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REVIEW ESSAY

THE LIMITS OF HUMAN RIGHTS LIMITS

*By Henry J. Richardson III**

Rescuing Human Rights: A Radically Moderate Approach. By Hurst Hannum. Cambridge, UK: Cambridge University Press, 2019. Pp. xx, 223. Index.

Rescuing Human Rights: A Radically Moderate Approach (*Rescuing*) was published shortly before the outbreak in 2020 of the novel coronavirus and its myriad human rights and class issues regarding equality, discrimination, health, and labor rights of people of color. This was also prior to the concurrent public murder of George Floyd as an unarmed Black man by the Minneapolis police in late May 2020, and the resulting continuing Black Lives Matter massive national and international movement against the deaths of Floyd and others and the history of systemic American racism, including police shooting deaths, discrimination, and brutality against African Americans, particularly unarmed Black men. Such comprehensive street protests have not been seen in America since 1968. They represent, inter alia, the cover of disguises of national racism being publicly stripped away, and the national confrontation with irrefutable evidence of a wide spectrum of systemic rights violations and the deficits of American law and government to ensure African Americans' basic rights. Further, *Rescuing* was published before it became fully apparent that the federal government's responses to Black Lives Matter, particularly the executive branch, would fan the racial conflicts of national mourning and demands for new justice narratives, rather than healing and unifying for American citizens as a whole, even as these protests were the most diverse in recent memory.

This timing of publication presents a particular challenge when the scholarly work is a human rights treatise, which is subsequently publicized and reviewed amidst such enormous national violations of human rights and backlash from the revealed substrata of aggressive historical American racism, the outbreaks of which the author could not have taken into account in his writing and narratives. Such a challenge, relative to assessing the quality of such a book beset by this timing, may well be unfair in common perceptions of narratives and subjects, but it is likely inevitable. The emerged, massive Black Lives Matter movement and its inherent questions of whether America's status quo ante would yet again absorb and squelch all new

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videotaped violations and systemic demands—even before the violations are multiplied by the concurrent deadly (over 300,000 American lives, with the heaviest burdens on people of color) and economically destructive human consequences of the current global pandemic—simply cannot be ignored in reviewing a new human rights treatise by a prominent American scholar.

Inevitably, the author's written narratives and future projections about the durability of his and others' doctrinal analysis, resolution of the disputed scope and application of rights will be brought forward into readers' current understandings of historic events about racial justice defining their lives, and of new locations of duties to produce that justice. The book's narratives will in some way pose the question of whether the author, notwithstanding the timing of publication, was nevertheless sufficiently prescient to suggest the new paradigmatic rights issues from the historic confluence of a deadly pandemic and a Black Lives Matter movement. Or at least, to provide durable human rights wisdom to help decision makers charged with building new just human futures from this deadly confluence, to do so a bit more perceptively and equitably in confronting interlocked bundles of urgent issues of rights, rights opposition, and authority.

And so, this challenge of disparate timing must be a backdrop for this Review, at least as the author's rights interpretations and narratives—which heavily focus on narratives defining limits to human rights law—can be identified as seemingly valuable, or as being more deflecting from the intense new rights violations landscape into which this treatise has been released.

Hannum, professor of international law at Tufts University, The Fletcher School, in *Rescuing*, has given us an informative, well-crafted scholarly exploration that aims to rescue international human rights law from overzealous human rights advocates, regarding desirability of interpretations, strategies of human rights application, and consequences of rights enforcement. It arrives in the company of other similar approaches that argue for limitations on prescribing and applying human rights legal solutions to human conflicts and needs. These approaches often posit that such "overextending" of human rights principles into inappropriate areas harms both human rights law by diluting or raising community backlash to its authority, and delays or corrupts the addressed underlying human need or oppression by politically blocking more effective policy and alternative narratives and remedies.

Such approaches raise the question of why are they being put forward during this historical period? Whose interests in the international community and intersecting national communities are being served by pushing a human rights jurisprudence of limited rights prescription and the substitution in authority by other disciplines, e.g., political science, economics, and sociology, to displace human rights law in remedying human rights violations? There are concurrent other approaches to reinterpret the global human rights project, such as identifying Northern-tier neoimperialist human rights invocations to subordinate Southern peoples and cultures, and of identifying human rights doctrine as a colonial continuation and justification for Northern military and economic exploitation of Southern peoples. The appearance of a potential functional approach justifying human rights limits tempts us to see a possible relationship of the latter to the former issues. But the foundational issue paraphrased from Richard Falk must prevail: "Can we study international human rights law as if people (living beyond its proposed 'limits') really mattered?"

In *Rescuing*, Hannum has illuminated and sharpened these and related questions in a clearly written, self-styled "pragmatic" approach. In this well-documented inquiry, he is

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clear about his aim to warn against the overextension of human rights law into areas of human harms and state policy where it does not belong, while preserving its legal authority and necessity in areas where it does.

In developing these narratives, Hannum surveys most of the human rights landscape to identify, discuss, and draw conclusions about where to distinguish the permissible holdings of human rights law as "law," from the moral, political, social, economic, and cultural premises that underpin other "nonlegal" categories of human rights demands, interpretations, and claims. Throughout, he illustrates and warns of the threats to human rights law when its commentators and practitioners push to stray toward framing issues and prescribing human rights legal solutions for human harms in areas of social, moral, and policy problems where, under Hannum's concept of human rights law, they have no business. Examples of human rights law "overreaching" by NGOs, United Nations organizations, and scholars are often characterized as being "morally defensible" and "laudable and necessary." But they are beyond the "original intent" of the Universal Declaration of Human Rights.

