I

Introduction

THE doctrine of human rights is the articulation in the public morality of world politics of the idea that each person is a subject of global concern. It does not matter what a person's spatial location might be or which political subdivision or social group the person might belong to. Everyone has human rights, and responsibilities to respect and protect these rights may, in principle, extend across political and social boundaries. The propagation and diffusion of this idea are among the most impressive of the legacies of World War II. To adopt Richard Rorty's phrase, human rights have become "a fact of the world" with a reach and influence that would astonish the framers of the international human rights project.[1] Today, if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights.

1. Why there is a problem

This book is a contribution to the political theory of human rights. It is stimulated by two observations. The first is that human rights has become an elaborate international practice. Since the end of World War II, this practice has developed on several fronts: in international law, in global and regional institutions, in the foreign policies of (mostly liberal-democratic) states, and in the activities of a diverse and growing array of nongovernmental organizations (NGOs) and networks. The practice has become more conspicuous politically since the end of the Cold War as the scope of human rights

[1] Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 134.

doctrine has expanded and the human, political, and material resources devoted to the protection and advancement of human rights have multiplied. Participants in this practice take its central moral ideas with great seriousness. Many are empowered by them. Some risk their lives for them. Its beneficiaries and potential beneficiaries regard the practice as a source of hope.

The other observation is that the discourse and practice of human rights can also evoke a disabling skepticism, even among those who admire its motivating ideas. I do not mean the radical skepticism reflected in a wholesale rejection of morality or the more limited skepticism underlying a refusal to accept what we ordinarily regard as moral considerations as reasons for action in global political life. I mean a skepticism about human rights that might be embraced in one or another form even by those who are not alienated from morality in general or global political morality in particular. This kind of skepticism consists of a disparagement of human rights as grounds of political action. It can take various forms and may be encouraged by some elements of the human rights enterprise itself: for example, the indistinctness of the range of interests protected by human rights, the difficulty of seeing contemporary human rights doctrine as significantly "universal," the elasticity of the permissions to interfere that human rights seem to generate, and the potential costs of acting consistently to protect human rights against abuse and to promote adherence to them.

One reason to take up the political theory of human rights is to see how successfully this kind of skepticism can be resisted. This is an important reason, but not the only reason. Even when regarded sympathetically, the practice of human rights is bound to seem puzzling. It is unclear, for example, whether the objects called "human rights" within this practice are in any familiar sense *rights* and why certain standards but not others should count as human rights. It is not clear what responsibilities attach to human rights, on which agents these responsibilities fall, and what kinds of reasons should motivate these agents to care about them. It is not clear why a practice that aims to protect individual persons against various threats should assign responsibilities primarily to states rather than to other kinds of agents. It is not even clear why one should regard human rights as grounds of *international* action at all: one might, instead, regard them as standards whose security within a society is the exclusive responsibility of that society's government. The more clearly we appreciate the substantive scope of international human rights doctrine and the variety of practical

purposes for which appeal to human rights is actually made, the more difficult it is to assimilate them to any familiar moral idea. Even a friend of human rights may be left wondering if the enterprise represents anything morally coherent. One might be tempted to regard it, instead, as no more than an unstable construction, explicable only historically.

2. Forms of skepticism

Skepticism about human rights comes in many forms. Some philosophers believe it is part of the idea of a right that there should be some mechanism in place for its effective enforcement. But international human rights practice notoriously lacks a standing capacity to enforce many of the rights listed in the major treaties, and even when an enforcement capacity exists, it usually applies selectively and often only at the sufferance of those states against which it might be used. To make matters worse, it is not even clear how we should conceive of "enforcement" in relation to some of the requirements of human rights doctrine. What, for example, would it mean to "enforce" the right to an adequate standard of living?[2] It is possible, of course, to imagine policy measures that would ensure the satisfaction of this right, but it is unclear that the enjoyment of the right can sensibly be "enforced" in the same way as the enjoyment of more familiar rights. If one thinks that genuine rights must be effectively enforceable, then one might be encouraged to believe, as Raymond Geuss suggests, that the idea of a human right "is an inherently vacuous concept."[3]

Another kind of skepticism, perhaps related, arises from the belief that the satisfaction of at least some human rights is not feasible under existing or readily foreseeable social conditions. It is not always clear how this belief should be understood: the thought might be that the resources required to protect or satisfy a right are not available, or that the opportunity cost of devoting resources to this purpose is unreasonably great, or that the right can only be satisfied under institutional or cultural conditions that cannot easily be brought about. The motivating idea in all three cases is that a value

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 11(1).

