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# The Changing Character of Human Rights

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## THE CHANGING CHARACTER OF HUMAN RIGHTS

In a shameless attempt to have some of the scholarship from Professor Hew Strachen's Europaeum lecture and project rub off on me, I have chosen to ride on his coat-tails and entitle this lecture 'the changing character of human rights'. When Professor Strachen lectured on the changing character of war at the Graduate Institute in Geneva in 2006, he took a mainly historical/philosophical perspective, in the spirit of the interdisciplinary tradition of the Europaeum lectures I will be staying within my comfort zone and deliberately offering a rather legal perspective.

This is not to suggest that I think that historians or philosophers have nothing to add on the study of human rights - they do. It is rather because I want to reflect on some of the issues that I have been faced with as a lawyer, and let you see how a lawyer is adjusting to the changing ways that human rights are being used today. So unlike Professor Strachen I will not really be pointing to 'the true nature' of human rights as he was able to do with his explanation of the 'true nature of war'. Nor will I place human rights in historical perspective - spanning centuries. I feel this is for others to do. My inquiry is really limited to how I see human rights changing over my professional life; so we will cover three decades rather than three centuries. In many ways this is self-consciously rather subjective. It's about what I see changing in my line of work, as a teacher, researcher and occasional practitioner.

What does this perspective represent? As I said there are multiple worlds of human rights debate, an academic involved in the current controversies over the contemporary *history* of human rights or the *political* relevance of the human rights movement might offer you a particular perspective. I would refer here to the ongoing discussions around the work of Samuel Moyn or Stephen Hopgood.<sup>1</sup> A philosopher could start to discuss the human rights debate by engaging with the work of Oxford's own Professor Griffin.<sup>2</sup> You could find dozens, perhaps hundreds, of human rights practitioners in the United

Kingdom to come and speak about their changing world of human rights in the UK's courts, or in the corridors where the future of the Human Rights Act and the European Convention are debated. But the epistemic/practitioner community I inhabit is the world of human rights as seen from Geneva. My world involves discussions with representatives to the UN's Human Rights Council in Geneva, governments, civil society and UN agencies. My world is heavily influenced by what the UN High Commissioner for Human Rights and his office are prioritizing or concerned about. My world is determined in part by the multiple sites for international law discussions that are hosted in Geneva. I am thinking of the International Law Commission, the World Trade Organization, the investment disputes, many of which remain private, the International Committee of the Red Cross, the World Health Organization and of course some of the newer organizations: the secretariat of the Arms Trade Treaty and the secretariat for ICoCA (the International Code of Conduct for Private Security Providers' Association).

Some of you in listening to what I am about to say may already be thinking 'but he is living in the Geneva bubble', and I suppose I am; but my answer would be what bubble are you living in? I am not sure that anyone can really claim to have a handle on the complete character of human rights. The best I can do this evening is offer my own perspective.

So what do I mean by human rights in the present context? I am speaking about those rights that have been enshrined in international texts and adopted by states. Some texts have almost universal approval, others are adhered to only by few states or only at the regional level. But in all cases in international relations these rights can be, and are, referred to as human rights. I don't need here to list them all; what I will be talking about is what is going on in the penumbra, that is to say the expansion of the well known catalogue into new areas that were unthought-of in 1948, the year of the adoption of the Universal Declaration of Human Rights.

To be clear I am not suggesting that these new rights are outside the law, a penumbra of moral aspirations beyond the core law in the sense conceived by H.L.A. Hart.<sup>3</sup> I want to suggest that, whether the historians and philosophers like it or not, the international law of human rights now covers issues beyond what was imagined in 1948, and the current work of many human rights lawyers is not really related to the preoccupations of the post-war era, or even the human rights debates of the 1970s or even the 1990s.<sup>4</sup> Where are we 67 years later? What would I highlight today? I have chosen 6 topics as follows: new rights; non-state actors; human rights in armed conflict; the relationship with the laws of war; extraterritoriality; and human rights in the private sphere.

## 1. NEW HUMAN RIGHTS

The developments I would highlight (in no particular order and in a non-exhaustive list) are: the absolute prohibition on the use of the death penalty for those who were minors when they committed their crime, and a limitation of the death penalty to the most serious crimes; the development of certain prohibitions on discrimination with regards to gender, age, or caste; the catalogue of rights of indigenous peoples and new meanings for the right to self-determination; a detailed set of rights for persons with disabilities; and lastly I would mention a very 21st century preoccupation: an expansion of the right to privacy to encompass control over personal data, leading, at least in the EU, to the so called 'right to be forgotten on the internet'.

On this last point, which is of more than academic interest, it may be worth mentioning that by February 2015 Google had 'received 218,427 requests, comprising a total of 789,496 links. It has reached a decision on 83% of the links and actually removed 264,450 of them, or 34% of links'.<sup>5</sup> (As a parenthesis, as a result of this ruling when you do a search on Google using an EU Google search engine you will have noticed that some material could be missing, the exact expression used is '*Some results may have been removed under data protection law in Europe. Learn more*'. This is a standard rider at the end of the search and does not necessarily mean that you have stumbled on some embarrassing aspects of the person's past you are googling.

Of course many feel this interpretation of the human right to privacy has encroached too much on freedom of expression and the right to information, that may be, but my point here is that the outer limits of human rights are in flux, they can be expanded or even contracted as our attitudes to different claims change over time. Freedom of speech may have seemed sacrosanct at the height of the cold war, but now this is tempered by concerns about cyber-bullying. The right to privacy and family for some time would have been expansively interpreted to protect the family from interference by the state, today that right is restricted by greater concern over domestic violence. The women's rights movement have made domestic violence against women a human rights issue. This was not always the case. When I started my PhD I was told in no uncertain terms by all the authorities that private violence was outside the scope of human rights law. Let us look a bit closer at developments surrounding the state/non-state divide.

