

**THE USE, ABUSE AND MISUSE OF HUMAN RIGHTS:  
CHALLENGES AND PROSPECTS**

*EL USO, ABUSO Y MAL USO DE LOS DERECHOS HUMANOS:  
DESAFÍOS Y PERSPECTIVAS*

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**ABSTRACT**

The concept of human rights has confronted a series of challenges over the years. Yet, the concept has retained considerable appeal, an appeal that is reflected in the various ways in which the concept has been, and continues to be, used, abused and misused. This article is divided into two sections: the first section defines and discusses the key terms of use, abuse and misuse; the second section briefly addresses two of the major challenges currently facing human rights: (1) the responses to transnational terrorism on the aftermath of the 9/11 attacks; and (2) the proliferation of states of emergency during the COVID-19 pandemic.

**KEYWORDS:** human rights; humanitarianism; NGOs; use; abuse; misuse; states of emergency; transnational terrorism; COVID-19 pandemic.

**RESÚMEN**

El concepto de derechos humanos ha enfrentado una serie de desafíos a lo largo de los años. Sin embargo, el concepto ha conservado un atractivo considerable, un recurso que se refleja en las diversas formas en que el concepto ha sido, y sigue siendo, utilizado, abusado y mal utilizado. Este artículo está dividido en dos secciones: la primera sección define y discute los términos clave de uso, abuso y mal uso; la segunda sección aborda brevemente dos de los principales desafíos que enfrentan actualmente los derechos humanos: (1) las respuestas al terrorismo transnacional después de los ataques del 11 de septiembre; y (2) la proliferación de estados de emergencia durante la pandemia de COVID-19.

**PALAVRAS CLAVE :** derechos humanos; humanitarismo; ONGs; utilizar; abuso; mal uso; estados de emergencia; terrorismo transnacional; pandemia de COVID-19.

**INTRODUCTION**

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As with every idea that has captured human imagination, the concept of human rights has moved along a complex and uneven path.<sup>2</sup> On the one hand, major developments in standard-setting and advocacy have placed issues relating to individual and group well-being on the international community's agenda, thus challenging conventional readings of sovereignty.<sup>3</sup> On the other hand, human rights violations, often of a massive and systematic nature, persist, raising thus serious questions about the extent to which human rights norms and international human rights law matter.<sup>4</sup> Yet, despite considerable setbacks, the concept of human rights has retained considerable appeal reflected in the various ways in which the concept has been, and continues to be, used, abused and misused. This article is divided into two sections: the first section defines and discusses the key terms of use, abuse and misuse; the second section addresses two of the major challenges currently facing human rights: (1) responses to transnational terrorism; and (2) states of emergency during the COVID-19 pandemic.

### Use, Abuse and Misuse

Before we proceed with a more detailed examination of this issue, it is necessary to define the key terms involved: Use refers to the development and effective application of the human rights framework and corresponding instruments in redressing wrongs; abuse refers primarily to situations in which the advocacy of human rights is used as a disguise, or is co-opted by power holders in pursuit of policy objectives that seek to undermine the promotion and protection of internationally recognized norms and standards; lastly, *misuse* refers to actions undertaken by human rights advocates that unintentionally erode international norms and/or adversely affect the well-being of their intended beneficiaries.<sup>5</sup> It is important to note at this juncture that the narratives of use, misuse, and abuse do not unfold in strictly separate and distinct pathways. On

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<sup>2</sup> This article draws and builds upon earlier work on this issue area; see, in particular, George Andreopoulos and Zehra F. Kabasakal Arat, 'On the Uses and Misuses of Human Rights: A Critical Approach to Advocacy,' in George Andreopoulos and Zehra Arat (eds.), *The Uses and Misuses of Human Rights. A Critical Approach to Advocacy*. Palgrave MacMillan, 2014.

<sup>3</sup> John Rawls, *The Law of Peoples*. Harvard University Press, 1999.

<sup>4</sup> The persistence of human rights violations and the concomitant failure of international human rights law to ensure greater protection are among the most common criticisms raised by skeptics; see, among others, Eric A. Posner, *The Twilight of Human Rights Law*. Oxford University Press, 2014.

<sup>5</sup> For more on this, see Andreopoulos and Arat, 'On the Uses and Misuses of Human Rights: A Critical Approach to Advocacy,' note 1, pp. 3-8. Our understanding of these terms is also applicable in the context of humanitarianism and humanitarian organizations, despite the considerable differences between human rights and humanitarianism.

the contrary, they inhabit the same terrain and the intersections between instances of use, abuse and misuse can often render determinations of the nature of the actions involved (for example, use v. abuse) quite problematic.<sup>6</sup>

There are several reasons for this co-habitation of the various narratives, but, due to space limitations, two will be highlighted here. The first, and most recent one, relates to the success of human rights in displacing other emancipatory discourses and emerging as the hegemonic discourse for all sorts of empowerment-driven, resistance-oriented and social justice-related claims and demands. This development has led to concerns that the dominance of human rights has crowded out “other ways of pursuing social justice and other emancipatory vocabularies that may sometimes be more effective, such as religious vocabularies, local traditions, and tools focused more directly on economic justice or social solidarity.”<sup>7</sup> Needless to say, it is the very success of the human rights discourse that has rendered it so vulnerable to co-optation/abuse by power holders.