[3] Raymond Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001), 144. He continues: "Perhaps if we repeat claims about natural rights long enough and loudly enough, and pass enough resolutions, people will stop doing various horrible things to each other. Indeed, perhaps they may, but perhaps not."

cannot count as a right if there is no agent who can be held to be under a duty to satisfy it. If one accepts this idea and some version of the belief that the satisfaction of at least some human rights is not feasible or would be unreasonably costly, then one might conclude that at least some human rights recognized in international doctrine cannot be real rights. Values of this kind state aspirations for the future but do not generate reasons for action in the present.[4] Their status is analogous to Hobbes's laws of nature in the state of nature: they "bind to a desire that they should take place" but not necessarily "to the putting them in act."[5]

Two other forms of skepticism arise from doubt about the idea that human rights can be "universal" in any significant way. The most straightforward interpretation of this idea is that human rights apply to everyone or are claimable by everyone. Skepticism arises when we consider why this might be the case. It is frequently said that human rights belong to persons "as such" or "solely in virtue of their humanity." As we shall see, it is not obvious what this idea amounts to, but for the moment we might say that a right belongs to persons "as such" if the ground or justification of the right appeals to features that persons possess regardless of their contingent relationships or social setting. The skeptic holds that no plausible interpretation of this idea will yield a conception of human nature sufficiently robust to justify any practically interesting catalog of rights. An extreme version of this type of skepticism holds that nothing "called a human right can be derived from human nature" because the behavioral dispositions we actually observe in human beings are too diverse and conflicting to allow for any coherent generalization.[6] A more moderate position holds that the interests that are in fact shared by all human beings are too few to provide a foundation for any but the most elemental prohibitions—for example, of murder, torture, severe material deprivation. The reference to "interests" is essential: the skeptical idea is not that people do not *agree* about human rights (this, too, is a skeptical idea, but it is a different idea). It is, rather, that human beings taken in abstraction from the contingencies of their historical and social circumstances do not share sufficiently many desires or needs to justify more

[4] Many people have held views of this kind. An early example can be found in Arthur Holcombe's trenchant critique of the draft of the Universal Declaration in *Human Rights in the Modern World* (New York: New York University Press, 1948). A familiar source is Maurice Cranston, *What Are Human Rights?*, rev. edn. (London: Bodley Head, 1973), ch. 8.

[5] Thomas Hobbes, *Leviathan* [1651], ed. E. Curley (Indianapolis: Hackett, 1994), ch. 15, para. 36.

[6] John O. Nelson, "Against Human Rights," *Philosophy* 65 (1990), 345.

than a very short list of standards.[7] The result of accepting this idea is not a wholesale skepticism about human rights but rather a skepticism about international human rights doctrine as it exists today: its scope will appear to extend well beyond what might reasonably be seen as rights belonging to human beings "as such."

We get another kind of skepticism from the thought that human rights can be "universal" in a morally significant sense only if they are acceptable from all moral and cultural points of view. This is different from the idea that genuine human rights must belong to human beings "as such:" any relationship between the catalogs of rights that satisfy this standard and those that are acceptable all around would be contingent. One might be attracted to the latter idea by recognition that human rights violations can serve as triggers for international interference in the society where the violations take place together with the belief that it would be objectionably paternalistic to interfere in defense of values not actually shared within that society's culture.[8] It is a commonplace that some of the norms found in the main international treaties conflict with elements of some of the major social-moral codes found in the world (consider, for example, provisions requiring equal treatment of men and women or those calling for equal individual rights to participate in politics). If human rights are supposed to describe a basis of intersocietal or intercultural agreement, then again it will appear that international doctrine overreaches. So we arrive by another route at the view that genuinely "universal" human rights are relatively few.[9]

A fifth form of skepticism results from combining this last thought with a view about the influence of the disparities of power found in global politics on human rights doctrine and practice. Modern human rights doctrine originated in Europe and the US, and while it is sometimes overlooked that smaller states, mostly outside of Europe, played a substantial role in the

[7] This idea is found in H. L. A. Hart's analysis of "the minimal content of natural law" in *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 9.2, though without reference to human rights.

[8] The canonical expression of this idea is the "Statement on Human Rights" of the Executive Board of the American Anthropological Association, *American Anthropologist*, NS 49 (1947): 539–43. The statement no longer represents the position of the Association. See American Anthropological Association, Committee on Human Rights, "Declaration on Anthropology and Human Rights" [1999], http://www.aaanet.org/stmts/humanrts.htm (consulted September 2, 2008).