Hannum frames his distinctions between appropriate and overreaching applications of human rights law in a well-documented survey of contemporary human rights legal trends and issues. It features observations about law crossing into forbidden territory, including some nuggets of quiet myth-busting delight in illustrating widely cited claims to legal authority, for example, in his discussion of the Ruggie Principles[1] and the human rights (non)obligations of multinational corporations, where he clearly finds missing the precedents and sources of any such authority.

Thus, in ten chapters, Hannum takes us on a well-organized journey of doctrine, sources, precedents, and "realistic" interpretations of human rights law flowing in its appropriate riverbed, setting out his "radically moderate approach" to rescuing human rights law. He sees high stakes riding on the "rescue" being successful. The unintended consequence of overexpansion may be "to set back an entire movement that is based on the proposition that all human beings enjoy certain universal rights *that their governments must protect*" (p. 5, emphasis added).

But he quickly notes that interpretations of international norms change over time, and that we have "a much fuller understanding of human rights than we did in 1948," including that people today are less likely to tolerate inequities and ill-treatment that were common a half century ago (*id.*). He warns further that human rights restraint in formulating new rights should not serve as cover to justify attempts "to turn the clock back to an earlier time, when women, children, minorities, and other disempowered groups 'knew their place'" (*id.*). However, the *process* of change to expand human rights legal interpretations that Hannum would applaud—beyond new multilateral treaties—is never made clear, when compared with his strong warnings against overexpansion that are integral to rescuing human rights law.

In the Introduction, Hannum makes clear the centrality of national state authority in not only enforcing human rights but in defining human rights law. Acknowledging the

[1] John Ruggie's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," UN Doc. A/HRC/17/31, Annex (Mar. 21, 2011) (a prominent set of principles reflecting comments from governments and other stakeholders, opposing previous UN Norms on corporate responsibility for human rights, as discussed in: PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1478–90 (2013)).

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importance of human rights treaties in creating legal obligations, he concludes that "in most instances the ultimate power to determine just what those obligations entail remains with the [states] themselves" (p. 6). But conflating the legal existence of a right with the efficiency of its enforcement, with the latter prevailing, under Hannum's "pragmatic" approach to human rights law, creates jurisprudential ambiguity throughout his discussion. He touches early on recent trends in Europe and the United States of nationalism and populism from the right, and notes that most of the issues involved in "rescuing" pre-date this global political shift to the right.

Central to this enterprise is Hannum's notion of human rights as "law." He holds that the status of human rights as law must be protected, and the distinction between legal obligations and other obligations of a moral or political nature must be maintained. "Human rights may mean all things to all people, but international human rights law cannot" (p. 8). Admitting that this approach may be criticized as narrow, he sees it as providing a structural context in which human rights can best be understood in today's world. "Law" here is understood as defined exclusively by the agreement of national governments on which rights they will protect. This approach provides the best evidence of the content of human rights, and the best evidence of the essential universality of the human rights commitments that states have actually undertaken. It is also essential to clarifying other roles that human rights may play, as ideology, utopia, or political weapon. Significantly, Hannum posits that expansive human rights claims are not needed now.

But he maintains that human rights law can change, and that its continuing evolution is demonstrated by the adoption of numerous treaties at global and regional levels that expand rights, occasionally limited by UN Charter and Universal Declaration norms. Notably, other nontreaty sources of international law garner little recognition of human rights evolutionary legal authority throughout his discussion. This is to be compared to contemporary doctrines from international courts and scholars expanding the sources of international law well beyond treaties. Hannum is clear that proclaiming new norms without ensuring that "meaningful consensus exists within all regions of the world can be problematic" (p. 9). This formulation is an early important marker in the book to define permissible limits for human rights advocates in pushing for new human rights norms. But it also raises the question of whether Hannum intends to posit that the universal agreement of states in the world community is the exclusive route to expanding human rights law.

Describing his approach as "pragmatic" and "realist," Hannum posits that the current international state system will continue to exist for the foreseeable future; no system of global governance will "ever be able to assume responsibility for protecting the rights of billions of people around the world" (p. 10). International human rights law has had a positive influence on the global human situation, and maintenance and better implementation of that law should be encouraged. It is not a primary agent of change, but it can facilitate other change factors so as to respond to the needs of most of the world's people. Human rights law provides a minimum standard for the relationship between individuals and their governments. But it "should not be utilized to impose any particular conception of the ideal society in every corner of the world" (*id.*). However, human rights "constrain some of the acts that might have been legally and politically viable options for states before 1948, [namely,] colonialism, and slavery which are no longer legally and morally acceptable in the world, as neither are genocide, torture, unfair trials, despotism, discrimination, unjustified limitations on basic freedoms, or

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government failure to put the rights of its population above the interests of its entrenched elites" (p. 10).

As he further discusses, in allowing for such a list of appropriately recognized and authoritative rights, presumably within the limits that human rights advocates may permissibly invoke international legal norms, Hannum defines a key prong of his "radically moderate" approach to "rescuing" human rights law. He does so by asserting that it has a firm historical foundation that remains authoritative today. And that all needed limits and warnings for human rights advocates should be understood to stand on this foundation, perhaps in urging them to better invoke and apply its principles and interpretations to new problems, but with their necessity to always secure the near-global agreement of national state governments.

In Chapter 2, Hannum discusses his limiting proposition that international crimes are not violations of human rights. He argues that the position that international crimes are human rights violations is an example of the many attempts to infuse human rights into unrelated concepts. Criminal justice does not automatically lead to greater general respect for human rights. It does provide examples of conflating human rights violations with international criminal prosecutions in the United Nations and by governments, for example, regarding amnesties and impunity issues. And focusing on international criminal prosecutions may even undermine human rights concerns by essentially sweeping them under the rug, for example, regarding Cambodia. Human rights violations are not crimes, and are attributable to governments, not individuals. Confusing international criminal prosecution with human rights distorts the latter's priorities, and diminishes the attention that should be paid to the "more boring yet more pervasive" human rights violations that are faced by most of the world's population most of the time (p. 25).