The second one goes back to the origins of the modern human rights regime and relates to the incorporation of provisions for emergency situations in some of the major human rights instruments. Examples of such incorporation can be found in the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the International Covenant on Civil and Political Rights (ICCPR). The doctrine of emergency has provided an opening for governments to often engage in massive and systematic violations of human rights, while claiming that the adopted measures have been deemed necessary to ensure the maintenance of law and order. While the declaration of states of emergency constituted a useful tool for many regimes during the Cold War to persecute/eliminate real or imagined opponents,<sup>8</sup> its usefulness transcended the ideological confrontations of that period. A telling example, as we will see below, is the widespread appeal of this tool to many governments around the globe in response to the current COVID-19 pandemic.<sup>9</sup> The continuing appeal of emergency measures should not come as a surprise: firmly anchored within fundamental human rights

<sup>6</sup> Andreopoulos and Arat, note 1, p. 3.

<sup>7</sup> David Kennedy, ‘Reassessing International Humanitarianism: The Dark Sides,’ <http://www.law.harvard.edu/faculty/dkenedy/speeches/TheDarkSides.pdf>

<sup>8</sup> Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance*. Cambridge University Press, 2003, p. 177.

<sup>9</sup> Centre for Civil and Political Rights, *STATES OF EMERGENCIES IN RESPONSE TO THE COVID-19 PANDEMIC*; <https://datastudio.google.com/reporting/1sHT8quopdfavCvSDk7t-zvqK1S0Ljiu0/page/dHMKb> (accessed May 3, 2020).

instruments, they provide arguments for legitimizing repressive measures based on official 'interpretations' of the relevant provisions in these instruments. Thus, a repressive measure, citing the emergency provisions of a human rights treaty to protect the security of citizens, would be framed as 'use' by the government adopting it, while it would constitute 'abuse' for those adversely affected by it.<sup>10</sup>

Here are some examples of the use, abuse and misuse of human rights:

### Use

Few would argue with the proposition that standard-setting constitutes one of the major achievements in human rights. Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, many international and regional declarations and treaties pertaining to human rights issues have been adopted/entered into force. At the international level, there are nine core treaties, several of them supplemented by optional protocols.<sup>11</sup> Each of these treaties has established a committee of experts whose task is to monitor member states' adherence to the obligations undertaken upon ratification. These committees of experts review member states' reports, issue general comments which further clarify and specify the core content and reach of the rights in question, and may, under certain conditions, receive and review communications or complaints from individuals.<sup>12</sup>

In addition to the international treaties and their monitoring bodies, there is a plethora of other inter-governmental bodies, as well as regional treaties and their corresponding mechanisms. The most important inter-governmental body is the Human Rights Council (HRC), established by the UN General Assembly in 2006 as successor to the Human Rights Commission.<sup>13</sup> The HRC

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<sup>10</sup> A good example would be the freedom of movement. Needless to say, this argument is relevant in the context of derogable rights, but not in the context of non-derogable rights, like the prohibition of the arbitrary deprivation of life. Having said that, certain developments in the post-9/11 period and, in particular, the discussion on 'enhanced interrogation techniques' have contributed to the partial erosion of the sharp distinction between derogable and certain non-derogable rights.

<sup>11</sup> A complete listing of the core treaties and their protocols can be found at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>12</sup> Currently, there are ten such committees of experts, eight of which may, under certain conditions, receive and review individual communications or complaints; <https://www.ohchr.org/EN/HRBodies/TBPPetitions/Pages/HRTBPetitions.aspx> There are ten committees of experts because the Optional Protocol to the Convention against Torture has established a separate Subcommittee on Prevention.

<sup>13</sup> United Nations General Assembly Resolution...



examines, through its Universal Periodic Review (UPR), the human rights record of all UN member states and oversees the Special Procedures. The Special Procedures involve working groups, independent experts or special rapporteurs who undertake a variety of tasks that include country visits, the drafting of reports and the development of international standards and are divided into two types: thematic mandates (for example, on arbitrary detention, foreign debt and housing) and country-specific mandates (for example, on Belarus, Mali and the Syrian Arab Republic). There are currently 44 thematic mandates and 12 country-specific mandates.<sup>14</sup>

Despite the considerable advances in this issue area, the overall record is mixed at best. While the majority of member states have signed and ratified most of the core human rights treaties,<sup>15</sup> the application and monitoring of standards is uneven. Part of the problem lies in the extensive use by states of reservations, understandings and declarations (RUDs) to evade their legal obligations. A couple of examples will illustrate this point: the US has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), but one of its reservations relates to provisions that may restrict freedom of speech and association: "...the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights..."<sup>16</sup> As a result of this reservation, the US has excluded itself from the requirement, stipulated in article 4b of the Convention, to ban groups like the Ku Klux Klan that promote racial discrimination.<sup>17</sup>

The second example refers to Saudi Arabia and its ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). One of the country's reservations states: "In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the

<sup>14</sup> For the list of thematic and country mandates, see <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (accessed May 5, 2020).

