



freedom rights project

Human Rights Inflation

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The Freedom Rights Project is a research initiative that addresses two big questions: What has gone wrong with international human rights? How can we fix it?

Universal human rights is one of the most emancipatory and revolutionary ideas of the modern world, and one that requires serious intellectual custodianship.

In the present world, however, the idea of human rights faces a unique set of challenges. First, the field of human rights suffers from a combination of complacency and conformism. The poor state of intellectual argument about human rights is at least in part to blame for the proliferation of international human rights over the last few decades. Secondly, the ever-expanding international apparatus for protecting human rights is ineffective – when not counter-productive.

As we abandon the short-lived illusion of a unipolar world to embrace the uncertainty of a multipolar one, we cannot afford to leave one of the great political, legal and moral ideas of the West in a state of confusion and disarray.

*The Project aspires to conduct research and generate argument that can produce change. Its Principal Investigators are: **Jacob Mchangama, Paulina Neuding, Aaron Rhodes and Guglielmo Verdirame.***

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
INTRODUCTION	5
HISTORICAL OVERVIEW OF HUMAN RIGHTS INSTRUMENTS	6
THE UNITED NATIONS	6
THE COUNCIL OF EUROPE	11
ANALYSIS OF THE INCREASE IN HUMAN RIGHTS INSTRUMENTS	14
CONCEPTUAL IMPLICATIONS	15
CONCLUSION	20
APPENDICES	22
APPENDIX 3	28
APPENDIX 4	30

EXECUTIVE SUMMARY

In this report we present a snap shot of the vast body of human rights instruments that have appeared within the past few decades, totalling 667 individual provisions in the United Nations system and 710 in the Council of Europe. We call this phenomenon ‘human rights inflation’, and trace its manifestation through international legislation; through expansive interpretation of existing rights; and through ‘atomization’, whereby humanity is carved into a bewildering number of individual interest groups, each of which gets its human rights guaranteed all over again, only this time by virtue of membership of that particular group. The result is not only needless complexity, but also real damage to the protection of human rights and the credibility of the project.

We argue that rights inflation is furthermore conceptually incoherent, and that there should be a moratorium on further human rights treaties, and especially those that purport to privilege one particular interest group over another. Instead, the focus should be on the rigorous enforcement of existing core rights throughout the world. Rights inflation has merely been a mask for our failure to do so.

Human rights treaties are supposed to be a vital and targeted check on government. In principle, they achieve this by obliging states to respect a clearly determined set of basic rights and freedoms, subject in some exceptional and narrowly defined cases to an overriding national interest. There is thus a certain principled self-limitation that has allowed human rights law to flourish as an idea: insofar as they protect a set of interests recognized as truly fundamental from government interference, they are capable of commanding respect across the political spectrum. This feature has been instrumental to the success of the idea of human rights in recent decades, and its emergence, in Samuel Moyn's words, as the *last utopia*.

But the idea now finds itself in peril. If the acceptability of human rights depended on their restriction to only the most crucial of personal liberties and on their clarity, it must now face the possibility that neither condition holds. This report analyses the United Nations and the Council of Europe's attempts at safeguarding human rights. The main finding is that—whether in spite or because of their stewardship—the mainstream conception of human rights has changed for the worse: the corpus of core rights it aims to protect has become larger than it is capable of protecting, and the means of their protection them have become weaker and more confused.

Part II of this report surveys the history of United Nations and Council of Europe human rights instruments and the increase in their number. Part III analyses this increase. It argues that, far from strengthening the protection of human rights, the greater number of instruments appears to have diluted them. Part V assesses what these data say about the state of human rights protection, and offers some suggestions about how it can be put back on the right path.

II. HISTORICAL OVERVIEW OF HUMAN RIGHTS INSTRUMENTS

In general, there are three different ‘layers’ of international human rights law. The topmost comprises multilateral treaties, often sponsored by the United Nations, which are open to ratification or accession by any country in the world. Below are treaties that apply only to a specific region. Finally, there is a vast body of ‘soft law’, including for example UN General Assembly Resolutions and other declarations of principle.

A. The United Nations

The United Nations Charter (‘the Charter’), which was adopted in 1945, laid out the principles and purposes of the United Nations featuring the respect for human rights prominently in the preamble as well as substantive articles. Article 13 of the Charter provides, for instance, that the General Assembly should initiate studies and make recommendations to further the realization of human rights and fundamental freedoms.

This paper focuses solely on the human rights treaties that appear in ‘Chapter IV: Human Rights’ of the United Nations Treaty Collection,¹ but it must be emphasized that this collection is not exhaustive. The number of such instruments listed on the website of the United Nations High Commissioner for Human Rights alone numbers more than 90, and hundreds of human rights-related resolutions are adopted each year at the Human Rights Council and the General Assembly.

It was not till the General Assembly adopted the Universal Declaration of Human Rights (‘UDHR’) on the 10th of December 1948 that human rights were codified and defined on the international plane, casting the foundation for the United Nations human rights regime—indeed, for the foundation of international human rights law². As the UDHR is not a treaty, it is not itself binding, although some of its provisions have been accepted as custom.

The UDHR has 30 provisions. Articles 3–11 contain rights of the individual, 12–17 the rights of the individual in civil and political society, and 18–21

¹ <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

² http://www.un.org/en/documents/udhr/hr_law.shtml

spiritual, public and political freedoms. Articles 22–27 of the Declaration contain social, economic and cultural rights.