In Chapter 3, Hannum focuses on "The Importance of Government, for Better or Worse," through a strong discussion of why human rights law should not prescribe obligations for multinational corporations (p. 26). He argues that governments are the only entities that truly have human rights obligations under international law. From this follows strong criticism of communications and codifications argued to establish such multinational corporate obligations, including the Ruggie Principles, as lacking sufficient state agreement to make them authoritative. This overreach defines necessary limits for all human rights advocates who posit that such obligations have evolved into human rights law.

In Chapter 4, Hannum considers how overstating the ability of human rights to resolve complex issues, faced by all societies, weakens their legitimacy and power. The danger lies in conflating human rights with creating a sustainable environment, regulating trade, ending corruption, and dealing with rapid advances in technology. Such conflation reduces rights to "mere tools to achieve other goals," rather than supporting them as law to be followed and enforced (p. 56). The "adversarial absolution of rights language," as it drives away "the often more fruitful path of disagreement and debate may make it *less* likely that society will be able to arrive at viable solutions to these problems," because of less focus on needed "political, economic, scientific, and ethical perspectives" (*id.*). But despite this skepticism supporting limits on human rights law, Hannum upholds the legal authority of the International Covenant on Economic, Social and Cultural Rights,[2] in part because of its graduated obligations on the state and its references to the availability of national resources to achieve them.

[2] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

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However, there seems to be a risky assumption that such needed policy debates for viable national rights solutions will occur in societies that are sufficiently democratic and representative to ensure to all stakeholders fair participation in shaping the policy outcomes. This assumption underscores the importance of disaggregating the state relative to identifying, dominating, and subordinating politics among national groups in any assessment of the application of human rights law to citizens regarding the obligations of that state compared to the power of dominating domestic groups. Hannum's discussion throughout strongly focuses on the state as a unitary sovereign entity in its exclusive obligations to ensure and protect human rights. Discussions based on disaggregating the state regarding rights outcomes among its pluralistic groups are omitted.

Hannum opens Chapter 5 by further defining his equation between needed limits on creating new rights and the available space for new rights norms, both of which he would permit, and examples are cited for both conceptions. Further nuances are included, such as: "The occasional excesses of activists who misuse human rights norms to achieve social goals are matched by the attempts of some governments to use human rights as purely political tools to promote geopolitical strategies" (p. 58). He posits that the most common means through which the content of rights can change are through "interpretation, extension, and creation" (*id.*)

As previously noted, treaties are his preferred mode of rights creation and confirmation, as they are interpreted under the Vienna Convention on the Law of Treaties, but he posits that human rights tribunals and treaty bodies consistently interpret human rights norms using a progressive and evolutionary approach. He finds the process of interpretation to generally expand the scope of human rights, for example, the recognition of the rights of indigenous peoples to their land, and quickly notes that none of these rights is explicitly mentioned in the treaties under consideration. He cites a category of "intersectional rights," not truly demands for new human rights, but demands for more focused attention to neglected issues within human rights, such as the right to water.

Hannum points to the UN treaty-making process as generally extending human rights, as well as clarifying or deepening protection of certain rights, such as workers' rights to health and safety. Importantly, in clarifying his notion of "limits," he declares that extension of rights through new treaties "is not problematic, since a new treaty imposes obligations on countries only if they ratify the treaty, but a treaty's scope cannot be expanded merely through adoption of guidelines or recommendations per se, which would more properly be seen as a means of interpretation" (pp. 60–61). This rather narrow construct of treaty authority is consistent with the heavily statist focus throughout the book. Hannum sees soft law as the best example of the "attempted creation" of new rights, which approach simultaneously features new human rights directions possibly useful. But their adoption by nonstate groups create examples of "silly or over-the-top rights," or "'wannabe' rights" whose legitimacy "has not been confirmed by their inclusion in a legally binding treaty or through wide political acceptance by states" (p. 61). His prime example here is the right to development.

It is puzzling for the right to development to be so enthusiastically cited as an example of human rights overreaching, not least because Hannum cites the wide political support for the notion of such a right. He also joins other commentators, such as David Kennedy,[3] in

[3] David Kennedy, The Dark Side of Virtue: Reassessing International Humanitarianism, ch. 1 (2004).

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opposing its recognition as a human right because of the supposed unworkable complexity of its issues of interpretation and implementation. This focus spotlights North/South divergences in defining this right, between definitions focusing on economic development and conditions for sending Northern resources to the South to help produce Southern state progress-in-development, including under the global neoliberal economic consensus. On the other hand, there is Southern legal history and its narratives, seeing "development" differently as a postcolonial imperative and empowering collective right regarding the ability of sovereign Southern states to mobilize their own power and authority. This refers to their creating arrangements, resources, options, and an identity for their peoples' future, for example, the doctrine of permanent sovereignty over natural resources, and to shield themselves from dominating interference by outside Northern states and institutions. The perennial tensions between these notions include Southern demands for Northern reparational obligations, and define a moving frontier between neocolonial exploitation and international cooperation. They stem from the decolonization period, the determination of the North to retain ultimate economic control of the international community, questions of, inter alia, Northern industrial demands for Southern natural and extractive resources, and the necessity of equitable global solutions to climate change.

These tensions around the right to development illuminate the question of whether Hannum's notion of needed limits on human rights principles and interpretations must inevitably deny the relevance of human rights to global problems of exploitation, subordination, and empowerment of Southern tier peoples of color relative to the evolution of a globally equitable international order. Is human rights legal relevance to be denied regarding Northern coercive impositions against Southern states and peoples to make them compliant with Northern notions of development? All commentators who espouse the notion of human rights limits cannot escape addressing this and similar questions of global subordination, explicitly or implicitly by omission.