<sup>15</sup> The majority of states have ratified seven of the nine core human rights treaties; <https://indicators.ohchr.org/> (accessed May 6, 2020).

<sup>16</sup> For the text of the US reservations, see [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en)

<sup>17</sup> Article 4b of the ICERD provides that states parties "shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;" <https://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>

Convention.”<sup>18</sup>This reservation has been widely criticized as being inconsistent with the object and purpose of the Treaty since it enables the country to continue to deny basic rights to women. Besides the specific problems posed by reservations, there is a wider and continuing debate on the overall effectiveness of human rights treaties.<sup>19</sup>

Last, but not least, a brief note on the role of non-governmental organizations (NGOs) in this area. One of the most important developments in the post-1945 period has been the explosive growth of NGOs, both domestic and transnational.<sup>20</sup>Beginning in the 1960s, a growing number of NGOs have been framing their causes and policy objectives in human rights terms and have been expanding their activities both thematically and geographically. A good example is Amnesty International (AI), widely considered a pioneer in this area. While the initial focus of AI’s work was on prisoners of conscience,<sup>21</sup>its agenda, beginning with its global campaign against torture in the 1970s,<sup>22</sup> has broadened to encompass social and economic rights and LGBT rights, among others.<sup>23</sup>Other NGOs have followed a similar path and have become actively engaged in lobbying and campaigning activities by articulating their demands for social and legal action in these terms.<sup>24</sup>While there are contending assessments on the effectiveness of NGO advocacy and on whether the NGOs’ rising profile has signaled the emergence of a ‘global civil society,’ their work unquestionably reflects the widespread use and appeal of the human rights discourse.

## Abuse

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<sup>18</sup><https://www.refworld.org/pdfid/42ae98b80.pdf>

<sup>19</sup> For contrasting assessments, see Stephen Hopgood, *The Endtimes of Human Rights*. Cambridge University Press, 2013; and Gráinne de Búrca, “Human Rights Experimentalism,” *American Journal of International Law*, vol. 111(2), April 2017, pp. 277-316.

<sup>20</sup> The literature on NGOs is extensive. See, among others, Kim D. Reimann, “A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs,” *International Studies Quarterly*, vol. 50(1), 2006, pp. 45-67.

<sup>21</sup> Tom Buchanan, “‘The Truth Will Set You Free’: The Making of Amnesty International,” *Journal of Contemporary History*, vol. 37(4), 2002, pp. 575-597.

<sup>22</sup> Amnesty International, *Combating Torture and Other Ill-Treatment. A Manual for Action*; <https://www.amnesty.org/download/Documents/POL3040362016ENGLISH.PDF>

<sup>23</sup> <https://www.amnesty.ca/our-work/issues/economic-and-social-rights>; <https://www.amnestyusa.org/international-day-against-homophobia-and-transphobia-2014-2/>

<sup>24</sup> For example, Human Rights Watch (HRW). Like Amnesty International, it began as an NGO focusing exclusively on civil and political rights issues, but it has since expanded its range despite the skepticism of some of its founding members.

A key indicator of abuse is the co-optation of the human rights discourse by power holders. Recent history is replete with instances of such co-optation that transcend a country's regime type (democratic, authoritarian, hybrid), and overall record of adherence to international human rights standards. A prominent example of such abuse is the way in which the appeal to human rights was articulated during the George W. Bush administration to justify the use of force in Afghanistan and Iraq. While the Congressional joint resolution on the Authorization for Use of Military Force,<sup>25</sup> adopted after the 9/11 attacks, made no reference to human rights issues, US policymakers subsequently made repeated appeals to human rights issues in the context of the wars in Afghanistan and Iraq. For example, then Secretary of State Colin Powell, in a speech on Afghan women delivered a month after the start of the air campaign in Afghanistan, noted that: "During these years of great suffering, the women of Afghanistan have been the backbone of the Afghan society....The recovery of Afghanistan must entail the restoration of the rights of Afghan women. Indeed, it will not be possible without them. The rights of the women of Afghanistan will not be negotiable."<sup>26</sup> In a similar vein, then Deputy Secretary of Defense Paul Wolfowitz, one of the main architects of the war in Iraq, sought to justify the 2003 military intervention in terms of defending the human rights of the Iraqi people.<sup>27</sup> An enabling factor in this cooptation was the vocal support provided for these military interventions by certain human rights analysts and advocates.<sup>28</sup>

