1. Human rights, liberal democracies and challenges of national security

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HUMAN RIGHTS AND LIBERAL DEMOCRACY

Since the Universal Declaration of Human Rights (UDHR)¹ was adopted in 1948, people have increasingly defined their relationships with the state in the language of human rights. It is through the UDHR and the range of treaties adopted in its shadow, for example the 1966 International Covenant on Civil and Political Rights,² that people have navigated injustice on both large and small scales. These rights have subsequently been further specified and developed in regional human rights documents, such as the European Convention on Human Rights,³ and serve as the basis for the drafting and interpretation of constitutional rights provisions or bills of rights across a diverse variety of states. It is therefore accurate to understand human rights as a highly legalized field with no shortage of hard law to which people across the world can point to as a source for articulating how a state is interacting with its people, for better or worse. Yet human rights practice and discourse is not the sole realm of lawyers; it is a field to which politicians, academics, activists and the public also contribute in a myriad of ways.⁴ In fact, since the idea for the UDHR was

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UN Doc UNGA Res 217 A(III).

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

⁴ See discussion in Kasey McCall-Smith, 'The Proliferation of Human Rights: Between Devotion and Calculation' in Jan Wouters, Koen Lemmens, Thomas Van Poecke and Marie Bourguignon (eds), *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs* (Edward Elgar Publishing 2020) ch 6.

first posited, there are few aspects about the development of human rights that have not been largely driven by politics and international relations and the local and global issues to which these pursuits constantly respond. As a result, a particular legal human rights instrument reflects the socio-political environment of the particular period of its creation. As will be outlined below, for the purposes of this book these different periods of development are framed as phases of transition and contextualized in light of specific socio-political backdrops, particularly in the era of the current millennium.

This chapter delivers a brief overview of the way in which human rights and national security intersect to challenge the international human rights system in a variety of ways. To do so, it sets the stage for developing key elements of the transitional phases of human rights that frame this book. The next section presents a brief chronology of the human rights system that underpins the analysis found throughout the subsequent chapters. It considers how human rights became synonymous with liberal democracy and why this in and of itself presents a range of challenges when considered in the context of global peace and security. This is followed by a discussion of how human rights quickly transitioned from a general acceptance period to successive periods of uncertainty driven by counterterrorism discourse. In the fourth section, an overview of how the contributions to this book map onto this background is given. The chapter closes by highlighting the key themes running throughout the volume.

MOVING HUMAN RIGHTS FROM A DECLARATION TO A NATIONAL SECURITY COUNTERPOINT

Following the creation of the UDHR, as the concept of human rights began slowly to spread across the globe – from the very public battlegrounds for mass human rights recognition and protection to the small places close to home – incremental improvements in the lives of everyday people came about. There appeared ‘glimpse[s] of the rule of law above the nation-state’.⁵ It was not until years later that the comprehensive architecture of the international human rights system began to emerge more rapidly with the development of regional and international human rights systems and corresponding supervisory mechanisms, though for decades the project was largely driven by the United Nations (UN).⁶ Only with the adoption of the first human rights treaties in the mid-1960s were processes put in place to monitor states’ human rights obligations, though it would be another decade before many of these mechanisms and

⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 45.

⁶ Ibid 45–6.

processes began to function as the treaties entered into force.⁷ Furthermore, international organizations and agencies were increasingly established to serve as watchdogs, capacity-builders and all-around human rights promoters of both general and rights-specific campaigns.

While this change happened more quickly in some countries than in others, the latter half of the twentieth century witnessed a massive migration to liberal democracy as the preferred form of governance.⁸ Much of this migration was cajoled through the persistence of human rights advocates on behalf not only of the people in these rapidly changing states, but also as the governance preference driven at the international level by the UN and its most powerful Member States. This preference was based on the understanding that human rights as advocated by liberal democracies would support the maintenance of international peace and security.⁹ To appreciate the preference for liberal democracies in this sense it is important to understand the content of the term used here. Liberal democracies are characterized by the institution of the state, the rule of law, the recognition of individual rights and freedoms, and democratic accountability; crucially, the role of the state is 'to keep the peace, defend communities from external enemies, enforce laws, and provide basic public goods', each of which has a direct bearing on the delivery of human rights, while the rule of law and democratic accountability keep the state's power in check.¹⁰ During the initial phase of active human rights development, therefore, human rights were a core element in the foundation of liberal democracies, and in the articulation of their relationship with other states and institutions at the international level.