In leaving Chapter 5, several factors seem pertinent for Hannum. They include human rights advocates being restrained by the original intent of an interpreted treaty right, by the need for wide political acceptance by *states*, by reference to the individual person(s)' relationship to their national government, and by the need to show the practicality of the proposed new right in a positivist state-centric approach to human rights law.

Hannum opens Chapter 6 by observing that whether we take an expansive or restrictive view of "Women, Sex, and Gender," even the "easy" norm of nondiscrimination against women remains "woefully unimplemented in many countries and societies" (p. 80). His review of the history of international human rights texts on the rights of women in recent decades, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), reveals a paradigmatic question about the nature of human rights: whether they (should) articulate the highest most inclusive egalitarian universal standards and aspirations of half the world's population? Or whether human rights should establish only a minimum standard of "true" nondiscrimination and formal equality, and leave it to countries, societies, and even local communities to determine what is fair, just, and desirable beyond that international minimum?

This is a paradigm question, especially so regarding the rights of women because of their global numbers, their pervasive global exposure to subordination, violence, and levels of excusatory legal, cultural, and social norms to support the patriarchal power arrayed against them.

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The question's first prong goes to whether human rights jurisprudence, doctrine, and norms will be defined to fully condemn and hold accountable all acts of patriarchal power and violence globally—whether or not such acts are deemed normal, culturally embedded, and productive of backlash against protective interference—that are mobilized against women as individual persons. That is, will international human rights law incorporate best strategies and resources of equitable and moral guidance to protect especially women of color in the international community, committing processes and resources of enforcement to raise this law to that desirable level?

The question's second prong incorporates a notion of deference to existing patterns of systemic oppression against women, such deference limited by a floor of foundational principles of "true" nondiscrimination and "formal" equality to protect as they can women's welfare against global patriarchal power. But otherwise, the vast remaining areas of sovereign, national, social, and local normative discretion are depended on, as their collective decisions incorporate such oppression, to make protective determinations about women's lives and rights as to what is fair, just, and desirable beyond that international minimum. Such local determinations, protective or not, are then reincorporated back into international law, through domestic jurisdiction and such vestiges of cultural relativist doctrine regarding human rights that their universal authority has not been interpreted (by states?) to block.

Riding as close as this prong does to leaving women's human rights in state territories at the "fair, just, and desirable" mercy of government-defined cultural relativism (p. 81), it must be asked whether this is simply too great a normative burden for "realism"—as partly defined by quantitatively and politically determined recognition of aggressive patriarchal oppression—to bear as a justifying approach to "law"? That is, international human rights law in its "realism" is relying on the interstices of the global status quo of permitted women's privileges, state prerogatives, subordinating politics and culture, to make only incremental advances toward protecting and ensuring any more protective and wider scope of women's rights.

Hannum finds CEDAW as a treaty of basic norms of nondiscrimination to be "impressive." He nevertheless notes that some provisions go well beyond "formal non-discrimination," such as state obligations to eliminate discrimination against women by any person or enterprise, and to abolish laws, culture, and customs of anti-women discrimination. He confirms that human rights law requires truly eliminating discrimination in all fields, and this "may be achievable " (p. 84). But he finds that broader social change in all public and private relationships is much more difficult to impose "through international norms that are supposed to be universal" (*id.*). Law by itself cannot change male attitudes of control over women operating for millennia. Education and economic advancement are more desirable than immediately putting women in situations where they are resented. Contrary religious belief against claims of equality for women is part of the continuing ambiguity in defining what equality toward women entails. And regarding universality and human rights, this cannot lead to men and women determining the same results everywhere.

On the issue of whether "sex" in human rights documents includes other than heterosexual orientation, Hannum finds affirmative recent trends in decisions of human rights bodies, along with supporting international court decisions that discrimination against homosexuals violates the prohibition against sex discrimination. He then confronts Northern tier versus Southern tier divisions regarding African governments' hostility to LGBTQ rights, with two-thirds of them criminalizing homosexual acts. In Asia there are also broadly negative

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and repressive attitudes. Hannum finds that UN organs have used a narrow focus to avoid confronting these wide variations in law and practice, and notes that Islam and Catholicism both condemn homosexuality, with some possible doctrinal shifts. He then inquires how best to allocate global human rights authority across these wide variations of law and practice.

Rejecting any basis in customary international law for prohibiting such discrimination, due to variations in state practice, Hannum posits that the individual state violates its human rights obligations if it does not adequately protect individuals, including LGBTQ persons, from threats and violence against them.

The North/South split on issues of women, sex, and gender is "striking," and reinforces Southern "long-standing though often hypocritical" arguments that human rights are only an attempt to impose "Western" norms on the rest of the world (p. 91). But rather than exploring whether and how human rights can be a source of Northern subordination of Southern peoples, Hannum here puts the burden on "some LGBTQ activists" for such Southern arguments. They include in their advocacy "much more" than nondiscrimination issues, for example regarding race and gender. Such advocacy leads to increased risks for LGBTQ people in many countries, including governments reacting with repression to unwanted assertions of their rights. He asks whether such advocacy unintentionally increases prejudice rather than encouraging acceptance "through quieter or more subtle means" (p. 92). But this argument appears to conflate the legal existence of LGBTQ human rights with any intense and violent government and cultural opposition to their enforcement. In this connection, Hannum limits human rights advocates to the primary goal of protecting all persons of all sexual orientations in the real world, rather than simply supporting their own personal convictions or seek broad social change in very different societies through "the narrow lens of human rights law" (*id.*).