## **2. THE ISSUE OF NON-STATE ACTORS IN GENERAL AND ARMED GROUPS IN PARTICULAR**

This brings me to a second line of inquiry: who is bound by human rights law? This is a controversial area, and I have my own (perhaps some might even say maverick) perspective which I will not pretend here is the mainstream view (yet). Before tackling the legal developments I should like to ask, as did Professor Strachan, if we have something called the 'true nature of human rights'. I am constantly told by students and colleagues that the true nature of human rights is a contract between the state and its citizens, that this is the historical and traditional understanding. But I really wonder if this is the true origin. I will now leave my legalistic world (and nevertheless break my promise to stay within my field of experience) and comment that John Locke's reasoning in 1690 was that no one may 'take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another'. In this way, 'men may be restrained from invading others' rights and from doing hurt to one another'.<sup>6</sup> Civil government was to be his preferred solution but the rights he was invoking were owed by

men to each other. Tom Paine, a century later, is, I think, even clearer.

‘While the Declaration of Rights was before the National Assembly, some of its members remarked, that if a Declaration of Rights was published, it should be accompanied by a Declaration of Duties. The observation discovered a mind that reflected, and it only erred by not reflecting far enough. A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee, as well as to possess.’<sup>7</sup>

I know I am not going to change anyone’s mind with a few selective passages from these Enlightenment thinkers, but even the Universal Declaration of Human Rights does not explicitly say who has the obligations. The United States among others were not ready to admit to international obligations in this context, only rights for individuals. Duties were very much part of the philosophy of rights, and the legal obligations of states were very much off the agenda. If you look again at the catalogue of rights, each Article usually starts with the expression ‘everyone has the right to’ or ‘no one shall be’: ‘Everyone has the right to life, liberty and security of person... No one shall be held in slavery or servitude ... No one shall be subjected to torture ... No one shall be subjected to arbitrary interference with his privacy ... Everyone has the right to freedom of opinion and expression; Everyone has the right to work ... Everyone, without any discrimination, has the right to equal pay for equal work.’

The history of the Universal Declaration is curious in this regard. The first draft of the Declaration started with Article one providing that everyone has *duties to their state* and the United Nations, this shifted to *duties to the community* and later to *society*; and a close vote moved this article from the beginning to the end of the Declaration (take a look at the long overlooked Article 29).<sup>8</sup>

Of course the concern of some (including from the Soviet Union) may have been to emphasize the community of interests between the individual, society and the state, but others saw this as a moment to stress that human rights involved individual duties towards other individuals. The Belgian delegate said early on: that he approved of what became Article 29 because it went beyond the obligations of the individual to the state, and that ‘Indeed, man had duties to his family, to his neighbour, and to himself.’<sup>9</sup> The very last article in the Declaration Article 30 is addressed to any state, group or person, and the preoccupation of the drafters in the Commission at the time was to prevent groups reintroducing Nazism or Fascism. By the time the matter reached the General Assembly the same Soviet delegate Mr Pavlov, reinforced the point by referring to the dangers of the Klu Klux Klan in the United States and the role of ‘high finance’ in supporting Germany’s war potential after the First World War.<sup>10</sup>

All this to say that those who point to the historical ‘essence’ of human rights being a contract between the individual and the state have not really appreciated what rights of man thinkers were perhaps thinking over three hundred years ago, nor what happened in the context of the adoption of the Universal Declaration after the Second World War. So in my view, human rights, even in historical perspective, are about more than a need for a so-called constitutional or social contract with citizens. A moment’s thought makes this obvious, one of the key human rights being proclaimed and claimed since the Second World War is the right to seek asylum. Obviously this is nothing to do with a contract between a government and its own nationals.

But back to international law; of course if you start with the human rights treaties (where the obligations of states were being carefully worked out) and only look at human rights through the prisms of what happens, for example, at the European Court of Human Rights and the treaty it applies, you will only see the obligations of states. There is here of course a sort of ‘jurisdictional filter’ which prevents you from seeing any other sort of violation.

In class I have tried to illustrate this by returning to the physics experiments I remember from school. I dimly remember laser light being shone through slits and creating patterns. In classical physics it was assumed that light had to be described either in terms of particles, or as waves, even though scientists seemed to discern both properties in different experiments. The elusive search for the true nature of light (particles or waves) is partially resolved by the notion of *complementarity*. In 1927, Niels Bohr formulated a new way of looking at the dilemma. He considered that, although wave and particle behaviour seem to mutually exclude each other, we need to understand both qualities for a proper appreciation of the object's properties. Most importantly, he pointed out that whether or not the object behaves as a wave or a particle depends on the experiment you use for looking at it. This has been explained as follows: 'To decide if it's a wave, [physicists] diffract it through slits and see whether they get interference fringes. To decide whether it's a particle, they bounce it off things and see if it holds together. They ask wavy questions to decide whether it's a wave, particley questions to decide whether it's a particle.'<sup>11</sup>

So if we set up a wave detector we see waves. If we look for human rights cases before courts of law in the UK or before the European Court of Human Rights in Strasbourg we only see violations by public bodies or states. But what if you live in Geneva and your human rights detector is the UN Human Rights Council with its attendant commissions of inquiry? The picture starts to look a little different. The preoccupation at the moment is with Syria but more particularly with the so called 'Islamic State' and its behaviour. If we are looking for the most gruesome violations of human rights with an experiment set up to detect violations by such non-state actors the detector starts to sound like a Geiger counter going wild. The last special sessions of the UN Human Rights Council have been focussed on the 'Islamic state' and Boko Haram. The speeches and the eventual resolution were focused on the non-state actors and not any breakdown of a sacred contract between the state and its citizens.