In the past two decades, however, the interdependence of liberal democracy and human rights has been progressively eroded. In many Western liberal states human rights have come to be presented and understood as unjustified constraints on the policies and actions of the democratically elected institutions of government, and thus in tension with their core democratic values. The main driver for this transformation has been concerns about national security,

⁷ Convention on the Elimination of all forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969). The ICCPR and International Covenant on Economic, Social and Cultural Rights did not enter into force until 1976 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸ Francis Fukuyama, 'Why is Democracy Performing So Poorly?' (2015) 26 *Journal of Democracy* 11, 11–12.

⁹ See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter). This point is often discussed under the banner of democratic peace theory; see for example, Michael W Doyle, *Liberal Peace: Selected Essays* (Routledge 2011); Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

¹⁰ Fukuyama (n 9) 12.

particularly in the context of terrorism. Again, human rights and national security concerns were not always necessarily understood as competing priorities, or as being in tension. As the human rights framework developed, state obligations moved from negative obligations not to violate human rights to positive obligations to protect rights, which included the protection of the life and security of individuals from abuse from third parties, ranging from private citizens to transnational corporations to terrorist organizations.¹¹ National security policies and measures were thus, at least in part, a reflection of states' human rights obligations. It was only when certain states moved to pursue their national security policies and actions in ways that pushed the boundaries of, or openly infringed upon, established human rights norms and standards that the rift between human rights and national security arose.

At the same time, human rights became increasingly institutionalized in the international arena. Over the years, national security has infiltrated a vast range of legal and political studies, but it is not clear at which point this became the overarching, rather than an incidental, concern. Nor is it clear at which point national security became the overriding concern that justified the deep intrusion into or outright suspension of human rights. Was it the terror attacks of 11 September 2001 (9/11) that marked the moment when this change occurred? If this was the point at which the change occurred then it *could* explain the increased use of questionable counterterrorism measures, such as extraordinary detention regimes, targeted killings of suspected terrorists or the use of secretive courts by formally archetypal liberal democracies. Alternatively, it could be argued that the stronger focus on national security discourse is simply a new form of imperialism whereby more powerful states – predominantly liberal democracies – impress their global security approaches on less powerful states. This reasoning aligns in many ways with similar arguments that Western states often use human rights as a pretext to pressure less powerful states.¹² However, perhaps the perceived state infatuation with national security is really not infatuation at all? The question of when national security became 'the' major and overriding concern for states rather than 'a' concern will no doubt depend

¹¹ See *X and Y v the Netherlands*, Ser. A No. 91 [1985] 8 EHRR 235. In *Velásquez-Rodríguez v Honduras* (Merits), Ser. C, No. 4, (1988) [172]–[175], the Inter-American Court of Human Rights opined that the failure to prevent harm by a third party triggered the international responsibility of the state; reaffirmed *Ximenes-Lopes v Brazil*, Ser. C, No. 149 (2006); Case No. 55/96, *SERAC and CESR v Nigeria*, 15th Annual Report of the ACHPR [2002] 10 IHRR 282 (2003). See Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors Through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 225.

¹² See, for example, Connall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart 2020).

on a multitude of factors, such as a state's experience with terrorism or the role it has played in international national security debates.