However, it must be noted that such limits, beyond omitting important questions about the intersection of social change with demands for better human rights, by putting such burdens on "inappropriate" human rights advocates, shield the governments and perpetrators of backlash, repression, and violence from any normative accountability for their actions. Doing so thus encourages the backlash question of whether the human targets of oppression *deserve* such government accountability. Simply blaming legal advocates avoids issues of assessing the use of more supposedly effective "quieter and more subtle means" of human rights protection. This leaves the door open for national government actions against their vulnerable citizens, justified by their international invocation of "long tradition" as a waiver of their universal rights-protective obligations for those citizens. Determinations must be made in human rights law about how much authority, and why, to give long-embedded cultural traditions and state power that produce inhumane outcomes against women and other vulnerable people.

In concluding his discussion on women, sex, and gender, Hannum advances three propositions. First, in advocating new norms of international human rights law, declarations, resolutions, reports, and other soft law communications must be examined closely to see if the proposed protective norms are already included within existing international human rights norms. This can be the case, for example, for the Yogyakarta Principles protecting rights relating to sexual orientation and gender identity.[4] Advocacy of rights beyond those norms lies

[4] Yogyakarta Principles, *at* www.yogyakartaprinciples.org. In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of principles related to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to international human rights

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beyond appropriate limits. Second, the extent and relevance of gender identity is not automatically congruent with human rights provisions relating to women and "sex." At stake here is preserving a notion of human rights universality that does not demand identical rights outcomes in all national jurisdictions. At stake also is whether human rights law will simply dismiss the consistently expressed opposition of countries when they believe that rights are being unjustifiably expanded or created. Hannum strongly argues that this dismissal should not happen.

However, a contradiction must be noted here between *countries/governments* believing that unjustifiable rights are being created, and the inherent subject matter and content of the proposed rights referring only to human persons. Such government beliefs and opposition seem to violate its settled human rights obligation to provide rights remedies for its citizens, unless that obligation also can be waived by government claims to follow embedded traditional national culture. And third, Hannum warns against "sex rights" (pp. 94, 96) being equated with diversity, stating that international norms protect many intolerant beliefs. Universal human rights norms will never reflect everything a good many advocates would like to see in the world, even as those norms are expressed in a wide authoritative multilateral treaty such as CEDAW, in part because issues of women, sex, and gender are unlikely to be viewed identically from the local level.

In Chapter 7, Hannum brings forward "flexibility" as his response to the underlying global human rights question of universality versus cultural relativism. He uses this notion (referring to the national/local level) both to stay out of the deep clutches of cultural relativism, and to stay away from what he sees as false doctrinal accusations of equating universality with "uniformity in a world of diverse societies, differing government structures, and sovereign states" (p. 98). As an enabling doctrine for national and local rights application, he invokes the European narrative of "margin of appreciation" through an informative discussion.

Hannum holds that "states should respect the cultural diversity and pluralism that exist within communities and societies as a source of enrichment and value added. However this should not justify any breach of universal human rights and fundamental freedoms" (p. 103). This amounts to a balancing act between sovereign state domestic competence to authorize cultural pluralism as the final definition of human rights for its citizens, underpinned by a minimum floor of international sovereign obligation to protect universal human rights and fundamental freedoms, implemented by just the appropriate degree of international scrutiny of the state's domestic jurisdiction. This is a fine line to walk, and Hannum makes a valiant effort within his own parameters.

The omnipresent question looms of how to characterize the domestic pluralism and cultural traditions invoked by governments as a competing source of both human rights authority and human life, especially for vulnerable people. Hannum calls for respecting pluralism and traditions as a source of enrichment and value added. This can indeed be the case, and the school of Third World Approaches to International Law[5] and other Southern-tier-oriented

which affirm binding legal standards with which all states must comply. On November 10, 2017, a panel of experts published additional principles on the original document reflecting developments in international human rights law and practice since the 2006 Principles: The Yogyakarta Principles Plus 10, which cover additional state obligations in areas such as torture, asylum, privacy, health, and the protection of human rights defenders.

[5] For an excellent recent overview, see James Gathii, Grotius Lecture, ASIL Annual (virtual) Meeting, June 25, 2020 (to be published in the *ASIL Proceedings of the Annual Meeting*). *See also* James Gathii, *Writing Race and*

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jurisprudential literature goes even further in protecting such traditions, to which Southern citizens of color have a right to historic ownership, pride, and protection from Northern neocolonial policies of domination and subordination, including their own definitions of enrichment.

If, however, we now shift our gaze to Northern states, not least the United States, we see that pluralism, majority rule, and the dark side of federalism have all been confirmed in opposition to the vast Black Lives Matter popular resistance movement (now global) and in support for progenitors of systemic violent racism against African Americans and others. Resting on traditions, white identity claims, narratives, and racial captures of government prerogatives, this racism extends on a historical bridge back to the beginnings of American slavery four centuries ago. American practice and jurisprudence, in prohibiting international scrutiny and prohibiting defining African American rights as resting on international human rights to freedom, have shown no less than a powerful continuing invocation of cultural relativism against American universal human rights obligations.

For the United States, the question of whether this pluralism and cultural diversity is a source of enrichment and value added is being answered in the negative simultaneously in American streets, numbers of other streets in other countries, and increasingly the United Nations. There are calls and globalized realizations for greater international rights scrutiny and assessment of embedded cultural narratives in the United States and in other Northern tier countries. Systemic racism somewhat explains Northern invocations of human rights violations against Southern states to gain legal, normative, economic, and political leverage through "human rights imperialism." But the value demands now invoked in the American streets against Northern racism are reparational and equitable, targeting government and private sheltering of Northern racism, and do not aim to use the rights-appraisals of persons in the South to impose new narratives of Northern protocolonial control and subordination.

