrutiny. It is the sole country with a standing agenda item dedicated to it: “Human rights

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165. *Id.*

166. Brett Schaefer, *A U.N. Human Rights Council Reform Agenda for the Trump Administration*, HERITAGE FOUND. (Mar. 29, 2017), <https://www.heritage.org/global-politics/report/un-human-rights-council-reform-agenda-the-trump-administration>.

167. Ted Piccone, *Ten Years Later: The Status of the U.N. Human Rights Council*, BROOKINGS INST. 2 (May 17, 2016), <https://www.brookings.edu/testimonies/ten-years-later-the-status-of-the-u-n-human-rights-council/>.

168. *Country-Specific Scrutiny by the U.N. Human Rights Council: Changes Documented During U.S. Membership, 2009–2015*, JACOB BLAUSTEIN INST. FOR THE ADVANCEMENT OF HUM. RTS (Feb. 2, 2016), <http://www.jbi-humanrights.org/jacob-blaustein-institute/2016/02/country-specific-scrutiny-by-the-un-human-rights-council-changes-documented-during-us-membership-200.html>.

169. Neil MacFarquhar, *U.S. Joins Rights Panel After Vote at the U.N.*, N.Y. TIMES (May 12, 2009), <https://www.nytimes.com/2009/05/13/world/13nations.html>.

170. *Id.*

171. Piccone, *supra* note 167, at 3.

situation in Palestine and other occupied Arab territories.”<sup>172</sup> There have been more resolutions against Israel than all other nations combined.<sup>173</sup> This is remarkable given some of the horrific human rights violations that have occurred during the Council’s first decade, including genocide in Sudan and the military attacks against civilians (including the use of chemical weapons) launched by the Syrian government of Bashar al Assad.<sup>174</sup> Indeed, while Israel has been the subject of seventy-eight resolutions, Sudan and Syria have been the subject of three and nine respectively.<sup>175</sup>

While member states continue to target Israel, they also continue to use the system to protect themselves and their allies from censure. In her book, *Failing to Protect*, Professor Rosa Freedman describes how a nation like Saudi Arabia, despite ratifying many human rights treaties, continues to deny religious liberty and engage in discrimination, torture, and summary executions:

The country is protected by its Gulf neighbours, and by its political allies within the Organisation of Islamic Cooperation. The country’s oil and wealth, its ties with the US, and its position amongst Muslim states means that other countries pay scant attention to its abuses and

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172. *Israel, the Palestinians, and the United Nations: Challenges for the New Administration, Joint Hearing Before the Subcomm. on Middle East & N. Afr. & the Subcomm. on Afr., Glob. Health, Glob. Human Rights, & Int’l Orgs. of the Comm. on Foreign Affairs H.R.*, 115th Cong. 8 (2017) (testimony of Hillel C. Neuer, Exec. Dir. United Nations Watch).

173. Schaefer, *supra* note 153. See Rep. of the Human Rights Council, at 8–10, U.N. Doc A/73/53 (2018), <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>.

174. See ‘Clear and Convincing’ Evidence of Chemical Weapon Use in Syria, *U.N. Team Reports*, U.N. NEWS (Sept. 16, 2013), <https://news.un.org/en/story/2013/09/449052-clear-and-convincing-evidence-chemical-weapons-use-syria-un-team-reports>; See also *Darfur Genocide*, JEWISH WORLD WATCH, <https://www.jww.org/conflict-areas/sudan/darfur/> (last visited Aug. 25, 2019).

175. See Rep. of the Human Rights Council, *supra* note 173. On March 20, 2017, United States U.N. Ambassador Nikki Haley criticized the Council for its long-standing “anti-Israel bias.” Tracy Wilkinson, *Haley Accuses U.N. of ‘Anti-Israel Bias’ and Tensions Rise over Proposed U.S. Budget Cuts*, L.A. TIMES (Mar. 20, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-u-s-spars-with-u-n-over-israel-amid-1490022960-htmstory.html> (saying “[t]he United States will not participate’ in discussions on the Israel-specific agenda item ‘other than to vote against the outrageous, one-sided, anti-Israel resolutions that so diminish what the Human Rights Council should be.”). On March 20, 2017, the State Department issued the following statement regarding how the United States intended to approach the Council and this agenda item:

As an expression of our deeply-held conviction that this bias must be addressed in order for the Council to realize its legitimate purpose, the United States decided not to attend the Council’s Item Seven General Debate session. It does not serve the interests of the Council to single out one country in an unbalanced matter. Later this week, the United States will vote against every resolution put forth under this agenda item and is encouraging other countries to do the same.

Press Statement, U.S. Dep’t of State, Opposition to U.N. Human Rights Council Agenda Item Seven (Mar. 20, 2017), <https://www.state.gov/r/pa/prs/ps/2017/03/268525.htm>.

care even less about holding the Saudi regime to account for its violations against its own citizens.<sup>176</sup>

Finally, it is important in this context to recall that it is the Human Rights Council that has passed two resolutions on “Defamation of Religion.”<sup>177</sup> By calling for restraints on speech in the name of human rights, the Council is undermining freedom of expression, freedom of religion, and human rights in general.

In sum, the Human Rights Council continues to suffer from a lack of clear checks, balances, and accountability. Without meaningful membership criteria and critical changes in the way member states are elected, we will continue to have politicization and debasement of the Council’s rights enforcement work.