In 2014 the UN Human Rights Council resolution:

*Condemn[ed]* in the strongest possible terms the systematic violations and abuses of human rights and violations of international humanitarian law resulting from the terrorist acts committed by the so-called Islamic State in Iraq and the Levant and associated groups taking place since 10 June 2014 in several provinces of Iraq, which may amount to war crimes and crimes against humanity, and strongly condemns in particular all violence against persons based on their religious or ethnic affiliation, as well as violence against women and children;<sup>12</sup>

In April this year 2015 the Council

*Condemn[ed]* in the strongest terms the gross abuses of international human rights law and violations of international humanitarian law perpetrated by the terrorist group Boko Haram;

Of course this focus on non-state armed groups is not without problems. The negotiation of such texts and the ensuing debates leave little space to consider the failure of states to tackle these problems or their own human rights in the effort to counter the atrocities being committed on the non-state side. But these issues can be resolved through political action. My point is that the character of human rights violations is no longer that of violations committed exclusively by state actors. Human rights bodies such as the UN's Human Rights Council may be tilting towards enthusiastic condemnations of non-state actors and away from what were often ideological driven battles of the blocs. States may today have too many overriding interests with other states to engage in vigorous condemnations of each other's human rights policies. And when it comes to condemnation of excesses by the armed forces in the defeat of armed non-state actors, few states are ready to tie their own hands by claiming violations of clear rules by the security forces of other states. Demanding that these groups respect human rights looks set to remain a fixture of the human rights landscape. We will explore this further in the next section.

### 3. HUMAN RIGHTS IN TIMES OF ARMED CONFLICT

This brings us to a third way in which traditional assumptions about human rights may be changing. Human rights are said to be for peacetime while humanitarian law is clearly designed for times of war and armed conflict. Why some people ask is human rights being stretched, or if you prefer having its *character* distorted, to cover situations of armed conflict? Here are a few suggested answers.

First, the international human rights machinery presents multiple fora for complaining about violations, these include the Human Rights Council in Geneva with its multi-lingual reports from Special Rapporteurs and Commissions of Inquiry. Secondly, the multiple human rights courts and commissions at the regional level allow for not only a hearing and a judgment ordering a change in the policies pursued by the government, but also the prospect of compensation, compensation which these days may amount to millions of pounds and which does in many cases get paid. Thirdly, the human rights superstructure groups sits on a base of committed followers and members who are easily mobilized through social media and action groups. This human rights architecture in part explains why human rights monitoring during armed conflict is burgeoning and is not at all eclipsed or displaced by references to the laws of armed conflict. Policing the laws of war is mainly left to confidential *démarches* and the very occasional war crimes trial.

But a further explanation lies in the particularities of contemporary conflict. If armed conflict today reflected the 19th century inter-state wars described by Professor Strachen I would venture that human rights law would not be evolving in the way it is now. But today nearly all wars/conflicts involve non-state armed groups. Today, what a UN Commission of Inquiry, or indeed an NGO like Amnesty International, have to cope with is: returning from a fact-finding mission and presenting a human rights report which will be accepted as balanced, scientific and addressed to the needs of the victims. A human rights report that only focused on the violations by the Syrian authorities but was silent on the behaviour of the Islamic State, Al Nusra or

the Free Syrian Army would not be taken seriously, and worse the human rights monitors would be accused of supporting terrorism through their one-sided reporting.

At this point several of you may be thinking but why not use the established principles related to the laws of war to detail the violations committed by such armed groups? Here again it is perhaps ironically the changing character of war/armed conflict that explains why human rights law is expanding to fill the gaps. At the start of the Syrian conflict the armed groups carrying out human rights violations were not, legally speaking 'parties to an armed conflict', the ICRC and others did not consider that they had the requisite degree of organization to trigger the laws of war. The UN's Commission of Inquiry reported back in Geneva that they had had to apply international human rights law to these groups in order to detail their violations of international law. Similar points can be made with regard to groups in Mali or Nigeria who may be in control of people, even in control of territory, but not strictly speaking in an armed conflict. So human rights monitors, of necessity, have to report on the cruelty and discrimination meted out by groups, before any eventual armed conflict takes place.

One can of course make the same argument for monitoring the behaviour of groups after the end of any armed conflict. And indeed this is exactly what happened with regards to the Maoists in Nepal after the end of the civil war.<sup>13</sup> The necessity arose of monitoring the political groups that emerged after the end of the conflict. Victims wanted human rights organizations to intervene to prevent intimidation and violence. Confusion over whether such groups could be addressed in human rights terms led some organizations to ignore the problem. Ironically in order to get attention from the international community one study shows how armed groups had to increase the level of violence to get noticed and asked to new peace-talks. From a policy point of view it makes sense to engage with such groups early on; from the victim's point of view it makes no difference whether the group has crossed the imagined threshold of insurgency or

control of territory that is said to trigger the right to condemn such groups for human rights abuses.