[9] Chris Brown, "Universal Human Rights," in *Human Rights in Global Politics*, ed. Tim Dunne and Nicholas J. Wheeler (Cambridge: Cambridge University Press, 1999), 119. Of course, someone could share the view that human rights represent particularistic values without becoming a skeptic as characterized here. Richard Rorty's view is an example; see "Human Rights, Rationality, and Sentimentality," 117–19.

genesis of the postwar human rights regime, it is unlikely that there would have been either a declaration or treaties without the active engagement of the wartime great powers. In the subsequent history of international efforts to protect human rights, strong states have been largely immune from political and military interference to protect human rights. Moreover, there is a record of powerful countries relying on human rights as public rationales for measures whose primary purposes were unrelated to and occasionally incompatible with these rationales. And even when powerful actors have been authentically concerned to protect human rights, their attention has usually been directed at regions where they have strategic interests and diverted from those where they do not. Taking these facts together, it may seem that the impact of disparities of political power has been to distort both the content and the application of human rights doctrine in ways that serve the interests of powerful actors at the expense of others. At the limit, human rights may appear to be a mechanism of domination rather than an instrument of emancipation. This perception can argue for a more-or-less radical reshaping of the content of human rights doctrine as well as a resistance to international efforts to enforce its requirements.[10]

There are also other kinds of skepticism, including a pragmatic form that proceeds from the empirical judgment that neither acceptance of human rights treaty obligations nor international efforts at enforcement appreciably affect state behavior.[11] But this is enough to illustrate the variety of reasons why someone might doubt the meaningfulness of human rights talk or the practical significance or value of international human rights practice. I have only gestured at the details of these views. Perhaps a more careful formulation would reveal ways that each view is vulnerable to criticism. But I do not believe that skepticism of these forms is effectively refuted piecemeal. One seldom makes headway by showing that views like these depend on mistaken premises and bad arguments; the views simply reappear in more sophisticated forms. One does better to seek a constructive explanation of

[10] For variations of this view, see Tony Evans, *The Politics of Human Rights*, 2nd edn. (London: Pluto Press, 2005), ch. 2; Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), 10–38; and David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004), 3–36. These writers are not equally skeptical about human rights.

[11] E.g. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), ch. 4, and Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most," *Journal of Peace Research* 44 (2007): 407–25.

the subject-matter that causes the force of skeptical doubts to weaken. One aim of this book is to see whether international human rights practice is susceptible to such an explanation.

3. Approach

We can think of practical principles for various arenas of conduct in one of two ways. We might think of them as inferences from some higher-level ideas or principles of broader scope, adapted to take account of the particularities of the arena of immediate interest. Or we can think of them as principles constructed for this arena, taking account of an unsystematic array of ethical and practical considerations, brought into a relationship whose reasonableness is judged by their coherence, fitness for purpose, and capacity to account for pre-reflective judgments of which we feel confident. Each way of thinking has implications for various aspects of the principles in question: for example, their substantive content, their scope of application, the range and type of considerations that may properly enter into their justification.

This distinction can be found in thinking about human rights.[12] Some philosophers have conceived of human rights as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice—for example, as "natural rights" or their secular successors, as fundamental moral rights possessed by all human beings "as such" or "solely in virtue of their humanity," or as conditions for social institutions about which all the world's social moral codes agree. These possibilities are not mutually exclusive. The usual view is that international human rights—that is, the objects referred to as "human rights" in international doctrine and practice—express and derive their authority from some such deeper order of values. For those who accept some variation of this kind of view, the task of a theorist of international human rights is to discover and describe the deeper order of values and judge the extent to which international doctrine conforms to it.

[12] Describing a similar distinction among approaches to human rights, James Griffin uses the terms "top–down" and "bottom–up." He characterizes his own approach to human rights as "bottom–up" but, for reasons I shall suggest (§ 10), it seems to me to be a sophisticated application of the approach described in this paragraph: *On Human Rights* (Oxford: Oxford University Press, 2008), 29.