As will be detailed in the chapters of this book, it is clear that the realization of human rights inside individual states is impacted by national security concerns in a number of ways. This impact, in turn, shapes the way in which states engage with national security discourse on the international level. It is therefore important to consider why national security features so prominently across both inter- and intra-state governance processes, as these processes speak directly to the relationship between a state and its people. For example, a state's experience of terrorism may shape the way in which suspected terrorists are treated in the national criminal justice system or the alliances the state seeks at the international level. More so than any field of law, human rights have shaped these relationships in an array of simple as well as extremely complex ways. While the legal instruments that outline states' human rights obligations appear to be black and white, even small, almost imperceptible variations in the actual practices of duty-bearing states can have just as great an impact on the enjoyment of human rights as large-scale assaults against individual freedoms. The international community, human rights organs and human rights advocates have aimed to reconcile the variations in practice through evolutive interpretation of human rights norms developed through judicial and treaty body practice. In many ways, this has been a successful pursuit, even if sometimes contested, and has resulted in the steady progression of human rights protections based on a widely understood common core of fundamental human rights. The common core language of human rights offered by the UDHR, for example, is accessible to a vast proportion of people across the globe and every state in the world is party to at least two of the core UN human rights treaties.¹³ Therefore, at the very least, people and states can point to a common international document to define minimum human rights guarantees. None of these legal human rights documents, however, speak directly to the issue of national security. As a result, this raises countless questions about the relationship between national security and human rights within and among nation-states.

¹³ The UDHR is one of the most widely translated documents in the world, having been translated into 523 different languages, most recently including Rohingya; see UN, Office of the High Commissioner for Human Rights, UDHR Translation Project <https://www.ohchr.org/EN/UDHR/Pages/SearchByLang.aspx> accessed 28 April 2020. For ratifications by state, see UN Treaty Database, Ratifications, https://treaties.un.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=5&Lang=EN accessed 28 April 2020.

THE SWIFT SHIFT IN HUMAN RIGHTS

Even with the historic, arguably mutually reinforcing relationship between human rights and liberal democracy, the reality that the world is in a constant state of transition suggests that a human rights shift was a foregone conclusion. What was not foregone, however, was where and when that shift would materialize or what event might define its beginning. Just after 9/11, Michael Ignatieff asked ‘whether the era of human rights has come and gone’,¹⁴ in light of governments all over the world using the threat of terrorism as an excuse to curb some of the most fundamental human rights. Though this book is not about 9/11, it is a point on which we, as editors, agree – in line with countless other academics – that many liberal democracies began to demonstrate less enthusiasm for and more scepticism towards the international human rights system. ‘We are often told that September 11 “changed everything.” But this is a sentiment more repeated than explained.’¹⁵ In many ways, this book is an attempt to explain a few of the ways in which human rights discourse changed after 9/11. However, it does not respond solely to the terror attacks of that day or the knee-jerk responses that flowed from the attacks. Instead, it considers key issues that niggled the human rights system from its very beginning, from the polarized world that developed as the ink dried on the UDHR and the difficulty that an entirely state-centred system would have in the face of millions, and then potentially even billions, of individual human beings, each with a claim on this system.

The challenges that have arisen as a result of compounding realities are genuine. While a beacon for a new era in which individuals were protected from the state, the hubris of the UDHR faded so quickly after its adoption that states were able to relax into the relative ease of no human rights enforcement. This changed in the 1970s as successive human rights treaties were adopted and their supervisory mechanisms began to operate. Simultaneously, the promise of self-determination and the disintegration of old colonial empires rapidly introduced dozens of new states into the global order through its proprietor, the UN. With more states came more bureaucracy and new treaties relating to different vulnerable groups, including women and children, were introduced. Rather quickly, the UN human rights treaty system became the most widely subscribed international club other than the UN. With the fall of the Berlin Wall in 1991, the Cold War ended and the full force of democrati-

¹⁴ Michael Ignatieff, Editorial, ‘Is the Human Rights Era Ending?’ *The New York Times* (New York, 5 February 2002).

¹⁵ Joseph Margulies, *What Changed When Everything Changed? 9/11 and the Making of National Identity* (Yale University Press 2013) 5.

zation was unleashed across formerly communist strongholds. All the while, human rights were circulating in and around the political negotiations, social movements and legal actions to ensure right over might.

The end of the Cold War and thawing of East-West relations led to a brief period in history of increased recognition of human rights in international law and politics. For instance, George Bush Sr proclaimed the emergence of a 'New World Order' that provided guidelines for a more ethical US foreign policy with emphasis on collective action to protect human rights. This also included plans for strengthening the UN as a multilateral institution aimed at protecting human rights as well as instances of humanitarian interventions to 'save strangers'.¹⁶ The events of 9/11 had a profound effect on human rights in national policy in a number of states and this seeped into international relations. Established international human rights standards increasingly took second place behind national security considerations. Advances in international human rights that had been made over the past decades were suddenly called into question for the need to emphasize national security, especially in the context of terrorism. Often, swiftly adopted counterterrorism measures had far reaching consequences for civil liberties and some of the most basic human rights. As a result, a number of human rights were brushed aside in the name of necessity to ensure the protection of national security against new and unprecedented threats.