### C. European Court of Human Rights

Lack of institutional checks and accountability are not just a U.N. problem. They also infect the work of the European Court of Human Rights (ECtHR). They do so, however, in a manner that is different from the Human Rights Council. The ECtHR follows clear and detailed procedures. The problem is not a lack of accountability in court structures, it is that the ECtHR’s approach to interpreting the European Convention of Human Rights lacks predictability, certainty, and accountability to the Convention’s text.

The ECtHR is the primary enforcement body of the European regional system of human rights protection, formed under the auspices of Council of Europe.<sup>178</sup> The Council of Europe, like the U.N., was formed shortly after World War II to promote human rights, democracy, and the rule of law.<sup>179</sup> The nations of Europe very quickly (by 1953) had not only created the Council of Europe, but they put into force a binding human rights treaty, the European Convention on Human Rights.<sup>180</sup> Today, the ECtHR interprets and enforces that treaty. It stands ready to hear petitions from any individual or group suffering a denial of human rights within Europe.<sup>181</sup>

The ECtHR has had many successes. It has protected religious liberty, including the right to evangelize.<sup>182</sup> It has developed a strong jurisprudence

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176. FREEDMAN, *supra* note 91, at 114.

177. See H.R.C. Res. 13/16, *supra* note 104. See also H.R.C. Res. 7/19, *supra* note 99.

178. DOUGLAS LEE DONOHO, INTERNATIONAL HUMAN RIGHTS LAW 334–38 (2017).

179. See THE COUNCIL OF EUROPE, *supra* note 112, at 3; *A Peaceful Europe—the Beginnings of Cooperation*, EUR. UNION, [https://europa.eu/european-union/about-eu/history/1945-1959\\_en](https://europa.eu/european-union/about-eu/history/1945-1959_en) (last visited Aug. 28, 2019).

180. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

181. *Id.* at art. 34.

182. *Id.* at art. 9.

dealing with forced disappearances and protections for the lives of civilians during military operations, such as Russia's intervention in Chechnya.<sup>183</sup>

Unfortunately, the ECtHR uses a doctrine to interpret the European Convention that ultimately threatens the court's credibility and ability to protect human rights: an evolutive interpretation of rights that is rooted in ascertaining the consensus of member states regarding the scope and application of particular rights.<sup>184</sup> The ECtHR describes its approach this way:

[S]ince the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved . . . . It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.<sup>185</sup>

Very consciously then, the ECtHR has embraced a role not only of Convention interpretation, but also human rights reform and development. And central to this approach is monitoring legal and social developments within Europe relevant to the particular issue before the court.

The ECtHR first used this evolutive approach in *Tyrer v. United Kingdom* in 1978 when it held judicially imposing three strokes with a birch rod as punishment for assault constituted degrading treatment under Convention Article 3.<sup>186</sup> The ECtHR continues to invoke the approach as an important part of its jurisprudence.<sup>187</sup> It does so for a noble purpose: it wants the system of human rights protections in Europe to be relevant over time as technologies and societies change. Unfortunately, the ECtHR uses this doctrine as a means of enforcing its own perspective—or its perception of current European thinking—on good public policy, with at times little regard for the text of the convention that governs its existence and function. The ECtHR is another example of a body that is well intentioned, but that demonstrates hubris as it determines social policy with little accountability.

The ECtHR has used its evolutive approach especially in cases involving sexual rights and identity. A good example is seen in a series of cases decided between 1986 and 2002 involving the United Kingdom and transgendered

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183. HENKIN ET AL., *supra* note 147, at 655.

184. See Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, 52 HOW. L. REV. 277, 287, 289 (2009).

185. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R.

186. 26 Eur. Ct. H.R. (ser. A) at 3, 14, paras. 9, 35 (1978).

187. See *e.g.*, *Pichkur v. Ukraine*, 2013-V Eur. Ct. H.R.; *Goodwin*, VI Eur. Ct. H.R.

individuals challenging the United Kingdom's birth certificate record system. The transgendered individuals in each case insisted that the United Kingdom violated their right to "respect" for their "private and family life" under Article 8 of the European Convention by refusing to allow them to change their birth certificates to reflect their new sexual identity.<sup>188</sup> Consistently from 1986 to 1998—in three separate cases—the ECtHR rejected the applicants' claims and ruled in favor of the United Kingdom, finding that the United Kingdom had a "wide margin of appreciation" in establishing and maintaining its birth record system.<sup>189</sup>

The ECtHR changed course in 2002. That year, in *Goodwin v. United Kingdom*, the ECtHR for the first time ruled for an applicant wishing to change her birth certificate.<sup>190</sup> It found that the United Kingdom had failed to respect the applicant's private and family life under article 8 by not allowing her to do so.<sup>191</sup> The European Convention's text had not changed between 1998 and 2002. The difference was that the ECtHR saw a change in society. Europe and the rest of the world were taking steps toward greater acceptance of transsexuals, including greater legal protection.

Throughout the period in which it decided this series of cases, the ECtHR consistently asked whether there was a "European consensus" on whether transgendered individuals should be permitted to change their birth certificates.<sup>192</sup> Interestingly, in 2002 the ECtHR reached the same conclusion in *Goodwin* that it had before: such a consensus did not exist.<sup>193</sup> How then did it reach the conclusion that the United Kingdom had violated article 8 of the convention? The court explained that

[w]hile this [lack of a European consensus] would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising.... The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal

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188. See *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986); see also *Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R.; *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990).