But even where the group is subject to the laws of war this may not be enough for human rights monitors to be able to do their job. The problems associated with the so called 'Islamic state' relate not only to the beheading of prisoners, clearly a war crime, but also to issues of discrimination, freedom of expression and religion, right to assembly and association and so on. These are issues unregulated by the laws of war or the basic principles of international humanitarian law. The issue was addressed head on by the UN's Special Rapporteur on human rights while countering terrorism:

The threshold for ISIL to be bound by human rights obligations has clearly been met.<sup>14</sup> This means, at a minimum, that ISIL is bound under international law to respect core human rights obligations, such as the right to life, the absolute prohibition of torture, cruel, inhuman and degrading treatment, the prohibition of slavery and the prohibition of enforced disappearance, as well as the right to freedom of thought, conscience and religion.

In addition, where ISIL [Islamic state] engages in violations that are unrelated to the conflict and not direct consequences of it, the governing legal framework should be international human rights law. In practice, this means that ISIL is legally bound to respect freedom of expression, freedom of assembly and freedom of movement. These rights should be protected without discrimination on any of the grounds prohibited by international law. The right to a fair trial should also be guaranteed. In areas of substantive overlap between international human rights and international humanitarian law, the principles that provide assistance in determining which framework is applicable are those of *lex specialis* and effective control: the more effective

control ISIL has over a territory or individuals, the greater is the extent to which human rights law will constitute the appropriate legal framework.<sup>15</sup>

#### 4. THE COMPLEX RELATIONSHIP WITH INTERNATIONAL HUMANITARIAN LAW

This brings us to a fourth newish characteristic of human rights law: its new ability to complement rather than be displaced by international humanitarian law. This is now one of the most controversial and contested frontiers of human rights law. Now the governmental interest is less about whether the Islamic state is condemned for a violation of a human rights treaty or the laws of war; the real battle is over whether the state's armed forces should be held to human rights standards when fighting an armed conflict. The law here is in flux, and I will not go into great detail,<sup>16</sup> suffice it to state a few emerging principles.

First, where the Geneva Conventions of 1949 provide a protective regime for the victims of armed conflict with procedural guarantees and monitoring, for example in the context of a traditional inter-state war with regard to the protection of prisoners of war, or civilians interned as security detainees in occupied territory, then that law of the 1949 Geneva Conventions will provide the legal basis for detention as well as key appropriate procedural safeguards (we could call this the *Hassan* accommodation principle after the case which the UK Government won in Strasbourg by successfully arguing that Mr *Hassan* was detained under the Fourth Geneva Convention during the UK's occupation of Iraq in 2003, and that therefore there was no violation of the European Convention on Human Rights because the Government's right to intern under international humanitarian law had been *accommodated* by the law of human rights).<sup>17</sup>

Second, when it comes to arbitrary deprivation of life, human rights law may involve a *renvoi* to the laws of war, for example with regard to rules prohibiting the use of certain weapons. This is what the International Court of Justice said when it

was claimed that the use of nuclear weapons would necessarily involve a violation of the right to life. The *renvoi* was to the law of prohibited weapons. More complex in the context of the right to life are issues of battlefield killings. In this context allegations of arbitrary deprivations of the right to life may in some circumstances have to be judged by interpreting the right to life in the light of the special rules for the conduct of hostilities.<sup>18</sup>

This all sounds reasonable so why exactly is this topic as controversial as I suggested? The answer is that the neat scenarios I just outlined are not really replicated in the current circumstances. The detentions which are being challenged are not the well-regulated situations of prisoners of war camps and civilian internees in occupied territory. The ongoing controversies relate to the detention of captured insurgents in Afghanistan and those detained in places such as Guantánamo.

The Geneva Conventions do not provide explicit authorization for such detentions (as they do for inter-state wars and situations of inter-state occupation),<sup>19</sup> and so the arguments turn on custom, analogies and logical inferences. The answers that lawyers give when confronted with these controversies turn in part on what they consider to be the character of the law of war. Does it provide protection and prohibitions? Or does it go further and impliedly grant powers and permissions? In other words does the relevant law of war end with the prohibition of ill treatment of detainees? Or does it go further and also provide the power to detain? This issue has been litigated recently all the way to the Supreme Court.<sup>20</sup>

But a moment's pause and historical perspective might again cause us to question whether it is human rights that have radically changed or our perception of them. I was interested to read recently in the book by Paul Halliday that individuals labelled prisoners of war in England in 1690s were allowed by to make successful *habeas corpus* applications.<sup>21</sup> Of course the King's Bench did not release people it had concluded were properly designated prisoners of war, but rather used the chance to see if

the person had been correctly labelled. Incorrect labelling could lead to release. The point here is that the remedy of *habeas corpus* (which today we would call a human rights approach) applied during wartime, even for those captured alongside combatants properly so called.

What about killings? Here again the controversy relates to what is going on in contemporary conflicts rather than the traditional killing in war. A drone strike on a wanted terrorist may take place miles away from any recognized or recognizable armed conflict and be justified other than by the laws of armed conflict. Or in the American expression beyond a ‘declared war zone’<sup>22</sup> or in the official US Government’s phrase beyond an ‘active war zone’, a geographical area also officially labelled in the recently leaked document from the US Government’s ISR (Intelligence, Surveillance, Reconnaissance) task force as ODTAAC, ‘Outside a Defined Theatre of Active Armed Conflict’.<sup>23</sup> The target may not even be part of an armed group or susceptible to being targeted for directly participating in hostilities. Do such targets have human rights? And if so how far does the notion of human rights protect them in such circumstances?<sup>24</sup>