Since 9/11, national security has grown from being predominantly terrorism-focused to include any number of formerly unrelated phenomena, from irregular migration to textbook criminal activity. As the label of national security is more liberally applied, the objects of those labels have increasingly been associated with terrorism. Therefore, there is a growing need to assess how the rule of law and democratic accountability are keeping the exercises of state power in check. The analyses in this book contribute to this task.

CONTRIBUTING TO THE UNDERSTANDING OF THE ROLE OF NATIONAL SECURITY IN HUMAN RIGHTS TRANSITIONS

This volume follows the 2018 gathering of the Association of Human Rights Institutes (AHRI), which came together under the theme 'Renewing Rights in Times of Transition: 70 Years of the Universal Declaration of Human Rights' and was hosted by the University of Edinburgh Law School. It tracks the framework presented by Professor Francesca Klug, OBE, in her opening address,

¹⁶ See, for example, Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press 2000).

where she suggested that the world has experienced several transition periods since the adoption of the UDHR. These include polarization (during the Cold War), acceptance (following the end of the Cold War), co-option (following 9/11) and ejection (the current phase). The book takes as its starting point the adoption of the UDHR and some of the key issues that were contentious during the drafting and adoption of the Declaration and remained so throughout the polarization period until this day. Along the lines of Klug's first identified transition period, one can trace how these initial difficulties with the system in the rapidly polarized world were exacerbated across the decades in an almost imperceptible way. This is not to say that they were not acknowledged, but that these difficulties triggered degradation of key components of the human rights protection system, including universal buy-in from the global community, that ultimately coalesced in different ways to shape the use of human rights at different stages in the development of today's global community.

Notably, the book focuses on understandings of human rights in liberal democracies that were previously viewed as the proponents and protectors of human rights. These same liberal democracies also encouraged, prodded and pushed a global transition into the human rights acceptance phase. While non-democratic states have also featured in the developing history of human rights, it is the individual and collective politics of states such as the United States, the United Kingdom and other Western European states that have driven human rights agendas in response to their perceptions of non-democratic states, especially in the past 30 years. Thus, liberal democracies have shape-shifted their use of human rights on the global stage in order to externalize internal agendas. While not an unexpected observation, a number of the chapters in this book offer evocative insights into the ways in which law is used to manipulate both intra- and inter-state relationships when national security and human rights intersect.

The book is structured into three parts. Part I contextualizes human rights goals, structures and challenges in the immediate post-UDHR era. It provides not only the architecture of transition eras examined in the two subsequent parts but also gives theoretical and doctrinal analyses of the challenges of the UDHR from its inception. Part II instrumentalizes those challenges raised in Part I through three intra-state narratives, demonstrating how highly rhetorical national security discourse has reshaped law and policy debates. Focusing on the co-option and ejection phases identified by Klug, these chapters explore the ways in which liberal democracies renegotiate their international human rights obligations to suit their shifting political agendas. Part III explores how co-option and ejection have manifested in law and policy debates beyond the state. In particular, the four chapters draw out challenges raised by the human rights system itself as well as those broadly inherent in international law as a general governance regime. Each of the parts is presented more fully below.

Human Rights Transitions – Theoretical Debates and Doctrinal Challenges

The opening chapter of Part I, by Francesca Klug, sets out the overarching basis of understanding for the transition phases of human rights in the post-UDHR system and the issues that have challenged its survival since the adoption of the UDHR. As suggested by its title, ‘Key challenges to human rights in democracies at a time of transition: Where to now?’, the chapter develops the four transitional periods – polarization, acceptance, co-option and ejection – before elaborating how the key challenges to the human rights system are not new. Klug identifies the key human rights challenges of bureaucracy, legalization, irrelevance, nationalism and globalization (the ‘BLING’ framework) as the long-standing problems that have contributed to the ease with which we have reached the ejection period of human rights. She argues that by addressing these problems the international human rights system might contribute to a return to a path more akin to the cosmopolitan ideal that the system was designed to achieve. The two chapters that follow elaborate these problems even further while exploring larger state-focused issues relating to despondency among states and the limitations of the state-centred system, both illuminating tension points in the human rights system that have existed since its inception.