189. See *Rees*, 106 Eur. Ct. H.R. at 13, para. 44; see also *Sheffield & Horsham*, 1998-V Eur. Ct. H.R. at 16, paras. 57–58; *Cossey*, 184 Eur. Ct. H.R. at 12–13, para. 40.

190. *Goodwin*, 2002-VI Eur. Ct. H.R. at 27, para. 93.

191. *Id.*

192. *Id.* at 24–25, para. 85.

193. *Id.*

recognition of the new sexual identity of post-operative transsexuals.<sup>194</sup>

Influential to the outcome was evidence of a “continuing international trend” found not within Europe, but primarily in New Zealand and Australia.<sup>195</sup>

As curious as it is that the ECtHR employed an international trend to overturn its longstanding interpretation of Article 8, more troubling is how little the ECtHR looked to the language of the European convention.<sup>196</sup> Indeed, in important respects the Goodwin opinion reads more like the report of a body of sociologists analyzing social developments in nations across the world than a judicial decision.

The ECtHR used the same approach in the 2009 case of *Vallianatos v. Greece*.<sup>197</sup> There applicant claimed that Greece violated the nondiscrimination principle of Article 14 of the Convention (read in conjunction with Article 8’s protection for private and family life) by excluding same-sex couples from application of its civil union law.<sup>198</sup>

Greece explained why it applied its civil union law to heterosexual couples but not to same-sex couples by pointing to the law’s main purpose: the protection of children. It argued the law would serve to protect the legal status of those born outside of marriage and make it easier for parents to raise children even if not married.<sup>199</sup> It argued that, since same-sex couples could not have biological children, they were in a different position with regard to application of the law.<sup>200</sup>

The ECtHR acknowledged that the protection of children was a legitimate aim. However, it insisted that it was not “necessary” for Greece to exclude same-sex couples from application of law to protect this aim; it was possible to both protect children and extend the law’s benefit to same-sex couples.<sup>201</sup>

The ECtHR cited both *Tyrer* and *Goodwin* in characterizing the Convention as “a living instrument, to be interpreted in present-day conditions.”<sup>202</sup> In particular, it argued that Greece “must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.”<sup>203</sup>

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194. *Id.*

195. *Id.* at 24, para. 84.

196. *See* European Convention, *supra* note 180.

197. 2013-VI Eur. Ct. H.R.

198. *Id.* at 32, para. 92.

199. *Id.* at 24, para. 67.

200. *Id.*

201. *Id.* at 31, 32, paras. 89, 92.

202. *Id.* at 29, para. 84.

203. *Id.*

As it had done in *Goodwin*, the ECtHR looked to see whether there was a consensus on how same sex couples should be treated under the law; again it did not find it.<sup>204</sup> Nonetheless, it found “a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships.”<sup>205</sup> It highlighted the number of states that permitted same-sex marriage as well as those that permitted civil partnerships for same-sex couples. It noted that Lithuania and Greece were the only states that did not permit civil partnerships to apply to same-sex couples.<sup>206</sup>

The ECtHR addressed a natural concern that arises from such an analysis—that once a consensus or trend develops, it will be impossible for one nation to have laws that differ from the majority. It insisted that being “in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention.”<sup>207</sup> However, this concession was not enough to help Greece. The court found that Greece failed to offer “convincing and weighty reasons” capable of justifying its law.<sup>208</sup>

The *Villianatos* reasoning is troubling. Once again, the ECtHR determined the meaning of a convention provision based in large part on a developing social trend. While the ECtHR briefly referenced the text, very little of its analysis was spent on the textual analysis. The ECtHR was engaged primarily in social analysis and prognosis.<sup>209</sup>

The parties expected this approach. The way they engaged in advocacy in the case demonstrates that they understood that social consensus would prove key to analysis. Indeed, the existence of a consensus and/or trend was a central argument raised by both the applicants and the nongovernmental organizations that participated in the case as third-party interveners. The applicants emphasized the trend toward legal recognition of same-sex couples throughout Europe.<sup>210</sup> And they insisted that Greece was “clearly and radically out of step with the norm among European countries in that regard.”<sup>211</sup>

Similarly, the interveners canvassed legal developments regarding the treatment of same-sex couples and argued that “Greece was unique, as it was the only European country to have introduced civil unions while excluding same-sex couples from their scope of application.”<sup>212</sup>

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204. *Id.* at 31, para. 91.

205. *Id.*

206. *Id.*

207. *Id.* at 32, para. 92.

208. *Id.*

209. *See generally id.* (reiterating the courts obligation to take into account societal changes in its analysis).

210. *Id.* at 21, para. 60.

211. *Id.*

212. *Id.* at 25, para. 69.

