Introduction

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When the Universal Declaration of Human Rights in 1948 proclaimed the universality of human rights, this was as much a projection of its future path as a statement of its then status. Human rights has since become as fundamental to political or legal action as mathematics is to physics; a common language to be applied to various problems or situations that arise. There has been a resulting exponential growth of human rights, to the point where it is inextricable from questions of democracy, state legitimacy and state co-operation. This complexity of human rights has seen a fracturing of its origins, motives and influences, and it struggles to be contained within the broad rubric of the UN international legal order or its regional counterparts. The edges of all of the individual rights-specific legal instruments are bursting with new interpretations or applications, as meaning is expanded to draw in wider issues or unforeseen consequences.

The discipline has seeped into 'such exotic and highly specialized'[1] areas of knowledge as international refugee law, minority rights, indigenous rights, children's rights, the international law of armed conflict and individual criminal responsibility, which all have their roots in the protection of the individual. The danger is that an ever-increasing corpus of rights will devalue the existing standards, hard-fought and hard-won, while adding meaningless layers and confusing advocates who seek simple expressions of state responsibilities. In this regard, the expanding range of actors, both state and non-state, has been the almost defining concern of the past two decades of rights scholarship and activism. Corporations among others have seen the need to respond to the barrage of calls for their engagement with the international human rights system.

It is into this cauldron that the present volume seeks to add a number of contributions. They are, like human rights discourse itself, at once

[1] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, para 4.

broad and specific, interdisciplinary and subdisciplinary, ambitious and restrained, technical and political. In other words, they reflect the idiosyncratic nature of human rights, as it has grown in all directions at the insistence of advocates or practitioners, while others try to drag it back to its original goals, whatever they may be. The book is the outcome of one meeting in one human rights centre in one country, and is something of a snapshot of the ability of human rights to stretch across genres.

The aim is to bring disparate ideas under the theme of forgotten rights, with the purpose of mapping future directions. The changing political, economic and legal landscape requires re-interpretation of the fundamental norms that govern international human rights, including the changed emphasis of rights holders and rights bearers and the remedies that can be provided. The ideas that informed the standard-setting period in international human rights law throughout the twentieth century are no longer consistent with contemporary developments, as rights become key to global models of the rule of law. The collection seeks to identify how the past should be re-calibrated to fit with the present; and how the future might look as we re-evaluate the tools of international law.

A common thread within all the pieces is the need to improve the world, as human rights, even in its theory, must always have a discernible measure of effect. The discipline of human rights concerns itself with the dispossessed or the marginal, and represents an attempt to challenge the traditional power structures or privileges within the legal structure. As such, human rights itself is susceptible to majority viewpoints, and within individual rights or within groups of rights, certain elements are emphasized at the expense of others.

Therefore this original collection of 16 essays is exploratory, and seeks to map a future path for human rights. It brings together works which highlight overlooked or forgotten rights and concepts, and contributions which suggest a new course for established rights, as the present century moves into its second decade.

The collection opens with a paper by **Josh Curtis** and **Shane Darcy** on Article 28 of the Universal Declaration of Human Rights (UDHR), the right to a social and international order for the realization of human rights. They ask whether Article 28 has been utilized since 1948 as a means to challenge structural barriers preventing the fulfilment of human rights, given that it has not been translated into legally binding norms like other key provisions of the document. Wider links are made between the aims of Article 28 and the requirements of other, related expressions of international law, such as the Declaration on the Right to Development and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. In mapping the drafting of this 'intriguing provision',

the authors highlight the central importance of the concept of international cooperation as an organizational principle of international law. In essence, they see the call in Article 28 for an overarching framework for the realization of all other human rights.

William A. Schabas charts the origins of the right to peace as a corollary of 'freedom from fear', one of the four freedoms proposed by Franklin D. Roosevelt in 1941. He outlines the subsequent marginalization of the right despite its place in the UDHR of 1948, outlining how the growth in two fields that are closely related to human rights law, namely international humanitarian law and international criminal law, may have helped push the issue of peace to the periphery. The successful adoption of amendments to the Rome Statute of the International Criminal Court at the Kampala Review Conference in June 2010, moving the crime of aggression back to centre stage, has added momentum to the importance of peace within the human rights vision. The author criticizes the 'back seat' role taken by NGOs in the adoption of the amendment clarifying the definition of aggression and the conditions where the court can exercise jurisdiction over it. Even though the matter is fundamental to human rights protection, the international NGOs largely eschewed the issue to protect their apolitical character.