Hannum raises the question of Northern human rights imperialism based on perceptions of "Western" rights, such as gender identity rights to be free of stereotypes. But he places a measure of blame for such perceptions on human rights advocates whose overreaching may undermine efforts to guarantee or restore equally important rights on which one may be able to find a wider measure of agreement. This formulation seems to assume that local cultural traditions should be characterized as general sources of enrichment, which overzealous human rights advocates are threatening to derail, to the harm of local citizens, by their advocacy bypassing appropriate limits and suppressing other unnamed sources of alternative international rights influences.

But what if those cultural traditions are not sources of "enrichment" but rather sources of globally recognized oppression? In the United States, the call in the historic Black Lives Matter movement is not for human rights advocates to self-limit their legal imaginations among discrete sources of law to define human rights authority within the American state, but precisely the opposite. Those oppressive, violent cultural traditions of systemic racism are not to be shielded from international scrutiny as embedded traditions demanding "flexibility." Rather, they are to be replaced through targeted national and international human rights advocacy to bring unprecedented *systemic* justice for people of color under the rule of

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law and police authority. Human rights imperialism toward the South may be undermined by these historic actions and wide advocacy of Northern peoples of color demanding their right to liberation—not simply from violations of their discrete precedential human rights, but from a systemic rights-violating oppressive ordering of American and other Northern societies.

Thus, Hannum's notion of "flexibility" to rescue the universal authority of human rights norms, with its centrality of national state authority to shape human rights obligations, faces an immediate historic challenge from Northern tier peoples of color. But in generally denying that international human rights law ever intended to create a single global social and moral order, Hannum makes four findings of recognized universal norms: "respect for the indefinable concept of human dignity"; "the more manageable commitment to non-discrimination"; the commitment to equal treatment (p.106); and the basic authority of the Covenant on Economic, Social and Cultural Rights and the Covenant on Political and Civil Rights (p. 98). In doing so, he signals that however his "radically moderate" limitations on human rights law are defined, they do not rest on hierarchal authority between civil and political rights and economic, social, and cultural rights.

In discussing regional prescription and interpretations of human rights norms, Hannum recognizes and approves of the more limited catalogs of human rights held under the European Convention on Human Rights, but less so the more expansive interpretations of the Inter-American Court and Commission on Human Rights, and the African Court of Human and Peoples' Rights, and he warns human rights advocates accordingly against overexpansion. But by fixing limits for human rights advocates that correspond to distinctions between European and Southern tier regional organizations, Hannum, unintentionally I believe, frames a question of human rights subordination. The question goes to the relationship between his limits (or anyone's) on human rights advocates seeking greater protection through "overreaching" under human rights law for vulnerable persons of color, and the continuation of colonial expectations of law formation and assigning global authority to European sources under international law. Those expectations presume Southern tier peoples do not make valid contributions to international law.

In Chapter 8, Hannum addresses the question of military intervention to protect international human rights, with a focus on the doctrine of responsibility to protect (R2P). He finds little basis for such intervention to prevent human rights violations in human rights law. He finds no real distinction between R2P and the earlier Western notion of "humanitarian intervention," and thus he sees the neocolonial overtones of the latter continued in R2P. He distinguishes human rights law from R2P's humanitarian and political aspirations and establishes a limit for human rights advocates, warning that linking R2P with the law of human rights is unlikely to advance the interests of either.

For Hannum, morality demands that decision makers must understand the likely outcome of military interventions. He does find that human rights law applies during armed conflict, but without quite relinquishing the notion of international humanitarian law as *lex specialis*, and while insisting that the two bodies of law must not be conflated. Further, human rights lawyers cannot condone "human rights wars." Military force should be used only as a "last resort," though Hannum does not reveal how to define that scenario. Throughout he is skeptical about the human rights consequences and benefits of any military intervention, regarding both unintended consequences and ambiguous criteria of such decision making, for example, citing in an acerbic cost-benefit approach the difficulty of deciding "how many lives

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the rights of women in Afghanistan are worth" (p. 132). There is a substantive discussion of recent instances of possible and military intervention for human rights protective goals. Hannum sees preventing the Rwandan genocide, if such an intervention could have been organized, as potentially effective and justified in at least decreasing the scope of the killing. All other instances were riven with confused goals, bad planning, and lack of awareness of the outcomes of military force, and thus showcased the downsides of R2P.

Hannum advances a notable distinction. While international humanitarian law assumes armed conflict, "human rights law generally assumes that states operate in conditions of relative peace and that governments are capable of acting effectively (if not perfectly) to ensure rights" (p. 133). But given established trends that most military conflict in recent decades has arisen within states and not between states, and further, given the global evidence over the last decade of national public orders and governments being challenged and sometimes taken over by anti-rights identity, anti-immigrant, and racist groups and ideologies against communities of peoples of color, producing demands for dictatorial government to ensure rights for only an identity segment of the population, this is a surprising assumption. It implies that the notion of "human rights *law* " as developed in the book might be even more narrowly positivist and exclusionary of most human rights goals and process than first thought.

In the end, Hannum sees R2P as an expression of humanism, not the protection of human rights, in part because of the former's limited scope of covering crimes against humanity and war crimes and not wider violations of human rights. He thus holds out hope for a more properly defined R2P in the future. If it prevented the widespread loss of life, whatever the cause, "it could be a meaningful advance in the humanization of international law and the protection of individuals under imminent threat" (p. 134).

In Chapter 9, Hannum turns to the United States and human rights. A conventional theme of many such discussions is that of the United States as the indispensable state in the world community in matters of economic stability, military security, and geopolitical stature, as well as maintaining the institutions and general ideology, ideals, and resources of universal human rights authority and protection. This chapter mentions these issues, while also discussing the impact of President Trump's America First policies and U.S. retreat from global human rights engagement.