It is not just in matters of sexual rights or identity that the ECtHR applies this evolutive approach based on consensus. The ECtHR similarly did so in a 2013 decision involving criminal punishment: *Vinter v. United Kingdom*.<sup>213</sup> There, the ECtHR ruled that a United Kingdom law permitting life sentences without the prospect of release or possibility of review amounted to inhuman or degrading treatment in violation of Convention Article 3.<sup>214</sup>

In *Vinter*, too, the ECtHR based its decision much more on its interpretation of current trends in European social policy than on an interpretation of the Convention's language. It found particularly significant that rehabilitation is "now" the main "emphasis" of European penal policy: "[t]he Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence."<sup>215</sup> Similarly, "there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."<sup>216</sup> To bolster its conclusion on this front the ECtHR canvassed not only European penal law, but also penal trends around the world.<sup>217</sup>

Having found that penal law had moved in the direction of rehabilitation, the ECtHR ruled that Article 3 now requires that every punishment must provide for the possibility of rehabilitation.<sup>218</sup> This includes life sentences: "[T]he Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence . . . ."<sup>219</sup> Thus, though Article 3 says nothing about rehabilitation—or any theory of punishment at all—the ECtHR determined that life sentences without the possibility of release or review are inhuman or degrading.<sup>220</sup>

In a partially dissenting opinion, Judge Villiger highlighted the decision's lack of rooting in the Convention's text: "To begin with, I note that in the judgment (for example, at §§ 121 et seq.) reference is made to the 'standards' and

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213. App. Nos. 66069/09, 130/10 & 3896/10 (Eur. Ct. H.R. July 9, 2013), available at <http://hudoc.echr.coe.int/eng?i=001-122664>. For an excellent discussion of *Vinter* and the dangers of the ECtHR's evolutive approach, see Ernie Walton, *Preserving the European Convention on Human Rights: Why the U.K.'s Threat to Leave the Convention Could Save It*, 42 CAP. U. L. REV. 977, 980–83 (2014).

214. *Vinter*, App. Nos. 66069/09, 130/10 & 3896/10 at 44, paras. 121–22.

215. *Id.* at 42, para. 115.

216. *Id.* at 42, para. 114.

217. *Id.* at 19–31, § III, paras. 59–75.

218. *Id.* at 42, para. 114.

219. *Id.* at 44, para. 119.

220. *Id.*

‘requirements’ of Article 3. However, nowhere in the judgment are these standards and requirements explained, analysed and applied.”<sup>221</sup>

Why should we be concerned by the ECtHR’s evolutive approach? First, the approach undermines the rule of law.<sup>222</sup> The rule of law values predictability, certainty, and equal application of the law. The ECtHR itself insists that such values are vital.<sup>223</sup> But the evolutive approach undermines these very values. In *Goodwin*, the United Kingdom had no way to know that the emergence of a trend outside of Europe would prompt the ECtHR to rule differently than it had in three previous cases over a 16-year period. Critically, the ECtHR does not tell us how one knows if a consensus or trend has been achieved or even what a trend is. There is no *legal* standard to be applied.<sup>224</sup>

The ECtHR has created uncertainty regarding other important human rights questions in Europe as states wait to see if or when the ECtHR will declare that a consensus exists. In *Lambert v. France*, for example, the ECtHR refused to determine that removal of artificial hydration and nutrition would violate Article 2’s right to life, concluding that there is no consensus among member states regarding the withdrawal of life-sustaining treatment.<sup>225</sup> Similarly, in *Hämäläinen v. Finland*, the ECtHR found that there is no consensus on whether recognition of same sex marriage is required by Article 8’s requirement that states respect private and family life.<sup>226</sup> Rather than providing clarity and certainty on these important issues, the ECtHR approach instead creates uncertainty for states and individuals about how these issues will be resolved in the years to come. Euthanasia and same-sex marriage are hotly debated topics worldwide, and laws regarding them are changing. At what point will those changes amount to a consensus or trend sufficient for the ECtHR to reinterpret the convention’s requirements? No one knows. In fact, no one knows exactly what evidence will be sufficient to show that the consensus threshold has been reached.

It is inherently problematic basing decisions about fundamental human rights on the shifting sands of contemporary social policy. European penal policy may

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221. *Id.* at 62 (Villiger, J., partly dissenting).

222. See Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 147–50 (2004). See also Walton, *supra* note 213, at 989–97 (discussing the threat European Consensus has on the rule of law).

223. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. at 21, para. 74 (“[I]t is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.”).

224. See *generally id.* at paras. 74–75 (discussing how the court does not have to follow precedent but apply standards based on present conditions).

225. App. No. 46043/14 (Eur. Ct. H.R. May 6, 2015), available at <http://hudoc.echr.coe.int/eng?i=001-155352>.

226. App. No. 37359/09 (Eur. Ct. H.R. July 16, 2014), available at <http://hudoc.echr.coe.int/eng?i=001-145768>.

“now” be rooted in rehabilitation, but that may well change. In the United States, rehabilitation was the dominant philosophy in early part of 20<sup>th</sup> century, but then fell out of favor as many of rehabilitation’s weaknesses became apparent as crime rates rose in the second half of the century.<sup>227</sup> Eugenics and compulsory sterilization, too, once comported with current trends and accepted notions of the best social policy both in Europe and the United States.<sup>228</sup> Something as important as human rights should not depend on the current state of social trends.

The ECtHR is not only crafting European social policy, it is doing so with few checks, balances, or accountability. There is no appellate court with jurisdiction to review ECtHR decisions.<sup>229</sup> There is only the possibility of a case being reviewed by a grand chamber (17 judges) of the same court or some political intervention by the Committee of Ministers.<sup>230</sup> And especially troubling, the doctrine means that the ECtHR is not truly accountable to the text of the Convention. In cases like *Vinter* and *Goodwin*, the text played a very small role in the cases’ outcomes.

The second problem with this evolutive approach is that it undermines the ECtHR’s very purpose—the protection of human rights. A consensus is a strongly majoritarian concept. But by their nature, human rights are counter-majoritarian. Individuals have rights that must be protected even if those in power or if the majority in a nation choose not to recognize those rights. So, it is inherently problematic to base the determination of the nature and scope of human rights on the consensus of nations.