## **5. EXTRATERRITORIALITY**

In order to answer this last question we need to consider another so called changing characteristic of human rights law. It is now said that human rights law can apply extraterritorially, ie it can apply to the acts which take place outside the territory of the state concerned. For me the confusion over extraterritorially stems from the same problem of using the wrong experiment in the quest to find waves or particles. If one is looking through the prism of a treaty based or constitutional jurisdiction detector which is set to look for actions within the territory of a state then one may find that the state has no enforceable human rights obligations beyond that space. But if one sets up one’s experiment to look for the rights of individuals based on the starting point that individuals have inherent human rights under international law, and for present purposes let us say these exist under customary international law, then treaty or constitutional

limitations related to say the European Convention or the Canadian Charter of Rights and Freedoms, could be considered jurisdictional barriers to a successful suit in Strasbourg or before the Canadian Supreme Court, but they do not alter the fact that an international human rights violation may have been committed abroad. We should not fall into the trap of equating the limits to the jurisdiction of a Court in Strasbourg or Ottawa or Washington, or the Strand, with the scope of international human rights law.

Moreover, as an issue of moral philosophy the idea that a state cannot violate human rights at home but has a free hand when it ventures abroad does not stand up. Again, this was less of an issue in the past because invasions and occupations were seen as exclusively covered by the laws of war and there were fewer jurisdictions for human rights claims. Today, drones, surveillance, covert operations, assassinations, abductions, secret detentions centres, torture programmes operating abroad have all come to be treated as human rights issues. Whole books have been written on the Strasbourg case law concerning extraterritoriality and I will not enter that topic here.<sup>25</sup> My focus is on the application of human rights law when states venture abroad as an issue of general principle not as an issue of case-law and treaty interpretation.

Seen as an issue of the character of human rights rather than through the prism of a jurisdictional and technical issue, the signs are that human rights do indeed apply in these extraterritorial situations. I am pleased to report that on this point the US Army training materials issued in 2012 seem to agree with me, as they state that for: ‘US personnel ... dealing with civilians outside the territory of the United States, it is CIL [customary international law] that establishes the human rights considered fundamental, and therefore obligatory.’<sup>26</sup> From the Canadian perspective Kevin Watkin has makes the point ‘even if it were determined that a human rights system of accountability did not apply as a matter of law to occupied territory, it would ordinarily be logical as a matter of policy to apply human rights norms to an occupier’s policing function’.<sup>27</sup>

## 6. HUMAN RIGHTS AND THE PRIVATE SPHERE

In the time left I should like to look at what could be called human rights in the private sphere. I will take two topics to illustrate the changing character of human rights. The first relates to the responsibilities of business. The idea of ‘corporate social responsibility’ has a growing band of supporters as well as a number of detractors and sceptics. The history is long and complicated.<sup>28</sup> One could say that, so far, the emphasis has been on non-legal ways of seeing the human rights responsibilities of companies. But I think the character of the discussion is changing and in turn this affects the character of human rights themselves. The latest working group established in Geneva to consider a new human rights treaty will discuss the option of defining and monitoring human rights obligations for companies through a new treaty.<sup>29</sup> Of course the agenda is much wider and includes extra obligations for states, but there is a serious discussion on the human rights obligations of companies that could be referenced in a new treaty. But here, rather than speculating on the contents of any new treaty,<sup>30</sup> I want to briefly mention two new characteristics of human rights in the private sphere: first, corporate criminal responsibility - and second, the recognition that private entities with human rights obligations may have their own human rights counterclaims.

One new characteristic of the human rights obligations of companies is the prospect of the criminal prosecution of companies for committing international human rights crimes. Again I hear you thinking ‘but the International Criminal Court can only prosecute individuals!’, but I would suggest that such thoughts again confuse institutions with substantive obligations. If you think of international criminal law as being defined by the prospect of winning a case in the Hague at the International Criminal Court then your field of vision is already limited, we could say you have slipped on the jurisdictional filter again. You are blinkered, blindsided, or simply blind as to what is really going on. Beyond the Hague, there are considerable changes afoot.

The African Union has recently adopted a treaty that foresees a new Chamber to its Court of Justice and Human Rights which would allow for the prosecution of companies for a long list of international crimes,<sup>31</sup> and the latest draft by the International Law Commission of a new Convention on Crimes against Humanity foresees an obligation to allow for companies to be prosecuted or sued for crimes against humanity.<sup>32</sup> I think it is fair to say that for many people human rights can be said to have changed their character when prosecutions for crimes against humanity are being extended beyond the pariah individual in the dock to large companies assisting or facilitating such atrocities.

The second point under human rights and the private sphere, and this will be my final point, is that the complicated part of imposing human rights obligations on private actors is that some of those actors may also have human rights too. We then have a real clash of rights. Well known examples include the shopping mall cases: The right to demonstrate (or freedom of assembly) comes smack up against the right of the property owner to peaceful enjoyment of possessions. The best known examples in the UK are now perhaps the so-called ‘bed and breakfast’ cases. A couple refuse to have unmarried couples sleep under their roof while they are running a bed and breakfast on the grounds that this is an affront to their religion. In an era when same sex-couples cannot get married this turns into discrimination on grounds of sexual orientation. One related case, of a marriage guidance counsellor, Mr McFarlane, who felt his religious conviction prevented him from providing guidance to same-sex couples, went all the way to the European Court of Human Rights. The Court did not take the easy option of saying that his choice of working for a private company had restricted his right to demand respect for religious convictions, rather they held that, although his right had been interfered with through his sacking, his company had done this in order to ensure another set of human rights involving the right not to be discriminated against. For ‘the Court the most important factor to be taken into account is that the employer’s action was intended to secure the implementation of its policy of providing a service without discrimination.’<sup>33</sup>