Any present discussion of the United States and human rights must interrogate the necessity of discussing human rights through large measures of disaggregating the pluralistic state to understand the local processes of protecting the rights of vulnerable citizens on the ground. The same discussion must also interrogate the composite notion, of which this book is an important example, of the validity of "limits" to human rights law and advocacy, its desirability, the interests it serves, and equally its deficits. Such a comprehensive inquiry is beyond the scope of this review, but a few issues can be raised. Hannum's work assumes the validity of such limits, even as it seeks to moderate their application by suggesting a floor of widely recognized human rights norms, but doing so through a definition of "human rights law" where those limits "rescue" the authority of that law.

The American human rights narrative was hammered by the Black Lives Matter movement to focus on and frame the historical truth of racism as systemic in American public order against people of color. This narrative was further recast by constitutive demands that African Americans and other American people of color have a human right, and the incorporated entitlement for it to be implemented, to an entire alternative system of American

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governance and culture that would centrally ensure national equality and justice across its institutions, doctrines, and processes. Any inquiry into the notion of "limits" on human rights law, in this chapter and elsewhere, must confront this historic conjunction, and its future projections, of simultaneous American multidirectional crises and rights demands laying open the centrality of systemic racism to American governance and policing.

This book thus faces the appraisal of whether it provides pertinent predictive insights for ensuring these new systemic rights of African Americans and people of color in this historic conjunction, and suggests inquiries regarding human rights law and issues to protect these rights into the foreseeable future.

Hannum discusses several useful issues here. He traces the American government struggle to fix the priority and institutionalization of human rights issues in federal foreign policymaking, including the key affirmatively expansive role of President Carter in attempting to prioritize international human rights obligations as a basis of foreign policymaking, and the responding role of President Reagan in folding human rights questions back under national security restrictions and the utility of American alliances with human rights violators. He discusses the negative impact on U.S. foreign policy of public American human rights violations abroad, such as the official torture programs at Abu-Ghraib and Guantánamo.

In this regard, he argues that trends of U.S. domestic rights protection and policies form part of American foreign policy, an argument that, while not new, might be expanded toward the consequences of the Black Lives Matter/coronavirus conjunction as a grand rights-based historic resistance to bad government policy. His discussion here is somewhat institutionally segmented, e.g., foreign policy as a conventional government policy category. Thus while his argument suggests the limitations of human rights in U.S. foreign policy in upholding U.S. support of the ideology of universal human rights, Hannum further suggests that greater respect for human rights in America is an important key to generate leverage to support that ideology. He also notes the need for increased American humility abroad, including in projecting human rights goals in other countries.

Hannum concisely discusses President Trump's "America First" foreign policy, his preference for alliance and friendship with dictators abroad, and the America disengaged from the consequences of these policies. However, there is no mention of the president's deliberate domestic appeal to right-wing forces in America violating or threatening to violate the human rights of minorities of color and immigrants. Nor is there mention of the executive excuses, abuses, and strategies covering these actions. Discussion of such official executive actions resting on political strategies of racial division, invoking sovereign state policy and agreement, which under Hannum's approach is the sole source of confirmed human rights obligations, seems at odds with his previous observations that human rights law assumes the general peaceful nature of the state, and that the state operates in stakeholder- representative ways to consider human rights-protective nonlegal policymaking.

The history and continuing nature of the sheer aggression of American racism as a source of bad energy fueling human rights violations is omitted in favor of more passive assumptions. The historic conjunction of coronavirus/Black Lives Matter starkly reveals this racial aggression in present realities of violence and subordination, as enabled by the highest state officials through claims to their formal authority. Without human rights law indicating a committed and legally imaginative path toward identifying and overcoming the aggression, systemic and otherwise, of racist violations, it is difficult to see the future relevance of this law, as defined

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solely through the state, in transforming the present historic conjunction into pillars of an equal and just American society.

In the concluding Chapter 10, under its theme of "less is more," Hannum sums up his notion that human rights law, defined as acceptance of obligations by states, must remain distinct from politics if it is to continue to receive state acceptance, and support on that basis a limited but true universality. Human rights law by itself cannot foster social change, and it must be distinguished always from other forces and disciplines which can, in order for its legal authority to survive. The following quote likely illustrates Hannum's response to the skepticism of several comments in this review:

> The restrained approach advocated here also may be interpreted, incorrectly, to support an overly conservative approach that discourages the formulation of new rights that are required to respond to social, political, and technological change. As correctly understood, however, it will not ask law to do more than it can possibly accomplish, while at the same time it will ensure that human rights are not lost or misused in the midst of passionate disagreements that are better resolved by appeals to science, logic, morals, economic considerations, and, yes, even politics. Resolution of these disagreements must be sought in the shadow of human rights, which constrain options that might violate rights even if they cannot often provide a clear guide to substantive solutions. (P. 166)

Final Reflections

Hannum's warning against the overextension of human rights law raises significant final questions:

1. What is the proper human rights role of the national state in a globalized world, especially in the face of Hannum's implicit demand that states (most of which are pluralistic) remain nondisaggregated under human rights law, and that state sovereign consent continue to be recognized as the primary source and thus the outer limits of human rights law?
2. How is Hannum's dependence on a positivist approach to defining human rights "law" to be understood? In particular:

    a. How to resolve the ambiguity about the scope of that law between Hannum's accepted corpus of doctrines, texts, and sources (heavily centered around treaty making and the two major international human rights conventions), and his claims of frequent dangerous overreach, despite accepted contemporary trends permitting wide citation of international legal sources?
    b. Relatedly, how to understand his seeming reluctance against human rights law being applied to newly recognized areas of human oppression and need, but also against its application to further expand rights already textually defined, especially some economic, social, and cultural rights (e.g., the right to water)? Such an approach to any legal system threatens to starve it of vitality, growth, and continuing relevance *as the rule of law* to the significant crises and narratives of the community it serves. That vitality arises often from the new invocation—sometimes rapid—of established legal doctrine by numbers of people and decision makers into political and economic policy areas to