The response of ECtHR’s defenders is that the ECtHR only uses its evolutive approach to expand, rather than contract, the protection of rights. But there is no reason to believe that this will always be the case. In fact, it is not the case now. Consider the 2010 judgment in *Mangouras v. Spain*.<sup>231</sup> In *Mangouras*, the ECtHR relied on trends in the way environmental crimes are viewed within Europe to restrict the right to bail for a criminal defendant in an oil leak case.<sup>232</sup> Apostolos Ioannis Mangouras was the ship’s master on the *Prestige*, which leaked 70,000 tons of fuel oil into the Atlantic Ocean of the coast of Spain in

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227. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. OF CHI. L. REV. 1, 9 (2003).

228. See BRAUCH, *supra* note 19, at 83–85 (describing how the U.N. General Assembly approved the Universal Declaration of Human Rights after WWII in order to protect the rights of all humans against the evil that had occurred during the war).

229. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 1, 10 (2014), [https://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](https://www.echr.coe.int/Documents/50Questions_ENG.pdf).

230. *Id.* at 4, para. 9.

231. App. No. 12050/04 (Eur. Ct. H.R. Sept. 28, 2010), available at <http://hudoc.echr.coe.int/eng?i=001-100686>.

232. See generally *id.* at 8–19, § II, paras. 28–55 (discussing the relevant domestic and international law and practice, including the use of criminal law as a means of enforcing the environmental obligations imposed by the E.U.).

2002.<sup>233</sup> The leak had a devastating effect on marine life, the fishing industry, and tourism.<sup>234</sup>

Once Mangouras was arrested, the judge set bail at 3 million euros, a figure Mangouras was unable to pay and which resulted in him spending much pre-trial time in jail.<sup>235</sup> He alleged that this bail violated Article 5(3) of the Convention, which provides: “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”<sup>236</sup>

The ECtHR acknowledged that the purpose of bail under the Convention is “to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing.”<sup>237</sup> Thus bail should take into account the means of the accused as well as the risk that he or she will abscond before trial.<sup>238</sup> How then did the ECtHR uphold a bail amount that was so high and well beyond the accused means to pay? The ECtHR conceded that it could not ignore the “growing and legitimate concern both in Europe and internationally in relation to environmental offences.”<sup>239</sup> The court acknowledged “that these new realities have to be taken into account in interpreting the requirements of Article 5 § 3 in this regard.”<sup>240</sup>

The “new realities” referenced by the ECtHR are social trends that have taken place regarding oil spills and our response to them, and the ECtHR relied on these “new realities” to change its interpretation of Article 5. It allowed Spain to set bail, not primarily based on ensuring Mangouras’ appearance at trial, but instead based on the seriousness of the offences in question and the extent of damage caused.<sup>241</sup>

The seven dissenting judges (the outcome was by a 10–7 decision) insisted strongly that the ECtHR was reinterpreting Article 5 just for cases like this.<sup>242</sup> Had this been an ordinary case—and not one involving a high-profile environmental disaster—the ECtHR would likely have ruled the other way. To the dissenters the gravity of the offense must not be the “decisive factor

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233. *Id.* at 3, paras. 14–15.

234. *Id.* at 3–4, para. 16.

235. *Id.* at 4–5, paras. 17–18.

236. European Convention, *supra* note 180, at 9, art. 5, para. 3.

237. *Mangouras*, App. No. 12050/04, at 26, para. 78.

238. *Id.* at paras. 79–80.

239. *Id.* at 28, para. 86.

240. *Id.* at 28, para. 87.

241. *Id.* at 4–5, 29, paras. 17–18, 92.

242. *See id.* at 31, para. 1 (Joint dissenting opinion) (rejecting the Court’s decision of setting the bail at three million euros in contravention of art. 5 § 3).

justifying the size of the bail.”<sup>243</sup> The fact that it was the decisive factor here rendered “illusory the applicant’s ability to secure his release from custody.”<sup>244</sup>

This is just one example of how human rights protections may contract rather than expand through use of the evolutive approach. As incidents of global terrorism continue to increase, we may find that a future consensus on appropriate means to combat that terrorism may embrace stronger measures and more infringements on freedom of expression or privacy—perhaps even infringements that would be viewed as human rights violations today.

It is simply not the case that a consensus approach will only expand our protection of human rights. The evolutive approach and the consensus standard are threats to both the rule of law and the protections of human rights.

The ECtHR, for all of its successes, is another example of a human rights enforcement entity that lacks sufficient checks, balances, and accountability. And this lack poses a threat to the long-term protection of human rights.

### III. SOME SUGGESTIONS FOR THE FUTURE

How are we as human rights advocates to confront not only the evil around us but the evil—particularly the hubris—within? There are several concrete steps we need to take so that the human rights movement will be effective in confronting evil and protecting the dignity of all human beings for generations to come.

First, it is time to change the human rights movement’s aim from further expansion of rights to enforcement of core rights to which states have already agreed. As Professor David Smolin notes: “It is an odd feature of the human rights movement that although it has failed to successfully implement principles with broader acceptance, such as the bans on genocide, slavery, and torture, it has continued to define ever more specific and controversial additional rights.”<sup>245</sup>

We don’t need additional working groups articulating increasingly vague and largely non-enforceable aspirations and calling them human rights. We recently spent six years carefully crafting a right to peace.<sup>246</sup> While world peace is a noble aspiration, and one to which the nations of the world should work, that declaration will do little to actually bring about peace. Such efforts only distract us and dilute our efforts.