This judgment I think reflects how the character of human rights is constantly evolving to keep up with contemporary demands: a private individual is sanctioned for discriminating on grounds of sexual orientation, and in turn the private company he works for is said to have a legitimate interest in protecting people from all sorts of discrimination, this corporate interest in human rights in turn outweighs any human right to freedom of religion that he may seek to enjoy with regard to his employer. The state as the ultimate guarantor of all these separate rights ensures a fair balancing through the actions of the judiciary, and is left a margin of appreciation by the international judges in Strasbourg. This kind of application of human rights law to the private sphere (in both senses of the phrase, in that the obligations fall on private individuals and also affect their most private thoughts and activity) could also be labelled the ‘privatization of human rights’, in the sense that what might have once been considered obligations that exclusively belonged to state authorities have now been squarely also placed in private hands. Of course the privatization is less than complete as the state retains its share of obligations.

## 7. CONCLUSION

To conclude, I have looked at what could be grouped as what, when, where, who and why questions.

*What* constitute human rights today? I suggested that for many of us the focus is on the rights found in the international texts, these certainly dominate the discourse in international relations and in world of civil society activism. The catalogue continues to expand and I would suggested the main developments in recent times have focused on the rights of persons with disabilities and the rights of indigenous peoples.

*When* do human rights apply? Here I highlighted that they are now seen applying not only in times of peace but also in times of war and to situations of armed conflict. The relationship with the law of war is complex, but there is no question that human rights law.

*Where* do human rights apply? I suggested that the frontiers of human rights protection now extend to areas abroad where potential victims have been brought under the control of an alien government or its agents.

*To whom* do human rights obligations apply? I suggested that recent developments mean that the international community now regularly accuses armed non-state actors of human rights abuses. In addition the human rights framework is applied to corporate actors and in the end to each and every one of us, as the wedding counsellor case shows.

*Why* should human rights be respected in this new landscape? I rather carefully stayed away from this philosophical challenge. If I have to offer an answer it would not be excavated from the historical texts referred to at the beginning. It would rather be an inkling that we care about these things called human rights because we care about human dignity. And even if there may be other rationales for protecting human rights, such as the way that they help us to build inclusive democratic societies, today the core driver for not only judicial decision-making, but also for human rights activism is the desire to bring dignity to the lives of others. And I would suggest that has perhaps been the defining character of human rights all along.

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## Notes

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10. UN Doc A/C.3/SR.156 at 671; Third Committee 25 November 1948.
11. J. Cohen and I. Stewart, *The Collapse of Chaos: Discovering Simplicity in a Complex World* (Harmondsworth: Penguin, 1994) at 276.
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  18. At the time of the writing the UN Human Rights Committee's latest general Comment on the Right to life is still under discussion. One recent draft states that: 'While rules of international humanitarian law may be relevant for the interpretation and application of article 6, both spheres of law are complementary, not mutually exclusive. Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a real risk to the lives of civilians and persons hors de combat, including the targeting of civilians and civilian objects, failure to apply adequate measures of precaution to prevent collateral death of civilians, and the use of human shields, violate article 6 of the Covenant.' CCPR/C/GC/R.36/Rev.2, 2 September 2015, at para 63.
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  20. See now *Serdar Mohammed v Min. of Defence* [2017] UKSC 2.
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31. *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014).
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33. *Eweida et al v UK*, Judgment of 15 January 2013, at para 109.

## Europaeum Lectures

Europaeum Lectures have been a part of the consortium work since its foundation, examining key issues confronting Europe today. A selection is shown in this list.

- **November 2016, Oxford**  
Professor Gilles Carbonnier on *The Case for Humanitarian Economics: Recalibrating Civil War and Disaster*
- **November 2015, Oxford**  
Dr Andrew Clapham on *The Changing Character of Human Rights*.
- **February 2014, Oxford**  
Professor Jussi Hanhimäki on *Re-Evaluating the Legacy of Henry Kissinger: Statesman or Stuntman?*
- **September 2013, Prague**  
Professor Sir Adam Roberts, on *Civil Resistance and Power Politics: From the Prague Spring to the Arab Spring*
- **May 2012, Oxford**  
Professor Peter Pulzer, on *Democracy: Whatever Happened to the People?*
- **November 2011, Oxford**  
Professor Keith Krause, on *The End of War: Political Violence in the 20th Century*
- **November 2010, Prague**  
Professor Robert Fox, on *Science and the travails of Modernity in Fin-de-siècle France*
- **May 2009, Geneva**  
Professor Margaret MacMillan, on *90 Years on - lessons for peacemakers from 1918?*
- **March 2008, Geneva**  
Professor Vaughan Lowe, on *The Double Helix of Terrorism and Tyranny: can civil liberties survive the war on terror?*
- **October 2007, Krakow**  
Professor David Marquand, on *The Challenges for Democracy in Europe*
- **November 2006, Oxford**  
Professor Wladyslaw Strozewski, on *Human Being and Values*
- **June 2005, Helsinki**  
Professor David Robertson, on *What now? Europe after the recent referenda*
- **November 2004, Leiden**  
Dr Godfrey Hodgson, on *The Other American Presidential Election: Choosing a President and Psychoanalyzing a Nation*
- **April 2003, Geneva**  
Sir Marrack Goulding, on *The United Nations and Peace since the Cold War: success, failure or neither?*
- **November 2002, Oxford**  
Professor Charles Wyplosz, on *Fiscal Discipline in the Monetary Union: Rules or Institutions?*
- **June 2001, Paris**  
Professor Raymond Barre, on *Quelle Europe pour demain?*
- **November 2000, Oxford**  
Dr John Temple-Lang, on *The Commission and the European Parliament - an uncertain relationship*