Kjell Anderson takes a broader approach to the right to peace, arguing that it is much more than the absence of aggressive war. He sees the emphasis on international conflict stemming from a state-centric model of international relations that has predominated for centuries. Consequently he focuses instead on non-international armed conflict, setting out how the state can violate the right to peace of its citizens through the capricious use of force and how non-state actors may also violate the right to peace through the illegitimate use of force. He also makes the important point that there are reasonable exceptions to the right to peace, including the protection of the rights of others, an idea that is expanded on in the pursuit of a meaningful interpretation of the concept. The aim must be a *jus ad bellum* for intrastate violence that does not asymmetrically remove rights from non-state actors but rather limits the recourse to armed force by states and non-state actors alike.

David Keane completes the triad of contributions on the right to peace by focussing on the role of UNESCO, whose constitution sets out the idea in its preamble that 'since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed'. He analyses the initiatives that culminated in the 1997 UNESCO Declaration on the Right to Peace, an attempt to codify the concept that was ultimately rejected by states which perceived that the organization was overstepping its mandate. Parallel to this, the UNESCO-led Seville Statement on Violence 1986,

which set out opposition to genetic theories of violence which imply that war is an inevitable product of biological or genetic behaviour, has seen renewed interest in line with developments in behavioural psychology. Retrospectively, UNESCO seems to have accepted the arguments that it overstepped its mandate, but the culture of peace at present represents a withdrawal that belies its historic contribution to the discussion on what has been termed 'mental disarmament'.

Shannonbrooke Murphy opens with a *tour d'horizon* of the roots of the right to resist, seeing its manifestation in writings from the Athenian Decrees of Demophantus and Eucrates, via de Vattel and Grotius, to the writings of twentieth century Marxist scholars. Her piece is premised on the fact that this right has clearly fallen into disfavour, despite the urgency of the need for explicit recognition in the past. The piece is shadowed by the events of the Arab Spring uprisings, which appear to support the argument that the right to resist has its place in the lexicon of international human rights, whether as an hortatory statement or indeed as a legal right to be enforced. The chapter is a closely reasoned, technical examination of a right that has an identifiable pedigree in international law, that has been cited whether it exists or not, and that has increasingly been seen by a variety of actors as critical to the enforcement of all other rights.

Éadaoin O'Brien extends the scope of the collection from the living to the dead, with her examination of the forensic exhumation of mass graves and the legal consequences as experienced by the international criminal tribunals. Inquiries into violations of international criminal law rely on the forensic sciences for evidence on the nature and pattern of crimes committed, and as a result the application of medical and forensic sciences in the investigation of violations of international humanitarian law have come to receive increasing attention by both practitioners and academics in the past number of years. In investigating the nexus between international forensic investigations conducted under the auspices of international criminal tribunals and the rules of international humanitarian law regarding the dead, she sees a potential symbiotic relationship that can satisfy the requirements of the legal system and broader societal needs.

Ray Murphy looks at the consequences of the Israeli occupation of the Golan Heights. The chapter examines the action of the Israeli authorities and argues that certain practices by the Israeli Defence Forces constitute war crimes, which in some cases may amount to grave breaches of the Fourth Geneva Convention governing the protection of civilians. The theme of the piece is the relation between geography, human rights and humanitarian law protections, with a strong sense of the need to understand the complexity of territory in order to arrive at conclusions and remedies. In this regard, the detail involved in establishing the problematic

is seen in the contours of the restrictions and violations imposed on the people of the sub-region.

Leila Nadya Sadat provides a glimpse of the machinery behind the elaboration of a potentially major instrument of international law. She highlights how the adoption of the Rome Statute of the International Criminal Court did not obviate the need to fill the lacunae in the legal framework regarding the commission of atrocity crimes, most of which are crimes against humanity and not genocide or war crimes. In 2008, the Whitney R. Harris World Law Institute launched the Crimes against Humanity Initiative, with the aim of drafting a convention on crimes against humanity that will fill the gaps left by the provisions of the Rome Statute. This chapter provides insights into the complex drafting phases that finally establish the principle of state responsibility as well as individual criminal responsibility for crimes against humanity.

Yvonne McDermott assesses the workings of the International Criminal Tribunal for the former Yugoslavia in its approach to the principle of double jeopardy, a rule that has inspired juridical debate at the domestic level but that has not received the same attention at the international level. With a close analysis of relevant case law, she argues that the ICTY has overstepped the boundaries of when a retrial can be ordered on appeal, which may lead to a dilution of the double jeopardy concept in the future. The conclusion is that the Tribunal has stretched the limits of retrial on appeal to such an extent as to find cause for reopening the case when the prosecution is merely unhappy with the outcome, a result that implies the need for greater introspection in terms of prosecutorial strategies at the international level.