Worse, our expansion of the body of “rights” actually harms our ability to enforce agreed upon rights. With over 1300 possible individual obligations (at least for European nations) and the notion that all rights are equal, we are

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243. *Id.* at 34, para. 8 (Joint dissenting opinion).

244. *Id.*

245. Smolin, *supra* note 48, at 1540.

246. Press Release, Spanish Soc’y for Int’l Human Rights Law, The United Nations Gen. Assembly Approves Declaration on the Right to Peace (Feb. 9, 2017), <http://www.world-psi.org/en/united-nations-general-assembly-approves-declaration-right-peace>.

unwittingly giving cover to repressive regimes to shield human rights abuses and even use the language of rights in a disingenuous way that works to undermine real rights enforcement.

Emilie Hafner-Burton has it right:

It probably sounds counterintuitive, but halting the production of more such laws, bureaucracy, and treaty bodies might pave the way for giving the international legal system more force and reach . . . . Thus, the first way to make reforms more feasible is to stop the system's swell of obligations and procedures. A pause would give reforms a better chance to work.<sup>247</sup>

Beyond just halting the growth of new human rights institutions and norms, however, we need to turn our attention to actual enforcement. This will mean placing our energy and focus on fewer and more core rights. We should put a spotlight on those rights that are most foundational to human life and dignity—and those that are crucial for functioning justice systems—and then work diligently for their enforcement. Aspirational goals are inspiring, but enforceability ought to be a key criterion for where we should put our efforts. So should protecting life and ending violence. A helpful start would be to focus on those rights declared by the Universal Declaration that are subject to actual monitoring and enforcement. Our time and efforts should be devoted to such fundamental rights as the right to life, freedom from slavery and torture, freedom from arbitrary arrest, free speech and religion, etc.

We need humility. Hubris thwarts and may ultimately destroy our work. We should instead focus on modest and achievable goals. In his book, *The Last Utopia*, Samuel Moyn presents a choice that confronts the movement: embrace either a utopian and maximalist political vision or a set of minimalist ethical norms. While the former may be inspirational and wonderful for rhetorical purposes, we need the latter to actually make an impact. In terms of our effort and financing, our focus must be on the enforceable rather than the purely aspirational.

Second, we should direct our efforts very intentionally toward enforcement of the rule of law around the world. As described above, we do not have a problem with too few human rights conventions with detailed norms. If anything, we have too many.<sup>248</sup>

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247. HAFNER-BURTON, *supra* note 65, at 130.

248. See Craig A. Stern, *Human Rights or the Rule of Law—The Choice for East Africa?*, 24 MICH. ST. INT'L L. REV. 45, 66 (2015):

The very commitment to securing a wide range of human rights contributes to the difficulty of securing the rule of law. Among the rights civil governments in East Africa pledge themselves to secure are broad positive rights, rights that oblige the governments by law to supply such goods as health, education, employment, and housing. The contingencies and qualifications entailed in these rights distinguish them from negative

In the same way, many nations have strong, well-tailored laws. Take human trafficking, for example. Five nations with large numbers of enslaved individuals include: India, China, Pakistan, Bangladesh, and Uzbekistan.<sup>249</sup> Each has a law forbidding purchase and sale of human beings.<sup>250</sup> India's law is excellent. Indian Penal Code (IPC) Section 370 "prohibits slavery, servitude, and most forms of sex trafficking and prescribes penalties ranging from seven years to life imprisonment, which are sufficiently stringent and commensurate with those prescribed for other serious crimes, such as rape."<sup>251</sup> The problem is that too often these laws go unenforced. And without enforcement, they are meaningless to the average citizen.

Nearly a decade ago, a United Nations report observed that "most poor people do not live under the shelter of the law, but far from the law's protection."<sup>252</sup> While poverty levels are lower than they once were, in 2008, approximately 2.5 billion people lived on less than \$2 per day.<sup>253</sup> And the poor are particularly vulnerable to lawlessness. Gary Haugen and Victor Boutros, in their book, *The Locust Effect*, conclude that the poor "are—by the hundreds of millions—threatened every day with being enslaved, imprisoned, beaten, raped, and robbed."<sup>254</sup>

Sadly, those people live in places where there are criminal laws and where police, prosecutors, and judges purport to enforce that law. Yet in many communities, law enforcement fails because the rule of law is absent.

How does this occur? Too often, police are a danger rather than a protection. In a large-scale study of poverty, the World Bank concluded: "Particularly in urban areas, poor people perceive the police not as upholding justice, peace and fairness, but as *threats and sources of insecurity*."<sup>255</sup> Why? In many places, a shortage of officers and low pay induce some to act corruptly. And while most police officers are dedicated to doing right, too many engage in extortion, sexual assault, and abusive detention.<sup>256</sup>

Effective law enforcement can fail at the level of prosecutors and judges, too. Sometimes the failure is simply a result of overwhelming and unmanageable caseloads. In Uganda, children sometimes sit in remand homes for years

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rights and yet, as explained above, at the same time may present a threat to negative rights. These factors likewise present a threat to the rule of law.

*Id.*

249. U.S. Dep't. of State, *Trafficking in Persons Report*, 80, 126, 205, 311, 423 (2017).

250. *Id.*

251. *Id.* at 205.

252. GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT* 16 (2014).

253. *Id.* at 39.

254. *Id.* at 17.

255. *Id.* at 83.

256. *Id.* at 82–83.

because the justice system is not equipped to process cases appropriately.<sup>257</sup> Children in such situations, even when guilty, can serve more time in pretrial detention than they would have served in total after a just sentence.<sup>258</sup> Even worse, where judges and prosecutors are underpaid and overworked, they can turn to extortion and other abuses of power. Haugen and Boutros note the impact this has: “Throughout much of the developing world, the prosecution segment of the justice pipeline has been allowed to gradually collapse into a nearly impenetrable barrier to meaningful enforcement of the law.”<sup>259</sup>

Where is human rights law in all of this? We can have the most compelling, well-written declarations and conventions, but they will be meaningless without basic law enforcement. Haugen and Boutros conclude: “There are billions for whom the promise of the human rights revolution remains a check they cannot cash.”<sup>260</sup>

Rather than creating more conventions, we need to focus our attention on combating violence through real, on the ground law enforcement. Some nations have done this with success. While it struggles with certain things, the nation of Georgia is an example of a nation that has made real progress on law enforcement by making the rule of law a priority.<sup>261</sup> Those associated with the human rights movement must have a critical role of coming alongside nations and supporting them in enforcing their own domestic laws.

The work needed to promote the rule of law in concrete ways in some aspects parallels changes that have taken place in the world of development economics over the past fifteen years. Like the movement to promote human rights, the movement to end poverty in the developing world has long been characterized by a strong utopian streak. In 1857, utopian socialist Robert Owen wrote:

that science which in its natural progress will ultimately develop the means by which, with the certainty of a law of nature, the human race shall be perpetually well born, fed, clothed, lodged, trained, educated, employed, and recreated, locally and generally governed, and placed to enjoy life in the most rational manner one arth, and to best fit them for whatever change may occur after death.<sup>262</sup>

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257. See generally JIM GASH, *DIVINE COLLISION: AN AFRICAN BOY, AN AMERICAN LAWYER, AND THEIR REMARKABLE BATTLE FOR FREEDOM* (Worthy Press 2015) (detailing the procedures of the Ugandan justice system).

258. *Id.*

259. HAUGEN & BOUTROS, *supra* note 252, at 141.

260. *Id.* at 167.

261. See WJP Rule of Law Index 2016, WORLD JUST. PROJECT 5 (2016), <https://www.worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>; Georgia: Rule of Law, USAID, <https://www.usaid.gov/georgia/rule-of-law> (last visited Jan. 10, 2019).

262. I.A. ROBERT OWEN, A SUPPLEMENTARY APPENDIX TO THE FIRST VOLUME OF THE LIFE OF ROBERT OWEN 5 (Supp. 1967).

Owen's grand vision is not much different from the one articulated in the 2000 United Nations Millennium Goals to "eradicate extreme hunger and poverty,"<sup>263</sup> and to "achieve universal primary education"<sup>264</sup> by 2015. MDG defenders such as Professor Jeffrey Sachs argued that extreme poverty could be ended within a short time if nations simply double their anti-poverty spending.<sup>265</sup>

In 2006, a year after Sach's bold call to end extreme poverty, NYU professor William Easterly released the very influential book, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good*.<sup>266</sup> He argued that utopian goals, while inspiring, were actually fruitless and even counterproductive.<sup>267</sup> Easterly described how the developmental economic community sought for years to reduce poverty through top-down approaches that ignored the realities and complexities within individual settings and nations.<sup>268</sup> That movement, like the human rights movement, demonstrated a hubris that championed lofty and noble aims, but frequently did not actually achieve them.

Encouragingly, in the last decade, there has been a move toward greater use of on-the-ground solutions empowering what Easterly describes as searchers—people who respond to concrete needs and provide concrete solutions—rather than planners who embrace a top-down approach. Indeed, as individuals and nations have followed focused and modest prescription, they have seen real successes on certain key issues. For example, Kenya saw a sharp drop in Malaria nationwide after undertaking a mass bed net distribution in 2006 and 2007.<sup>269</sup> The Kenyans used data from past efforts, both successes and failures, and catered the program to the specific context of their country.<sup>270</sup> As another example, starting in 2011, Nigeria spurred economic growth through a creative

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263. MDG 1: Eradicate Extreme Poverty and Hunger, MILLENNIUM DEV. GOALS, <https://www.mdgmonitor.org/mdg-1-eradicate-poverty-hunger/> (last visited Jan. 13, 2019).

264. MDG 2: Achieve Universal Primary Education, MILLENNIUM DEV. GOALS, <https://www.mdgmonitor.org/mdg-2-achieve-universal-primary-education/> (last visited Jan. 13, 2019).

265. JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 248–50 (2005).

266. WILLIAM EASTERLY, *THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

267. *Id.* at 367–68. Other scholars argue "[p]romising too much leads to disillusionment and can erode the constituency for long-term engagement with the developing world." MICHAEL CLEMENS & TODD MOSS, *CDG BRIEF: WHAT'S WRONG WITH THE MILLENNIUM DEVELOPMENT GOALS?* 1 (2005).

268. EASTERLY, *supra* note 266, at 367–69.

269. *Country Report: Kenya*, WORLD HEALTH ORG., [http://www.who.int/malaria/publications/country-profiles/profile\\_ken\\_en.pdf](http://www.who.int/malaria/publications/country-profiles/profile_ken_en.pdf) (last visited Jan. 13, 2019).