# The Europaeum Record

## I. Annual Academic Conferences

- 1993 OXFORD *Are European Elites Losing Touch with their Peoples?*
- 1994 OXFORD *Europe and America after the Cold War: the End of the West*
- 1995 BONN *Integration of East Central Europe into the European Union*
- 1996 GENEVA *Defining the Projecting Europe's Identity: Issues and Trade-Offs*
- 1997 PARIS 1 *Europe and Money*
- 1998 LEIDEN *Human rights, the plight of immigrants and European policy*
- 2000 BONN *The Implications of the new Knowledge and Technology*
- 2001 OXFORD *Democracy and the Internet: New Rules for New Times*
- 2001 BERLIN *Borderless Education: Bridging Europe*
- 2002 PARIS 1 *New Times, New Responsibilities*
- 2003 OXFORD *Whose Europe? National Models and the European Constitution*
- 2003 BONN *New Partnerships, Opportunities and Risks*
- 2004 LEIDEN *Moving the Frontiers of Europe: Turkey, Risk or Opportunity*
- 2005 OXFORD *US-Europe: Americanisation and Europeanisation: Rivals or Synonyms*
- 2006 OXFORD *The Reconstruction of Identities in Europe*
- 2007 WASHINGTON *Does the 'West' still exist? - America and Europe towards 2020*
- 2008 OXFORD *Dilemmas of Digitalization*
- 2009 OXFORD *Constitutional Pluralism in the European Union and Beyond*
- 2010 OXFORD *Federalisms - East and West - India, Europe and North America*
- 2011 SANTANDER *Futures for Europe: 2030?*
- 2012 LISBON *Open Societies, Open Economies and Citizenship*
- 2012 OXFORD *Conflict and Conflict Resolution in Europe*
- 2013 PARIS *European Society and Social Solidarity*
- 2013 LISBON *Governance, Leadership and Democracy*
- 2013 DELHI *Federalisms and Localisms*
- 2014 KRAKOW *Internationalisation of Higher Education*
- 2015 HELSINKI *Europe in Crisis: Grexit? Brexit? Euro-Exit? And the Return of Cold War Winds?*
- 2016 PRAGUE *Legacy of Charles IV - Education and Academic Freedoms, Innovation and Open Society*

## II. Summer Schools

- 1994 LEIDEN *Concepts of Europe*
- 1995 BOLOGNA *The Problem of Political Leadership and the Ethnic Nation*
- 1996 BOLOGNA *The Civic Nation and the Ethnic Nation*
- 1998 BUDAPEST *Risk Policy Analysis*

## *Annex B*

<b>1998 OXFORD</b>	<i>Human Rights</i>
<b>1999 PARIS I</b>	<i>NATO and European Defence</i>
<b>2000 BOLOGNA</b>	<i>European Policy and Enlargement</i>
<b>2000 OXFORD</b>	<i>Church as Politeia</i>
<b>2001 OXFORD</b>	<i>Human Rights and the movement of People in Europe</i>
<b>2002 OXFORD</b>	<i>The Economics of European Integration</i>
<b>2003 PRAGUE</b>	<i>Old and New Ideas of European Federalism</i>
<b>2004 LEIDEN</b>	<i>Islam and Europe: Building Bridges</i>
<b>2005 GENEVA</b>	<i>Multilateral Governance: Effective Ways Forward?</i>
<b>2006 KRAKOW</b>	<i>Bridging the Divide: US-Europe Relations after 9/11</i>
<b>2007 HELSINKI</b>	<i>Borders of Europe - where do they end?</i>
<b>2008 BONN</b>	<i>Sacred Buildings in European Cities</i>
<b>2009 PARIS I</b>	<i>Ethics and Policy-making</i>
<b>2010 BOLOGNA</b>	<i>The Media, Europe &amp; Democracy</i>
<b>2011 SANTANDER</b>	<i>The Future of Europe: Which Way Towards 2030?</i>
<b>2012 OXFORD</b>	<i>Conflict Resolution in Europe</i>
<b>2013 BARCELONA</b>	<i>Rights and Citizens in Europe</i>
<b>2014 MADRID</b>	<i>Women in Europe: The Unfinished Revolution?</i>
<b>2015 PRAGUE</b>	<i>Euroscepticism and Populism</i>
<b>2016 OXFORD</b>	<i>China and Europe: Challenges for the Future</i>

## **IV. Teaching Courses and Study Programmes**

<b>2012-</b>	Havel MA in <i>European Politics &amp; Society</i> (Prague, Paris I, Leiden)
<b>2009-</b>	Lisbon Annual Graduate Student Debates
<b>2008-</b>	Brussels Annual Policy-Making Seminars
<b>2004-</b>	MA in <i>European History and Civilisation</i> (Leiden, Paris I & Oxford)
<b>2006-08</b>	<i>European Business, Cultures, &amp; Institutions symposia</i> (Leiden & Oxford)
<b>2002-04</b>	<i>International Refugee Law</i> (Geneva and Oxford)
<b>2001-2003</b>	MA <i>Political Cultures &amp; European Political Systems</i> (Bologna, Oxford & Leiden)
<b>2001-2003</b>	<i>Economics of European Integration</i> (Paris - BA module option)
<b>1996-2000</b>	<i>European Community Law</i> (Oxford, Leiden and Sienna)

The Europaem played the key role in the creation at Oxford of the *Oxford Institute of European and Comparative Law*, the *European Humanities Research Centre*, the *Centre for European Politics, Economics and Society*, plus a number of fellowships, including the *Chair in European Thought* and, the *Bertelsmann Europaem Visiting Professorship in 20th Century Jewish History and Politics*.