As noted earlier, the co-optation of human rights transcends regime type. The Turkish Government of Recep Tayyip Erdogan has claimed that one of the reasons for launching Operation Peace Spring in Northern Syria in the Fall of 2019 was to create a 'safe zone' for the resettlement of some of the displaced Syrians in the country.<sup>29</sup> Likewise, Russian President Vladimir Putin has appealed to the right to self-determination when he requested that the Federal

<sup>25</sup> Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States; <https://www.govinfo.gov/content/pkg/BILLS-107sjres23enr/pdf/BILLS-107sjres23enr.pdf>

<sup>26</sup> Remarks at the Eisenhower Executive Office Building, Washington, DC, November 19, 2001; <https://2001-2009.state.gov/secretary/former/powell/remarks/2001/6229.htm>

<sup>27</sup> Lecture at the New School for Social Research, September 21, 2003.

<sup>28</sup> See, for example, Michael Ignatieff, 'Friends Disunited,' *The Guardian*, 24 March 2003; <https://www.theguardian.com/politics/2003/mar/24/iraq.world> Ignatieff later came to regret his support of the Iraq War; 'Getting Iraq Wrong,' *The New York Times Magazine*, August 5, 2007.

<sup>29</sup> For a critical perspective on the Turkish Government's rationale for the creation of a 'safe zone' in Northern Syria, see Eyal Benvenisti and Eliav Liebllich, "Assessing Turkey's "Resettlement" Plans in Syria under the Law of Occupation," *Just Security*, October 23, 2019; <https://www.justsecurity.org/66679/assessing-turkeys-resettlement-plans-in-syria-under-the-law-of-occupation/>

Assembly ratify the treaty admitting Crimea and Sevastopol to the Russian Federation, following Russia's military intervention and the March 16, 2014 referendum in Crimea. Putin noted that "As it declared independence and decided to hold a referendum, the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the right of nations to self-determination. Incidentally, I would like to remind you that when Ukraine seceded from the USSR it did exactly the same thing, almost word for word. Ukraine used this right, yet the residents of Crimea are denied it. Why is that?"<sup>30</sup>

### Misuse

As defined in this article, the misuse of human rights is a challenge primarily facing human rights and humanitarian advocates and practitioners. A notable example of misuse has been the call by human rights, as well as humanitarian, organizations for the use of force to stop mass atrocities. This problem has emerged with a vengeance, so to speak, in the post-Cold War period, and in the context of a growing trend seeking to establish that human rights and humanitarian law violations constitute threats to international peace and security. The contribution of the United Nations Security Council (UNSC) has been critical in this development; a development which formally began with the adoption of Resolution 688 on the immediate aftermath of the 1991 Gulf War.<sup>31</sup> Similar resolutions linking such violations to threats to international peace and security were subsequently adopted in the context of the situations in Bosnia, Somalia, Liberia, Haiti, Rwanda, Albania and Kosovo, to name just a few cases.<sup>32</sup>

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<sup>30</sup> Address by President of the Russian Federation, March 18, 2014; <http://en.kremlin.ru/events/president/news/20603>. The legal and political aspects of Russia's intervention in Crimea have been the subject of considerable debate among analysts; see among others, Thomas D. Grant, "Annexation of Crimea," *American Journal of International Law*, vol. 109(1), 2015, pp. 68-95; and John J. Mearsheimer, "Why the Ukraine Crisis Is the West's Fault. The Liberal Delusions That Provoked Putin," *Foreign Affairs*, September/October 2014, pp. 1-12.

<sup>31</sup> I have addressed this trend in, among other writings, George J. Andreopoulos, "The Challenges and Perils of Normative Overstretch," in Bruce Cronin and Ian Hurd (eds.), *The UN Security Council and the Politics of International Authority*. Routledge, 2008, pp. 105-128. In one of the preambular provisions of Resolution 688, the UNSC expressed grave concern at "the repression of the Iraqi civilian population...which led to a massive flow of refugees...and to cross-border incursions which threaten international peace and security in the region." Resolution 688 of 5 April 1991; <http://unscr.com/en/resolutions/doc/688>

<sup>32</sup> UNSCR 770, 13 August 1992 (Bosnia); UNSCR 794, 3 December 1992 (Somalia); UNSCR 788, 19 November 1992 (Liberia); UNSCR 940, 31 July 1994 (Haiti); UNSCR 929, 22 June 1994 (Rwanda); UNSCR 1101, 28 March 1997 (Albania); and UNSCR 1199, 23 September 1998 (Kosovo).

The international community's involvement in these crises, especially when such involvement provided for enforcement action under Chapter VII of the UN Charter, confronted human rights and humanitarian NGOs with a set of difficult questions. Should they advocate, even as a last resort, the cross-border use of force for human protection purposes? How would such support be morally justified, bearing in mind that NGO support would lend legitimacy to enforcement actions whose means and ends would be beyond their control? Would it be morally justified to abstain from taking a stand on the merits of an intervention (*jus ad bellum*), but be actively involved in assessing the intervening forces' battlefield conduct (*jus in bello*)? And last, but not least, how would the NGOs involved assess the human rights/humanitarian impact of the intervention?<sup>33</sup> Needless to say, given the complexity of the issues involved, this list of questions is by no means exhaustive.