I shall argue that it is a mistake to think about international human rights in this way. These familiar conceptions are question-begging in presuming to understand and criticize an existing normative practice on the basis of one or another governing conception that does not, itself, take account of the functions that the idea of a human right is meant to play, and actually does play, in the practice. As we shall see, they are also at odds with the historical development of international human rights doctrine. Its authors disowned the thought that human rights are the expression of any single conception of human nature or human good or of any but the most general understanding of the purposes of human social organization. They took it as an ineliminable fact that people would differ about these matters. They therefore aspired to a doctrine that could be endorsed from many contemporary moral, religious, and cultural points of view and that was suited to be implemented by means distinctive to characteristically modern forms of social organization. The approach that takes human rights as the expression of a received philosophical idea risks missing this feature of international human rights.

I want to explore a different approach, one we might describe as practical. It aims to exploit the observation that the human rights enterprise is a global practice. The practice is both discursive and political. As a first approximation, we might say that it consists of a set of norms for the regulation of the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons. The practice exists within a global discursive community whose members recognize the practice's norms as reason-giving and use them in deliberating and arguing about how to act. These norms are expressed in the main international human rights instruments—the Universal Declaration of 1948 and the major treaties intended to give legal effect to its provisions—though, as we shall see, these formulations are open to interpretation and revision within the practice. The discursive community in which the practice resides is global and consists of a heterogeneous group of agents, including the governments of states, international organizations, participants in the processes of international law, economic actors such as business firms, members of nongovernmental organizations, and participants in domestic and transnational political networks and social movements. The approach I shall explore tries to grasp the concept of a human right by understanding the role this concept plays within the practice. Human rights claims are supposed to be reason-giving for various kinds of political action which are open to a range of agents. We understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons.[13]

I will have more to say about the details of the practice of human rights later. Here, I note two qualifications. First, in holding that the practice consists of norms which are widely recognized within a discursive community, I do not mean to say that there is agreement within the community about the scope and content of the system of norms taken as a whole, about the weights that should be attached to the reasons for action supplied by these norms, or about how conflicts among human rights, or between human rights and other values, should be resolved. Indeed, as we shall see, it is not only an inevitable but also a functionally significant aspect of the practice of human rights that its norms serve as much to frame disagreement as agreement. The practice is constituted as a practice not by agreement about the content of the norms or the practical conclusions to which one is committed by accepting them, but rather by acceptance of a distinctive class of norms as sources of reasons—though not necessarily as decisive reasons—for an array of modes of action. We rely on the practice for an understanding of the discursive roles of human rights, not (or anyway not directly) to delineate their scope or content.

The other qualification is that the practice of human rights is emergent. It is unlike more settled and longstanding normative practices such as might be found, say, in a mature legal system. In mature social practices, there is fairly wide agreement within the community about the actions that are appropriate in response to failures to adhere to the practice's norms. This agreement is sustained over time by traditions of judgment about the appropriateness of these responses.[14] But human rights practice is not a mature social practice. There is disagreement about all its main elements—for example, about the content of its norms, the eligible means for their application and enforcement, the distribution of responsibilities to

[13] On the understanding of normative concepts in discursive practices, see Robert Brandom, *Articulating Reasons: An Introduction to Inferentialism* (Cambridge, MA: Harvard University Press, 2000), ch. 2, and Stephen C. Angle, *Human Rights and Chinese Thought* (Cambridge: Cambridge University Press, 2002), 27–39. Also instructive is John R. Searle's account of the progression from "social fact" to "institutional fact" in *The Construction of Social Reality* (New York: Free Press, 1995), 88 ff. Searle's brief remarks about human rights (p. 93) are abstract and do not take account of the normative breadth of contemporary practice.

[14] Robert Brandom, "Freedom and Constraint by Norms," in *Hermeneutics and Praxis*, ed. Robert Hollinger (Notre Dame, IN: University of Notre Dame Press, 1985), 178.

support them, and the weight to be accorded to considerations about human rights when they come into conflict with other values. International human rights institutions lack capacities for authoritative adjudication of disputes and coercive enforcement of the practice's norms. The division of labor between public human rights institutions and nongovernmental organizations that participate in international institutional processes is unstable. Most importantly for our purposes, there is no unambiguous basis for establishing the boundaries of the discursive community within which the practice takes place. I have said that the meaning of the idea of a human right can be inferred from its role in a discursive practice, but if the boundaries of the discursive community are indistinct—for example, if there is no authoritative basis for ruling participants in or out—then there may be unavoidable indeterminacy in our understanding of the idea. All of these features reflect the practice's emergent character and all complicate a practical analysis. Notwithstanding the complications, however, there is no denying the existence or the doctrinal and institutional complexity of the practice of human rights: it organizes much of the normative discourse of contemporary world politics and commands the energy and commitment of large numbers of people and organizations.