## V. Linked Scholarship Programmes

2016-	The <i>Oxford-Prague Bursary Scheme</i> - Annual bursaries for student exchanges between Oxford and Charles University.
2004-	The <i>Jenkins Scholarship Scheme</i> - Four Europaeum students to Oxford and two outgoing Oxford students per annum.
1997-	The <i>Oxford-Geneva Bursary Scheme</i> - Annual bursaries for student exchanges between Oxford and the IHEID.
2008-11	The <i>El Pomar-Europaeum Transatlantic Junior Fellowship</i> - One Europaeum student to USA research fellowship.
1997-	The <i>Scatcherd European Scholarships</i> - Fully funded places at Oxford for European graduates.
1995-2001	<i>The Europaeum Scholarships in Jewish Studies</i>
1990s	<i>Henry R Kravis Scholarships</i> - Allowed students read an M.Phil or M.Juris in at Oxford.

## VI. Research Projects

- *The Europaeum Research Project Groups* scheme encourages collaborative research across the association, supporting groups looking at such themes such as *Churches and the Family; European Economic Integration; The Kosovo Stability Pact; European Identity; Regulation of E-commerce; Liberalism in 20th Century Europe; Transmission and Understanding in the Sciences; Cultural Difference in Europe, and Political Concepts in Europe.*
- *The Future of European Universities Project 2001-5*, supported by Daimler-Chrysler Services A G, was a three-year investigation into the impact of new technology and the Knowledge Revolution with international expert conferences on *Borderless Education: Bridging Europe* (Berlin 2001); *New Times : New Responsibilities* (Paris 2002); and *New Partnerships: Opportunities and Risks* (Bonn 2003).
- *Islam-in-Europe Programme 2004-14*, supporting workshops and other events around this key theme, culminating in an international lecture series and conference.
- *Culture, Humanities, and Technology in Europe 2004-13* supporting workshops and other events around this key theme, culminating in an international conference.
- *The US-Europe TransAtlantic Dialogue Programme 2005-* supporting workshops and other events around this key theme, culminating in an international workshop and conference.

## VI. Recent Graduate Workshops

2007 BRUSSELS	<i>Policy-Making Inside Europe</i> [held annually at the European Parliament and NATO HQ thereafter]
2008 PARIS 1	<i>Roots of Modern Europe</i>
2008 PRAGUE	<i>European Migration in the 21st Century</i>
2009 BONN	<i>Thinking about Progress</i>

## *Annex B*

- 2009 KRAKOW** *Experience and Perceptions of Migration across Europe*  
**2009 LISBON** *Ideas of Europe: Ideas for Europe?*  
**2009 OXFORD** *Europeanisation: Historical Approaches*  
**2010 BOLOGNA** *Sacred ‘Spaces’ in Modern European Cities ?*  
**2010 LEIDEN** *Political Parties, Migration and Public Rhetoric in Europe*  
**2010 PARIS 1** *Risks from Climate Change: Lessons in Global Diplomacy*  
**2011 BONN** *Globalisation and Cooperation*  
**2011 LEIDEN** *Europe and its “Giants” of Leadership: Past, Present and Future?*  
**2011 OXFORD** *Europeanisation and the Roots of Modern Europe*  
**2012 PARIS 1** *The Arab Spring: One Year On*  
**2012 PRAGUE** *Rio +20: Challenges and Opportunities for Europe*  
**2012 OXFORD** *Rousseau and Republican Traditions in Europe*  
**2012 BOLOGNA** *Atlanticism*  
**2013 OXFORD** *Global History*  
**2013 PRAGUE** *Democracy in Times of Crisis*  
**2013 AMSTERDAM** *Climate Change, Waters & Cities*  
**2014 OXFORD** *Citizens, Economists, Emperors, Clerics: The Making Europe?*  
**2014 PRAGUE** *Financial Ethics*  
**2015 OXFORD** *Peace-Making and War-Mongering*  
**2016 BOLOGNA** *Migration and Movement today: Crisis for European Citizens?*  
**2016 KRAKOW** *Open Europe, Closed Europe*  
**2016 OXFORD** *Charisma and Political in European History*

## **VII. Recent Classics Colloquia**

- 2003 OXFORD** *Approaches to Herodotus and Tacitus’s Annals*  
**2005 LEIDEN** *Tears in the Ancient World*  
**2006 MADRID** *The Orient, Greece and Rome*  
**2007 OXFORD** *Myth, Culture, Society - in memory of Jean-Pierre Vernant*  
**2008 BOLOGNA** *Metamorphosis – between Science and Literature*  
**2009 PRAGUE** *Teaching, Teachers & Students*  
**2010 KRAKÓW** *Death & Afterlife*  
**2011 HELSINKI** *Strangers and Friends*  
**2012 OXFORD** *Leadership in the Old World*  
**2014 PARIS 1** *Man and Beast*  
**2015 BARCELONA** *The Power of the Word in Ancient Times*

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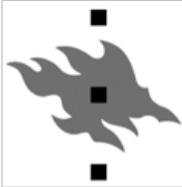
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