It should come as no surprise then that, when it comes to interventions, the NGO response has been marked by a certain degree of inconsistency and ad hocism. Human Rights Watch (HRW), for example, has supported the use of force in northern Iraq, Bosnia, Rwanda and Somalia but it has refrained from taking a position in the case of the NATO intervention in Kosovo; in the latter case, HRW's argument was that the decision to use force had not met the criterion of last resort.<sup>34</sup> Physicians for Human Rights (PHR), on the other hand, were among the earliest and most vocal NGO proponents of military intervention in Kosovo.<sup>35</sup> These variations are also reflective of the fact that the human rights framework does not provide clear and uncontested policy prescriptions in this critical issue area.

The humanitarian organizations faced an additional set of issues relating to their presence in the field. One of the key differences between human rights and humanitarian work is that the latter necessitates access to those that it seeks to assist.<sup>36</sup> As a result, humanitarian organizations have had to confront some serious ethical dilemmas concerning the delivery of humanitarian

<sup>33</sup> This topic has generated an enormous literature. For a comprehensive introductory treatment of the key issues involved, see International Council on Human Rights Policy (ICHRP), *Human Rights Crises. NGO Responses to Military Interventions*. Geneva, 2002; [http://www.ichrp.org/files/reports/42/115\\_report.pdf](http://www.ichrp.org/files/reports/42/115_report.pdf)

<sup>34</sup> ICHRP, *Human Rights Crises*, p. 23.

<sup>35</sup> *Ibid.*

<sup>36</sup> Human rights work can be performed at a distance, while this is not the case with humanitarian work. To bring one example: if an NGO does human rights work on displaced persons, its staff can be located at the border of a neighboring country and interview those who are fleeing the country. On the basis of the testimonies of the displaced persons, human rights NGO staff can prepare a report on the violations occurring against the displaced in the country of origin. Staff members of a humanitarian organization, on the other hand, cannot offer any assistance to those who are displaced in the country of origin unless they have direct access to them.

assistance. More specifically, should a humanitarian organization continue to deliver assistance in situations where some of the aid is being diverted for the benefit of the perpetrators instead of the victims? Another critical question is whether such an organization should deliver assistance in cases where the government of the country dictates/interferes in its distribution.<sup>37</sup> The overarching issue in both situations is when does the delivery of humanitarian assistance end up being part of the problem, as opposed to being part of the solution, and what should the organization do under these circumstances?

The experience of Medecins Sans Frontieres (MSF) is instructive here. The organization faced the issue of diversion of aid to perpetrators in the Rwandese refugee camps in Zaire and Tanzania on the aftermath of the 1994 genocide in Rwanda. In one of the many reports issued by MSF on the situation in the camps and the moral dilemma facing aid agencies, the organization noted: "Relief workers are becoming increasingly outraged about being unwilling accomplices to alleged perpetrators of genocide in Rwanda. To work in refugee camps where killers walk around freely, are often in control of the distribution of relief items and where preparations are being made for a new attack, poses a great moral dilemma for relief workers... At the same time MSF has a strong moral commitment to the most vulnerable populations among the refugees and its first aim is to prevent those from further suffering."<sup>38</sup> The deteriorating security situation and the manipulation of aid deliveries led to intense debates within and among the different MSF sections operating in the camps on whether MSF's presence was doing more harm than good. MSF-France was the first section to pull out of the camps at the end of 1994.<sup>39</sup> MSF-Belgium and MSF-Holland stayed a bit longer, but they eventually withdrew in July 1995 and, in the process, denounced the conditions within these camps.<sup>40</sup>

MSF faced another major challenge during the last phase of Sri Lanka's civil war. More specifically, the organization had to decide whether the price of access to the civilian population targeted during the conflict justified its acceptance of the government's terms on the delivery of

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<sup>37</sup> Once again, these examples are illustrative, not exhaustive of the dilemmas that humanitarian organizations face in the field.

<sup>38</sup> Medecins Sans Frontieres, *Breaking the Cycle. Calls for Action in the Rwandese Refugee Camps in Tanzania and Zaire*; <https://www.doctorswithoutborders.org/what-we-do/news-stories/research/breaking-cycle-calls-action-rwandese-refugee-camps-tanzania-and-zaire>

<sup>39</sup> Peter Redfield, *Life in Crisis. The Ethical Journey of Doctors Without Borders*. University of California Press, 2013, p. 104.