In Chapter 3, ‘The forgotten principle of *fraternité*: Re-interpreting the last three articles of the Universal Declaration of Human Rights’, Yota Negishi theorizes the quickly glossed over and forgotten principle of *fraternité* embedded in the final three articles of the UDHR. Negishi proposes two distinct but mutually related interpretations of the forgotten principle of *fraternité* that are reflected in the UDHR Articles 28–30, which – he argues – embrace democratic values and open up a much more realistic view of the UDHR. He finds that *fraternité*’s legal and political aspect, *fraternité naissante*, functions in practice to maintain a homogeneous society of the Self to be included, in which collective rights are invoked against the Other to be excluded therefrom. He argues that this contrasts with the principle’s pure, absolute and unconditional aspect emancipating brothers from their birth, *fraternité dé-naissante*, which has the potential to blur the boundary of the community of citizen-subjects for welcoming alterity in the democracy ‘to come’. Negishi concludes that in order to successfully project an image of community into current understandings of the UDHR (and the treaties to which it gave rise), it is necessary to reappraise the traditionally liberal image of human rights as solely focused on individuals’ rights.

Moving on from theoretical reinterpretations of the UDHR, in Chapter 4 Mátyás Bódig explores ‘Human rights protection and state capacity: The doctrinal implications of the statist character of international human rights

law'. In this chapter, Bódig analyses interactions between constitutive political ideals of democracy and the rule of law with human rights law and argues that the resulting political dynamic frames human rights protection as issues of state capacity. Looking at the headscarf cases in the European Court of Human Rights (ECtHR), he questions whether international human rights law is characterized by a growing tension between the original, holistic vision of the UDHR and the increasingly explicit statism of human rights jurisprudence. He advocates for research to be more open and reflexive about the underlying statism of existing human rights mechanisms in order better to understand the interplay of political ideals and human rights norms. Ultimately, Bódig queries whether the UDHR is destined to remain a monument to a regulative ideal about human rights that a state-centred international order cannot quite live up to.

Part I, thus, develops the key reference points for the remainder of the book. First, it demarcates the transitional phases that delivered us to the present legal and political approaches to international human rights law. Second, it presents the theoretical conundrum underpinning a system of rights and responsibilities designed not only for individuals but also for the preservation of democracy, which can present mutually exclusive goals. Finally, it demonstrates the constant tension raised by a human rights system that is fundamentally state-centric though defined by individuals needs and demands on states that may, or may not, respond in line with the international standards to which they have committed.

Co-option and Ejection of Human Rights in Liberal Democracies

Part II explores how states have utilized co-option and ejection of human rights language and argument over the past two decades. Tracking Klug's thesis that a new transition phase was brought in by 9/11 – the co-option phase – the chapters in Part II provide three distinct ways in which national security discourse has reshaped states' relationships with international human rights law. In different ways, each chapter speaks to Negishi's query about the forgotten principle of *fraternité* and how this principle, when applied, might affect a seemingly anti-human rights position for the sake of democracy. The chapters revolve around the role that national security has played in driving competition between individual rights and the rhetoric-laden, democracy-reinforcing approaches to national security.

The first chapter in Part II, 'US counterterrorism and the denial of fundamental rights from torture to fair trial', by Kasey McCall-Smith, unpicks US co-option of human rights language to create a 'right to security' that simultaneously ejects certain fundamental rights, namely the prohibition against torture, while seriously degrading others, including the right to fair trial. The

chapter first considers the post-9/11 rhetoric-charged public and secret counterterrorism campaigns spearheaded by the Bush administration, both of which cemented a US collective 'right to security' at the cost of degrading the rights of so-called 'terrorists'. It then considers how these campaigns normalized the ejection of human rights, including the prohibition against torture through the use of the alternative language of enhanced interrogation. Applying this analysis to the ongoing 9/11 military commissions in Guantánamo, the chapter details how ejection and co-option converge to undermine the fundamental right to fair trial and the rule of law, which simultaneously undermines US counterterrorism efforts. At the conclusion of Chapter 5 McCall-Smith makes clear that all is not lost in terms of restoring human rights in the context of national security aims, but that states must work within the international rule of law to do so effectively.