John Reynolds looks to the drafting of the *apartheid* convention and asks whether there is scope for its application outside of the South African context. In this regard he undertakes a review of the role *apartheid* has played in the development of human rights, seeing in its prohibition the enunciation of principles which have become central to the application of international law standards. The aim is to caution against restricting *apartheid* to the past, given that it was a form of governmental sanction and practice that can be read into contemporary situations. The example of Palestine and Israel is apparent; other examples include Fiji, between Indo-Fijians and indigenous Fijians, and India's caste system. The chapter defers on whether all these situations amount to *apartheid* or not, instead concentrating on the idea that *apartheid* is not confined to one context, and as a legal lens in which to view control of peoples, is essential to our understanding of human rights, past and present.

Nicholas McGeehan echoes this approach, in questioning a past human rights violation considered 'solved': that is, slavery. He carefully

deconstructs the case that slavery can be confined to an historical practice termed 'chattel slavery', and looks to the drafting of the conventions against slavery for answers as to how this international practice can be seen in contemporary situations. The chapter distinguishes between a number of key interrelated concepts, including slavery, forced labour and trafficking, and with an eye on labour practices that represent a high level of control of the individual, such as that witnessed with migrant workers in the Gulf region, he concludes that we cannot say that slavery does not exist anymore. He subsequently looks to the remedies provided in the past conventions and the present expressions of human rights standards, and expresses concern that the law is inadequate in its ability to tackle large-scale exploitative practices that are trapping millions through a combination of debt and other control mechanisms.

Peter Fitzmaurice traces the history of refugee law, from the early *laissez-faire* attitude to immigration to the birth of the 'refugee problem' in Europe in the early twentieth century. He examines the first international refugee legal instruments, with particular reference to the 1933 Convention Relating to the International Status of Refugees. The 1933 Convention had some major limitations, which paralysed its effectiveness in protecting those fleeing from persecution in World War II. Despite its shortcomings, the author argues, there are some interesting aspects to the 1933 Convention which suggest that we should not consign it to the annals of history. These include the fact that the inter-war refugee legal instruments were predecessors to today's international regime for the protection of civil and economic rights; the means in which the Convention established a mechanism through which individual states could supervise human rights violations in other countries, representing a shift from the collective supervision mechanisms that preceded it.

Daragh McGreal provides an innovative application of law and economics to the treaty-drafting process. This is long overdue given the predominance of law and economics theories in some domestic jurisdictions. The arguments in relation to efficiency, including the desire for an optimal number of state ratifications, are factored into drafter decision-making. The assumptions this involves are outlined, as well as the merits of the approach. He notes that combining the disciplines of law and economics with human rights law might initially seem a peculiar concept, with economic tools to analyse laws appearing anathema to the human rights ideal of advancing the security and liberty of individuals. Yet the chapter specifies how there is much merit in using basic economic tools to assess how drafting decisions and ratification decisions are intrinsically linked, ensuring that the approach will be of major interest to those involved in the treaty process.

Aoife Daly asks whether voting rights can be extended to under-18s. While the aim of the chapter is clear, in the course of her analysis as to why voting rights are not extended to under-18s, she uncovers the nature of our assumptions in terms of 'accepted' legal rules. The author unravels the manner in which a commonly held rule can gain the guise of a legal orthodoxy, and argues that it is no longer sufficient to assume that under-18s are incapable of contributing to decision-making processes. Recent events such as the summer riots in London, as well as the role of youth in the Arab Spring, support her views that the disenfranchisement of youth may not be as rational as it is set out to be. In particular, the context of children's rights and the struggle to have them effectively implemented by adults forms a backdrop to the chapter.

Majella Ní Chríocháin rightly asserts that of the five types of rights identified in the UDHR and given legal force in the covenants – civil, political, economic, social and cultural – cultural rights have long been neglected in the discourse. They have suffered from being bundled as economic, social and cultural rights, with the consequent privileging of economic and social rights as they vie for attention against the better protected civil and political rights. Furthermore the spectre of 'cultural relativism' has ensured their demotion. However the chapter perceives a new era for cultural rights, inspired by three key developments: the Committee on Economic, Social and Cultural Rights' General Comment 21 on the right of everyone to take part in cultural life; the appointment of an Independent Expert in the Field of Cultural Rights by the UN Human Rights Council; and the Declaration on the Rights of Indigenous Peoples, which has seen renewed focus on cultural rights as an essential demand of indigenous peoples. The importance of these is highlighted in the idea that cultural rights are fundamental to the survival of minorities and indigenous peoples.

Megan Carpenter takes an issue of commercial law, intellectual property, and gives it a human rights spin. The characterization of intellectual property as a means of protecting corporate or commercial interests has meant that its potential for contributing to human rights protection has been underplayed. The chapter looks to the sources of intellectual property rights in the international human rights treaties, presenting possibilities for a more inclusive approach. In particular, Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, and its authoritative interpretation by the Committee on Economic, Social and Cultural Rights, provides a legal grounding. That the scope of protection of the moral and material interests of authors provided for in Article 15 does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements, provides

a departure point for the discussion on the expansion of the range of intellectual property applications.

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