<sup>40</sup> Ibid; and Medecins Sans Frontieres, *CHRONOLOGY OF EVENTS 1993-1998*; <https://www.msf.fr/sites/default/files/6815193a9a0d7e4472487d1a17b2eaa2.pdf>

assistance.<sup>41</sup> At the end of September 2006, MSF-France and MSF-Spain were notified of a pending expulsion order due to their alleged clandestine activities in support of the Liberation Tigers of Tamil Eelam (LTTE).<sup>42</sup> While all three MSF sections operating in the country sought a government statement clearing them of these allegations and permission to access rebel-controlled zones, these requestswere not acceded to by the Sri Lankan authorities.<sup>43</sup> Eventually, the MSF sections decided to proceed with negotiations that led to the signing of a Memorandum of Understanding (MOU); the MOU provided for MSF operations in three hospitals chosen by the Sri Lankan Ministry of Health.<sup>44</sup> This was one of several instances in which MSF had to ‘shake hands with the devil’ during Sri Lanka’s civil war.<sup>45</sup>

Few would dispute the need for human rights/humanitarian advocates to maintain constant vigilance against the cooptation of their valued principles and norms by actors inimical to them; yet, what is often underestimated is the danger of ‘self-inflicted’ wounds. After all, the proverbial ‘the road to hell is paved with good intentions’ has lost none of its resonance in the contested terrain of human rights/humanitarian activism.

## Challenges

### Responding to transnational terrorism

One of the most troublesome features of the response to the 9/11 attacks has been the shift towards a more assertive form of hegemonic conduct through ‘ad hoc Coalitions of the Willing’ and a corresponding a la carte treatment of institutions, rules and processes that enable/guide international cooperation.<sup>46</sup> The key, but not the only, actor in this development has been the

<sup>41</sup> To be sure, this is a routine problem faced by humanitarian organizations, but the Sri Lankan case was particularly telling in this context.

<sup>42</sup> Fabrice Weissman, “Sri Lanka. Amid All-Out War,” in Claire Magone, Michael Neuman and Fabrice Weissman (eds.), *Humanitarian Negotiations Revealed: The MSF Experience*. Columbia University Press, 2011.

<sup>43</sup> There were three MSF sections operating in the country at the time: MSF-France, MSF-Holland and MSF-Spain.

<sup>44</sup> Weissman, “Sri Lanka. Amid All-Out War,” note 42.

<sup>45</sup> I borrow this expression from Romeo Dallaire’s powerful 2003 memoir on his service as head of UNAMIR in Rwanda. Fabrice Weissman’s piece offers a comprehensive account of the MSF experience in Sri Lanka.

<sup>46</sup> I have addressed key aspects of this development in George Andreopoulos, “Humane vs. Inhumane Treatment in the Era of Hegemonic International Law (HIL).” Remarks at PRIO Workshop, December 18, 2018; and “The Resurgence of Hegemonic International Law,” *global-e*, vol. 12(19), May 2019; <https://www.21global.ucsb.edu/global-e/may-2019/resurgence-hegemonic-international-law>



United States. According to certain commentators, the arrival of a new administration in Washington provided the country with the opportunity to seize the unipolar moment and “reassert American freedom of action.”<sup>47</sup> This freedom quickly manifested itself in institutional undertakings that sought to by-pass the collective processes of international law and redefine the content and reach of international norms.

Two features of the Coalitions of the Willing (CotW) model that distinguish it from previous manifestations of Hegemonic International Law (HIL) are its emphasis (1) on privileging informal processes of coordination and information-sharing, and (2) on a different understanding of the sequence between coalition formation and determination of the coalition’s purposes and aims. In particular, while CotW may engage with formal mechanisms of the international legal process (for example, treaty negotiations to reach a binding agreement), they would often by-pass such processes in order to coordinate activities among like-minded actors and create, through a combination of sticks and carrots, obligations for non-participating states.<sup>48</sup> The example that immediately comes to mind is the informal US-led coalition responsible for the military intervention in Iraq in March 2003, following the US’s failure to ensure UNSC support for this action. In other instances, CotW have been formed to enable the ‘leader’ evade/by-pass ‘objectionable’ treaty provisions.<sup>49</sup>

The above mentioned 2003 coalition is also instructive on the sequence between formation and purposes. While in formal organizational settings (for example, in alliances such as NATO), the leading state(s) will seek to institutionalize cooperation by bringing on board as many other states as possible before key decisions are reached on the mission, CotW reverses this process: the purposes and aims are determined in advance by key players and this determination shapes the membership of the coalition. This is best encapsulated in Donald Rumsfeld’s statement concerning the 2003 military action against Iraq: “When you begin an invasion, a rule is “the mission should determine the coalition, not the other way around.” You should not first assemble

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<sup>47</sup>Charles Krauthammer, The Bush Doctrine: ‘new unilateralism’, <https://www.chron.com/opinion/editorials/article/Krauthammer-The-Bush-doctrine-new-2055304.php>

<sup>48</sup> See Eyal Benvenisti, “Coalitions of the Willing” and the Evolution of Informal International Law, p. 2 (on file with the author).