In 'Counterterrorism and challenges to human rights: Justifying drones and targeted killing as acts of self-defence' Andrea Birdsall also examines the US government's justifications of counterterrorism policies starting with the Bush administration's ejection of human rights in favour of claims that an emergency exception was necessary to deal with the terrorist threat after 9/11. As intimated by the title, the main focus of Chapter 6 is the use of drones in this context and the ways in which Obama engaged in a strategy of co-option by using law and concerns for national security to justify his counterterrorism policies. He did so with varying levels of success: with regard to attempts to advance an argument towards no clear geographical limitations on non-international armed conflicts, the United States has (so far) not been able to create a persuasive precedent which is followed and accepted by others in the international system. The justification of 'self-defence' against an imminent threat, on the other hand, is presented in the chapter as an illustration of an issue that has attracted *some* following but continues to be controversial. Finally, the US difficulties to persuasively re-interpret the principle of distinction and non-combatant immunity demonstrates how a lack of transparency and clarity can hinder the setting of a new norm altogether. All of these issue areas demonstrate how the United States attempts to push boundaries of accepted meanings by intervening strategically not only to make its policy fit the existing international law framework but also, and at the same time, to advance its own strategic objectives. The chapter concludes with a brief assessment of the current Trump administration and argues that unlike his predecessors who engaged with international law in different ways, Trump attempts to eject all human rights by largely ignoring them.

While the first two chapters in Part II use examples of how the United States has co-opted and ejected individual human rights to justify and push its internal counterterrorism agenda both at home and abroad, the final chapter in this part considers how a state's rhetorical attacks on human rights may be

more of a discourse war between politicians and academics than a real concern for the general public. In Chapter 7, Jacques Hartmann and Samuel White examine ‘The alleged backlash against human rights: Evidence from Denmark and the UK’. Numerous states have seen a rise in populist rhetoric that co-opts and ejects human rights by framing them as threats to state sovereignty and national security. Actual opinion polls to uncover the effects such rhetoric has on affected populations are rare, leading much of the academic literature and political discourse to prematurely conclude that a major backlash against human rights is currently under way. The authors argue that, to the contrary, available data shows strong public support for human rights. Using the examples of Denmark and the United Kingdom, the chapter argues that popular support for human rights is either far stronger than many scholars or politicians suggest or that the true extent of popular support is simply unknown. Despite this, the authors argue that there is no room for complacency and that much work needs to be done in enhancing our comprehension of the public’s views, knowledge and understanding of human rights. Such research could provide valuable defence against new counterterrorism policies that widely impinge on fundamental rights.

Altogether, the three chapters in Part II reveal how national security discourse has caused liberal democracies to shrink away from full human rights protections in favour of graduated levels of protection dependent on characteristics identified in national security platforms. The challenges posed in these states range from human rights diminution for alleged terrorists, the use of advanced technologies for quasi-legal ends and the reliance on rhetoric to drive debates about the value of human rights. While each chapter has a different focus, they present a clear account of the ways in which states both co-opt and eject human rights to achieve variable political goals.

Human Rights and National Security Challenges Beyond the State

Part III addresses three phenomena that support Klug’s co-option and ejection theses set out in Chapter 2, namely how international courts and the UN Security Council have attempted to balance national security interests with individual liberties when inter-state relationships are a key influence. Chapter 10 then turns this on its head to explore how relying on the traditionally state-centric system at all costs can be a barrier to human rights protection in unrecognized states. The contra-indications presented across the chapters force us to think about how the global community of states can join forces to undermine the human rights of a variety of vulnerable or marginalized groups.