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attempt to define and remedy injustices under the rule of law, where nonlegal approaches have failed to remedy urgent wrongs. The responsibility under Article 13(1) of the UN Charter to foster the "progressive development of international law" extends to international legal scholars and practitioners as well as to the UN General Assembly. It was never intended to exclude international human rights law, but to strengthen it. The burden is thus on all those who would *limit*, by whatever approach, the reach of international human rights law, to explain why such curtailment of its emancipatory authority and its advocates conveys a greater benefit to humankind, as we struggle to conquer our current mountains of oppression against vulnerable people(s), than would encouraging that law to expand as far as possible up the slopes of those mountains. Here, Hannum could be stronger in meeting this burden, beyond citing: lack of original intent, political backlash (a permanent feature of rights-struggle nationally and internationally), dilution of human rights legal authority (again a perennial challenge by rights-opponents to rights-struggles' successes in fostering legal change), and the "practicality" of state and nonstate community processes of *de lege ferenda* evolving into state-agreed *lex lata*.

c. Hannum's central narrative often parallels that of scholars such as David Kennedy: that overextending human rights law suppresses other narratives and public strategies that can better and more effectively address the original human rights problem.[6] But neither Hannum, Kennedy, nor others satisfactorily identify these alternative narratives, nor explain why they are superior in emancipatory process and results for prescribing better justice and human rights outcomes in the same situations. Particularly, how are such alternatives of political negotiation and halting economic policymaking, which often suppress key questions of justice and remedy, superior to the history-tested role of human rights norms to publicly mobilize against powerful violations, define collective and individual injustice, to mobilize local organizing for rights protection against oppression, state and private injustice, and to create better law? Or, is the unannounced aim of human rights limits rather to deflect and suppress the very (sometimes unruly) process of human rights mobilization under law by people who have only this avenue to, authoritatively, relieve their daily oppression and subordination, including, in the telling words of Adrien Wing, their daily spirit-murders?[7]

3. Unfortunately, there is very little room in Hannum's overall approach for at least two missing imperatives: (a) Southern tier jurisprudence on human rights law (except his citations on African opposition to LGBTQ rights); and (b) the destructive dynamism of continuing Northern colonial perspectives in international law, including the aggression of racism and subordination out of the North toward Third World peoples and toward people of color in both the Northern and Southern tiers.

Hannum has long fought against racism, and his approved corpus of human rights law includes basic texts and interpretations in this regard. However, the adequacy of resting on this corpus to oppose the manifestations, global invocations, and systemic consequences of

[6] KENNEDY, *supra* note 3.

[7] Wing borrowed and discussed this concept from Professor Patricia Williams as an extension of her own formulation of "spirit injury" suffered by abused women. *See* Adrien Wing, *Critical Race Feminism and International Human Rights*, 28 U. MIAMI INTER-AM. L. REV. 337, 343 (1997).

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local and global racism as they descend from colonial aims and exploitation of the human rights process, is a critical question. It goes to the very definition of the Human Rights Project, and its relationship, under basic principles of equality and nondiscrimination, to the totality of the world's peoples and to the narratives of power, wealth, survival, dominance, and subordination that flow among them.

At stake is the legality of the bundle of strategies weaponizing the distinctions in human rights notions in a Southern target state by powerful outside states. As Makau Mutua and others have shown, these strategies of invocation have deep colonial roots inherent to the European civilizing mission in framing Northern policies of dominance against Southern peoples.[8] The evolved Northern tier aim was to force African culture, in its constitutive structure, to become, through, inter alia, cultural shaming and Northern "development assistance," Northern culture, as the global signal of complete Northern domination of Southern peoples. This signal, through Northern military and economic coercion plus the above human rights weaponization, remains active in today's post-colonial world. The long process of Northern weaponizing of human rights invocations comprises part of the dark side of universality in international human rights law.

Will this weaponized invocation of international human rights be made accountable under vital interpretations of human rights law? Such accountability is needed to restore the primary protection of human beings and their dignity, as the primary goals, strategies, and policies of that law. Or will such invocations serving intentions of power and subordination under human rights imperialism North to South, remain shunted by doctrines of "limits" into "appropriate" issues beyond the ken of human rights law? Will such accountability lie beyond the Universal Declaration and UN Charter propositions that international human rights protection of persons must lie under the rule of law in order to avoid major global conflict and destructive local revolutions?

A related question is whether Hannum's pragmatic-positivist-based definition of a non-overextended human rights law of appropriate scope can incorporate the durable competence and authority to effectively counter these weaponized invocations of human rights by both states and nonstate entities? Can it thus meaningfully oppose—through interpretations of "appropriate extension"—the current draining by the state of human rights authority away from the individual persons of the world and their human dignity that this law was meant to protect and enhance?

Rescuing is a richly sourced, well written, provocative argument about the best formulation of "limits" of modern human rights law. It deserves serious reading. The state-centric jurisprudence of limits and pragmatism by which Hannum intends to rescue international human rights law does, however, raise serious questions. Those questions go to his projected competence of human rights law, "rescued by its limits" even as Hannum proposes it "in moderation." Will it be competent to confront with justice the systemic public and private chains of aggressive human violations and provide systemic remedies? Will it be competent to prescribe and do all possible, under the rule of law, for ensuring the human dignity, rights, and entitlement to justice for vulnerable peoples, and thus for all peoples, as they live under aggressively rights-violative national governments and Northern tier subordination?

[8] Makau Mutua, Human Rights: A Political and Cultural Critique 71 (2002); Gathii, Grotius Lecture, *supra* note 5.

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