<sup>49</sup> The US’s pursuit of Bilateral Immunity Agreements (BIAs) with ‘willing states’ parties to the Rome Statute of the International Criminal Court (ICC) speaks volumes. The purpose of these agreements, based on article 98 of the Rome Statute, is to ensure that no US citizen would be subjected to the jurisdiction of the ICC. A combination of incentives and threats has been instrumental in securing these BIAs.



a coalition with many different views and then try to determine the mission. That leads to a lack of clarity as to the mission.”<sup>50</sup>

What are the implications of these developments for human rights? The privileging of informal over formal processes and the primacy of the mission as determined by the hegemon/leader paved the way for an a la carte treatment of legal rules and obligations, including those drawn from international human rights norms. The case of UNSCR 1373, adopted by the UNSCR on the aftermath of the 9/11 attacks, is telling in this context.<sup>51</sup> This a la carte treatment was exemplified by the way in which the resolution selectively incorporated provisions of the International Convention for the Suppression of the Financing of Terrorism, a legal instrument considered critical to the global counter-terrorism effort.<sup>52</sup> While the resolution included references to the Convention’s enforcement provisions that were aligned with the counterterrorism agenda, it left out key due process provisions, such as those relating to the rights of persons accused of terrorism-related offences; provisions reflective of fundamental principles of international human rights law.<sup>53</sup>

This instrumental selectivity characterized the approach to other norms, foremost the prohibition of torture codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Bush Administration drew a distinction between torture and enhanced interrogation techniques (EITs), a supposedly less abusive form of detainee treatment that could be justified; this was the view advanced by administration officials and supporters premised on the argument that even techniques that might constitute torture would potentially not incur criminal liability under the necessity and self-defense arguments in a situation of global emergency.<sup>54</sup>

In addition, in a series of legal memos drafted by Bush administration lawyers and subsequently released by the Obama administration, it was argued that EITs did not even constitute “cruel, inhuman, or degrading treatment” since, among other things, they were applied under certain

<sup>50</sup> Spiegel Online, Interview with Donald Rumsfeld. ‘Do I Have any Regrets? Of Course I Do;’ <http://www.spiegel.de/international/world/interview-with-donald-rumsfeld-do-i-have-any-regrets-of-course-i-do-a-754847.html>

<sup>51</sup> United Nations Security Council Resolution 1373, 4385th meeting, S/PV.4385, Friday, 28 September 2001.

<sup>52</sup> In fact, the Convention for the Suppression of the Financing of Terrorism is the only legal instrument expressly mentioned in the resolution.

<sup>53</sup> For more on this, see Jose Alvarez, “Hegemonic International Law Revisited, *American Journal of International Law*, vol. 97(4), 2003, pp. 873-888;

<sup>54</sup> This argument found its most forceful expression in then Assistant Attorney General Jay Bybee’s ‘infamous’ memorandum to Alberto Gonzales; <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf>, pp. 39-46.

safeguards.<sup>55</sup> However, this was a questionable qualification, to say the least: there is nothing in CAT and the Committee against Torture's case law that conditions the characterization of a particular technique on the basis of whether it is supervised or not. To put it another way: if we were to agree, for the sake of argument, that subjection to extended 'stress positions' does not constitute torture but cruel/inhuman treatment, the fact that its application is supervised does not transform it into a non-cruel/inhuman form of treatment and therefore authorize it as a permissible law enforcement technique.<sup>56</sup>

Many other states have followed the US's lead in this area and the resulting policies and practices have contributed to the steady erosion of certain fundamental norms and standards.<sup>57</sup> In its efforts to address the consequences of the post-9/11 'new normal,'<sup>58</sup> human rights advocacy is still very much on the defensive.

### States of Emergency during the Pandemic

At the beginning of this essay, we noted the continuing appeal of emergency measures to governments of all stripes, an appeal partially enabled by the fact that such provisions are incorporated into key human rights instruments. The current COVID-19 pandemic has provided another opening for many governments around the globe to 'seize the moment' under the pretext of handling this public health crisis. According to the Geneva-based Centre for Civil and Political Rights, out of the 173 states parties to the ICCPR, 89 have so far declared a state of emergency in response to the pandemic.<sup>59</sup> States parties to the ICCPR that issue such declarations and avail themselves of the right of derogation from their obligations under the ICCPR, have to notify all other states parties through the Secretary-General of the United Nations; in their notifications to the UN, states should specify the Covenant provisions from

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<sup>55</sup> One such safeguard cited was the presence and supervision of the process by qualified personnel (medical doctor/psychologist) authorized to intervene and stop the application of such techniques if they were to exceed the 'permissible' level.

<sup>56</sup> See Andreopoulos, note 46.

<sup>57</sup> Another big casualty of the anti-terrorism campaign has been international refugee law's principle of non-refoulement.