270. *Id.*

national business plan competition in which entrepreneurs were given \$50,000 to start a new business or expand an existing one.<sup>271</sup>

Professor Eric Posner summarizes the significant changes that have occurred in the development economic world this way:

Much greater attention is paid to the minutiae of social context, as it has become clear that a vaccination programme that works well in one location may fail in another, for reasons relating to social order that outsiders do not understand. Expectations have been lowered; the goal is no longer to convert poor societies into rich societies, or even to create market institutions and eliminate corruption; it is to help a school encourage children to read in one village, or to simplify lending markets in another.<sup>272</sup>

In his book, *The Endtimes of Human Rights*, Stephen Hopgood has a similar prescription for the human rights movement. He says that it is time to promote “human rights” rather than “Human Rights.” By “Human Rights” he means the top-down edifice of human rights enforcement: “a global structure of laws, courts, norms, and organizations that raise money, write reports, run international campaigns, open local offices, lobby governments, and claim to speak with singular authority in the name of humanity as a whole.”<sup>273</sup> He captures the hubris of “Human Rights” by describing it as: “a kind of secular monotheism with aspirations to civilize the world.”<sup>274</sup>

In contrast, by “human rights,” Hopgood means the activists on the ground who “combat [ ] violence and privation.” They raise awareness, put pressure on governments, and “demand their own freedom and justice in whatever language they prefer. These ethical and political claims are rooted in our shared interest in fair and equal treatment.”<sup>275</sup>

Human rights can be used tactically to help prevent torture, disappearances, or extrajudicial executions or to demand economic and social rights to food, water, and health care. It is a flexible and negotiable language. It does not “defend human rights,” it defends the person. It is a means, not an end in itself.<sup>276</sup>

Hopgood is exactly right that we should direct our efforts to on-the-ground protection of individuals from violence, oppression, and slavery. In doing so, we move from utopian dreams—and our own hubris—and put the protection of individuals front and center.

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271. David McKenzie, *Identifying and Spurring High Growth Entrepreneurship 2* (World Bank Group, Working Paper No. 7391, 2015), <http://www.documents.worldbank.org/curated/en/210491468178154286/pdf/WPS7391.pdf>.

272. Posner, *supra* note 33.

273. HOPGOOD, *supra* note 70, at ix.

274. *Id.*

275. *Id.* at viii.

276. *Id.* at ix.

Of course, as we engage in the hard, on-the-ground work of promoting the rule of law, we still need international enforcement bodies. The third and final recommendation is that in every international organization, we must insist on transparency and accountability, with checks and balances. The discussion above analyzed two human rights enforcement bodies in depth, the Human Rights Council and the ECtHR. The Human Rights Council desperately needs meaningful membership criteria. There should be a minimal standard of human rights compliance before a nation may stand for election. Election should be done by a two-thirds vote and clean slates should not be permitted. The Council rightfully should be a respected and effective instrument of human rights enforcement. It cannot be so without fundamental changes like these. We need to restructure the Human Rights Council before it suffers the same humiliating end that came to the Human Rights Commission before it.

The ECtHR must embrace humility and accountability as well. The judges must recognize that they are not the platonic guardians of European social policy. Above all, they need to exercise the discipline of faithfully interpreting and abiding by the Convention's text.<sup>277</sup> It is the text to which 47 nations have bound themselves, not ever-changing social trends as perceived by the current set of ECtHR judges. It is the text alone that embodies any consensus that exists. By embracing an evolutive approach rooted in trends and consensus, the ECtHR is undermining its credibility and the ultimate enforceability of the key rights protected under the convention.

Some will object that such a move would prevent the Council of Europe from responding to cultural changes and will leave human rights unprotected. But this is not the case. European states have now ratified 16 protocols to the European Convention on issues ranging from changing ECtHR procedures to banning the death penalty and articulating right to liberty of movement and freedom to choose one's residence.<sup>278</sup> This is not a situation where an amendment process exists in theory but is functionally unavailable. Yet despite the receptivity of European states to new protocols, the ECtHR continues to enforce unratified norms through judicial fiat.

Reform is needed for all international enforcement bodies, not just the two highlighted. In any international organization, including and perhaps especially those enforcing human rights, there must be institutional commitments to transparency and accountability. For instance, there must be independent oversight and, as Anthony Gallo has urged regarding the U.N. OIOS, there must be protection for whistle blowers. Here as well, good motives are not enough. We need to work diligently to create organizations that will fulfill the purpose for which they were created.

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277. Walton, *supra* note 213, at 998.

278. European Convention, *supra* note 180, at 40–49.

#### IV. CONCLUSION

The human rights movement is fueled by noble aspirations. It has achieved much in the confrontation of evil and the promotion of fundamental rights around the world. But in addition to confronting the evil in the world around us, it must also confront the evil within. In particular, it must abandon hubris and embrace humility. That includes humility in our aspirations and humility in the way we operate our organizations from day-to-day. It means focusing attention on fewer and more core rights—those that are clear, enforceable, and protect individuals from violence. It means implementing the rule of law so that the rights we declare are enjoyed by people on the ground. And it means creating human rights organizations with checks and balances that model transparency and accountability. In so doing we will better achieve the goal of protecting the rights and dignity of all humans, the purpose for which the movement began.