As we shall see, the most general consequence of taking a practical approach is to call into question the two familiar conceptions mentioned earlier—the idea of human rights as entitlements that belong to people "by nature" or "simply in virtue of their humanity" and the distinct idea of human rights as objects of agreement among diverse moral and political cultures. Here I should anticipate an objection. A practical approach does more than notice that a practice of human rights exists; it claims for the practice a certain authority in guiding our thinking about the nature of human rights. But someone might wonder why the practice considered as an empirical phenomenon should be allowed any such authority. For example, why should we count it against an otherwise attractive philosophical theory of human rights that its conception of a human right diverges from the conception found in the practice, under its best available interpretation? Why not say, so much the worse for the practice?

In summary, the reply I shall suggest is this. There are many questions that might be asked about human rights. We might ask, for example, which values count as human rights, which agents have responsibilities to act when a right is violated, and what kinds of actions these agents have reason to

carry out. We might also ask—indeed, the question arises prior to the others I have listed—what kind of object a human right is or, as I shall interpret this question, what an ordinarily competent participant in the discourse of human rights would understand herself to be committed to if she were to acknowledge that a human right to such-and-such exists. The approach taken in this book allows the practice to exercise some degree of authority over the prior question but not, or anyway not directly, over the others. The basic idea is to distinguish between the problem of describing human rights from the problems of determining what they may justifiably require and identifying the reasons we might have for acting on them. These questions are related, of course, because any view about the nature of human rights will have implications for their grounds and requirements. Still, the questions are distinct.

Two considerations explain why it seems legitimate to allow the practice even this degree of authority. First, as I have said, the practice exists: it is elaborate both doctrinally and politically, it consumes a considerable amount of human and other resources, and people tend to regard its norms with great seriousness. If the focus of critical interest is the idea of human rights as it arises in public reflection and argument about global political life, then it seems self-evident that we should take instruction from the public practice in conceptualizing its central terms. This does not mean that there is no point in investigating other conceptions of human rights such as those that might be inspired by various ideas found in the history of thought; only that we ought not to assume that this would be an investigation of human rights in the sense in which they occur in contemporary public discourse. The second point is that we have *prima facie* reason to regard the practice of human rights as valuable. On the face of it, its norms seek to protect important human interests against threats of state-sponsored neglect or oppression which we know from historical experience are real and can be devastating when realized. As I shall put the point later, a global practice of human rights offers the hope of constraining one of the two main perils of a global political order composed of independent states. (The other is the propensity to war.)

I do not suggest that these are reasons to accept the contents of existing human rights doctrine as binding on us or to agree that the practice as we find it is the best way to realize the hope one might see in it as a matter of first impression. These are questions to be examined in their own right. But

neither question can be rendered coherently without a clear grasp of the idea of human rights. To achieve such a grasp we do not suppose that human rights must express or derive from a single basic value or that they constitute a single, fundamental category of moral concern. Instead, we treat international human rights as a normative practice to be grasped *sui generis* and consider how the idea of a human right functions within it.

2

The Practice

THE central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents. This idea is incorporated in the human rights provisions of the United Nations Charter, which, as a US court put it, "makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern."[1] Since the end of World War II, the idea has taken form in what I shall call an emergent practice of human rights. In this chapter I try to describe the main elements of this practice.

The description seeks to be selective and thematic rather than comprehensive. I begin with a historical precis devoted to the origins of the modern practice of human rights. I then comment about the two main elements of human rights practice—its doctrinal content and the various mechanisms that have evolved for the propagation and enforcement (or "implementation") of human rights. All of this will be elementary for those familiar with the subject, but not all philosophical readers will have this familiarity and it is essential for what follows to see that human rights as we find them in contemporary world politics constitute a public political project with its own distinctive purposes, forms of action, and culture. The aim is to describe the most important features of this practice in a schematic and reasonably charitable way, if possible without prejudging the outcome of some interpretative and normative issues that arise when one thinks critically about it. At the end of the chapter, I try to anticipate these issues.

[1] *Filártiga* v. *Peña-Irala*, 630 F.2d 876 (1980), 881. The court held that the Alien Tort Claims Act of 1789 (28 U.S.C. § 1350) authorizes the federal courts to try cases brought by aliens alleging egregious violations of human rights, wherever committed, by agents found within the US.