The first chapter in Part III, ‘Surveillance measures and the exception of national security in the case law of the European Court of Human Rights’, by Pierre Notermans, considers the way in which the ECtHR has also contributed

to the changing narrative of human rights in cases where security is pitted against individual human rights. Examining cases involving surveillance practices, he argues that the Court at times co-opted human rights language to create previously unrecognized collective rights (those of national security). These tensions seem to underpin the struggles of many democracies to balance approaches to equality and the just application of human rights. Notermans reveals how the Court has moved away from constantly interpreting human rights in favour of individuals against the state towards a stronger emphasis on collective rights when democracy is at risk. Echoing points raised in Negishi's exploration of *fraternité* and Bódig's analysis of statism in Part I, he ultimately concludes that the Court is interpreting human rights not only as protections of individuals against the intervention of the state but also as protections of individuals within the state by the state.

Following Notermans' look at an archetypal human rights organ, the next chapter in Part III moves to consider the role of the quintessential international rule of law organization in promoting human rights in the face of states' concerns over national security. In Chapter 9, 'Constructing a right to counterterrorism: Law, politics and the Security Council', Vivek Bhatt analyses how the UN Security Council has used the human rights narrative to both defend and degrade human rights through the manipulation of security narratives. He outlines how the US and its allies argue that the use of force against terrorists and any accompanying perceived human rights infringements are justified in order to defend fundamental rights and freedoms which are threatened by terrorism. Charting the UN's counterterrorism responses, he crafts the timeline of how states co-opted human rights language to create a battle line between civilized nations ('us') versus a barbaric enemy ('them'), devoid of humanity or any claims to human rights. Reinforcing the statist character of the international system, the core of the chapter focuses on Security Council resolutions and debates since the 1990s to demonstrate how its power and legal authority have been harnessed in order to further the 'othering' discourses underpinning the war on terrorism. Bhatt concludes that previously accepted human rights standards have been co-opted in order to assert the existence of a collective right to be free from terrorism, which ejects some – the terrorist, however broadly defined – from the ostensibly universal human rights framework.

The final substantive chapter in Part III addresses a further dimension of the challenges of national security beyond the liberal democratic state by offering a critique of both the international human rights regime and international law generally. In Chapter 10, 'Non-state actors that aspire to be states: White spots on the international human rights protection map?', Linda Hamid considers how the statist, legalistic and overly bureaucratic approach to human rights excludes certain non-state actors. In particular, she analyses situations where non-state actors pose a potential security threat to a recognized state,

tracking observations made by Bódig earlier in the book. She argues that instead of actors ‘ejecting’ human rights, it is the human rights system itself that has effectively ejected these territories from participation as a result of its state-centric and legalistic nature.

The three distinct, but inter-related examinations raised in Part III of the book not only consider how different democratic stalwart institutions have arrived at a point where ejection seems uncontested, but also posit ideas about how to check the legal and rhetorical advance of ejection. At the same time, these chapters explore the variable dimensions of ejection and the way in which the ‘ejection’ era of transition is closely linked to, and often blurs with, co-option. Furthermore, they speak to the statist nature of the international human rights system and whether this nature is reconcilable with the liberal democratic view of human rights that pervaded, according to Klug, in the lead up to the co-option phase.

CONCLUSION

On the whole, the chapters of this edited collection speak to the ways in which the early history of the human rights system has shaped contemporary human rights problems. They elaborate examples about how liberal democracies, for better or for worse, have engrained national security discourse to achieve often questionable goals in terms of defining the relationship between a state and its people as well as between states. However, as a number of the chapters recognize, perhaps the questionable goals are only so if democracy is confined to an ultra-liberal construct and a willingness to sacrifice the ‘togetherness’ of democracy for the benefit of the few, as it is traditionally interpreted. Though counterterrorism efforts have presented many of the clearest examples of how states have distanced themselves from the international human rights system in favour of more ‘muscular’ democracy, these chapters suggest that counterterrorism was just the beginning of this shake up of human rights. We will reflect upon each of these points in the final chapter. Ultimately, the following pages seek to explain how to overcome what seem like insurmountable challenges in contemporary human rights practice, policy and discourse. Challenges which could also be viewed as opportunities to correct past inadequacies and promote a stronger human rights system for the future.