<sup>58</sup> Lawyers Committee for Human Rights, *Assessing the New Normal. Liberty and Security for the Post-September 11 United States*; <https://www.humanrightsfirst.org/sites/default/files/AssessingtheNewNormal.pdf>

<sup>59</sup> *STATES OF EMERGENCIES IN RESPONSE TO THE COVID-19 PANDEMIC*; note 9.

which they are derogating.<sup>60</sup> At the time of this writing, only 15 of the 89 states have submitted the requisite notification to the United Nations identifying the articles to which their derogation applies.<sup>61</sup>

A quick review of the 15 notifications based on the data collected by the Centre for Civil and Political Rights indicates that states derogated from eight of the articles of the ICCPR: articles 5 (arbitrary arrest and detention), 12 (liberty of movement), 13 (expulsion of aliens), 14 (fair and public hearing/due process), 17 (protection of privacy), 19 (freedom of expression), 21 (peaceful assembly), and 22 (freedom of association). All 15 states derogated from articles 12 and 21, followed by articles 9 and 17 (5), article 22 (3), and articles 13, 14 and 19 (1). All the articles from which states derogated are derogable under ICCPR. However, this does not mean that these derogations do not and will not pose serious problems for the protection of human rights. There are several issues of concern here: first, the perennially problematic human rights record of states during situations of public emergency;<sup>62</sup> second, the ‘usual suspects’ in the list of derogable rights are those that are particularly susceptible to massive and systematic abuses during emergencies (in particular, arbitrary detention, freedom of movement and expression, and due process rights); and third, the violation of certain derogable rights can affect the observance of non-derogable rights, like the prohibition of the arbitrary deprivation of the right to life and the prohibition of torture. As the Human Rights Committee (HRC), the monitoring organ of the ICCPR noted in General Comment 29:

It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights ... Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.<sup>63</sup>

<sup>60</sup> In accordance with article 4 para 3 of the ICCPR.

<sup>61</sup> *STATES OF EMERGENCIES IN RESPONSE TO THE COVID-19 PANDEMIC*, note 9. The 15 states that have submitted such notifications are: Armenia, Chile, Colombia, Ecuador, El Salvador, Estonia, Georgia, Guatemala, Kyrgyzstan, Latvia, Moldova, Palestine, Peru, Romania and San Marino.

<sup>62</sup> United Nations Economic and Social Council, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment. Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*. Special Rapporteur: Mrs. N. Questiaux; E/CN.4/Sub.2/1982/15, 27 July 1982; and United Nations, Economic and Social Council, *The Administration of Justice and the Human Rights of Detainees. Question of Human Rights and States of Emergency*. Final Report of the Special Rapporteur, Mr. Leandro Despouy; E/CN.4/Sub.2/1997/19/Add.1, 9 June 1996. One of the most unfortunate decisions ever taken by the Human Rights Commission was to discontinue the position of the Special Rapporteur on States of Emergency.

The COVID-19 pandemic has provided authoritarian regimes and their leaders with plausibly appealing arguments to restrict certain fundamental rights and freedoms. Who, for example, could convincingly argue against restrictions on the freedom of assembly and association, when infection could spread through large gatherings? As the Economist noted: “Autocrats are delighted to have such a respectable excuse for banning mass protests which over the past year have rocked India, Russia and whole swathes of Africa and Latin America. The pandemic gives a reason to postpone elections, as in Bolivia, or to press ahead with a vote while the opposition cannot campaign, as in Guinea. Lockdown rules can be selectively enforced. Azerbaijan’s president openly threatens to use them to “isolate” the opposition.”<sup>64</sup> And the list goes on and on. The rush to emergency legislation and the adoption of corresponding measures in many countries reinforce the view that the doctrine of emergency constitutes the “Achilles’ heel of the human rights doctrinal corpus.”<sup>65</sup>

## CONCLUDING REMARKS

The ongoing challenge of advancing rights and, in the process, of avoiding the pitfalls of misuse and abuse is, and will remain, a work in progress. The human rights regime faces several serious and ongoing challenges; in particular, challenges stemming from the responses to transnational terrorism and to the COVID pandemic that have accentuated the trend towards the a la carte treatment of fundamental norms. This treatment has been enabled by a toxic combination of plausible ‘alternative’ interpretations offered by public authorities and by the very same authorities’ appeals to ‘public security’ and ‘safety.’

Clearly, there are no magic bullets here. Having said that, a key lesson that emerges is the need to critically dissect advocacy work with a consideration of its full impact (both intended and unintended outcomes) and identify what leads to unintended negative outcomes (human rights violations and retrenchment of norms). Such a course of action would help in the design and execution of better and more effective advocacy strategies by providing fewer openings to power holders for norm cooptation and abuse.

<sup>63</sup>International Covenant on Civil and Political Rights. General Comment No 29. States of Emergency (Article 4); [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.pdf)

<sup>64</sup> The Economist, “Government under covid-19. A Pandemic of power grabs,” April 25<sup>th</sup> 2020.

<sup>65</sup>Rajagopal, *International Law from Below*, note 8, p. 176.

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