At the time of its adoption, the bulk of its provisions might have been characterized as protecting negative freedoms, such as the right to life, liberty, and security of the person; but it also contains provisions for positive rights, such as the right to social security, the right to adequate living conducive to health and well-being, and the right to education. However, it is important to bear in mind that this distinction, though often convenient, can be misleading. For example, the right to freedom of assembly may require positive action from the state to prevent others from interfering with that right. Similarly, the right to housing may in certain circumstances require no more than an absence of governmental interference with the peaceful occupation of one's home.

According to Chapter IV of the UN Treaty Collection, the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'), adopted in 1948 and containing 17 provisions, is also considered to pertain to human rights. The Genocide Convention is thus the earliest binding 'human-rights-related' convention in the UN regime.

If until 1965 the Genocide Convention was the only legally binding instrument in the UN regime that could be thought of as a human rights instrument, the years of 1965 and 1966 saw a relatively large expansion with the adoption of four legally binding human rights instruments. These were the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') in 1965, and the International Covenant on Civil and Political Rights ('ICCPR'), an optional protocol to the ICCPR as well as the International Covenant on Economic, Social and Cultural Rights ('ICESCR') all three adopted in 1966. The UDHR, the ICCPR and the ICESCR are jointly referred to as the "International Bill of Human Rights" but as we shall see below this bill has been continually expanded by new conventions.

While the issues that ICERD addresses are undeniably important ones, this convention also evidences the drifting in human rights treaties, in both content and form, from the more coherent aims of the human rights system as originally intended. Some provisions of ICERD (notably articles 5 and 6) that oblige states to grant individual rights serve no apparent purpose: ICCPR and ICESCR

already prohibit discrimination on the basis of race and several other factors in respect of human rights, so what purpose does it serve to re-enact only one aspect of those? Other ICERD obligations are problematic because, for example, they require states to suppress political speech and association—both themselves guaranteed by fundamental rights at several levels, however undesirable the ends or motives for which those freedoms of expression are employed.

Finally, the very laudable title and aims of the Convention nonetheless betray a problematic lack of insight into the purpose and limits of human rights protection. Establishing a ‘human rights’ treaty to achieve a specific goal may not seem objectionable. But in fact it subtly stands the whole concept of human rights on its head. Human rights protection seeks to delimit essential human interests that may not be trampled on whatever policy or rules the state may adopt. ICERD, by contrast, starts at its broadest with the policy outcome³ and leaves the delimitation of ancillary interests unfocused. But even more problematic is the idea, foreshadowing the philosophy of the even greater inflation to come, that human rights treaties are a panacea.

The division between the ICCPR and ICESCR is particularly significant. The ‘civil and political rights’ of the former refer to rights such as freedom of the press, fair trial, and freedom from torture that are relatively readily protected by a willing government, and form the basis of a democratic society. Article 2 of ICCPR obliges states ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized’ in it; and its first optional protocol provides a mechanism for individual complaints of violations. This is, compared with the anemic provisions usually found in many other human rights treaties, an unusually strong enforcement mechanism.

‘Economic, social, and cultural’ rights such as those to ‘adequate food, clothing, and housing’ have a different pedigree. After protracted negotiations about the form that a UN human rights covenant would take, it was eventually agreed that these rights should be the object of a separate treaty, which became the ICESCR. Given that its monitoring mechanisms has only just entered into force with a mere ten ratifications and its principal obligation is ‘to take steps ...

³ See, e.g., art. 2(d): Each State Party shall prohibit and bring to an end, by *all appropriate means*, including legislation as required by circumstances, racial discrimination by any persons, group, or organization. (Emphasis added)

with a view to achieving the full realization’ of its rights, there has long been a debate about whether these are justiciable ‘rights’ in any meaningful sense. Several of the founders of the UDHR, including Eleanor Roosevelt and Rene Cassin, argued that the two sets of rights were substantially different and that socio-economic rights were dependent on political implementation rather than justiciability.⁴ However, the Committee on Economic, Social, and Cultural Rights (‘CESCR’) has advocated in its 9th General Comment, that maintaining any distinction between the justiciability of civil and political rights and socio-economic rights would be ‘arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. The concept of indivisibility was formally adopted as official UN Doctrine in the 1993 World Conference on Human Rights’ Vienna Declaration and Programme of Action and is referred to ubiquitously in UN Human Rights documents.’ Nonetheless, most nations have not taken up the CESCR’s invitation to treat the two sets of rights with such parity. The principal difficulties is that they are vague and unclear, often require substantial economic resources to achieve and blur the separation of powers by affording the judiciary powers to rule on issues of economic and social policy often reserved for the legislature and the executive. Some countries, such as the United States and United Kingdom, therefore include no constitutional guarantees of socio-economic rights, whereas others, such as Ireland and India, provide for them in their Constitution as Directives of State Policy rather than as fundamental rights. Even countries such as South Africa whose constitution explicitly protects a number of economic, social and cultural rights distinguish between this category and civil and political rights in practice

From just 30 provisions in 1948, the adoptions that took place in 1966 saw the number of provisions increase to 140 and thus heralded an all-out expansion of the human rights protections within the UN regime.

In 1968, just two years later, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted, adding another 8 provisions to the tally. The development has continued with the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973, the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) in 1979, the Convention against

⁴ Department of State Bulletin, December 31, 1951, pp. 1059, 1064-1066 accessible at <http://www.udhr.org/history/statement.htm>

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') in 1984, the International Convention against Apartheid in Sports in 1985, the Convention of the Rights of the Child ('CRC') in 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ('CMW') in 1990, the International Convention for the Protection of All Persons from Enforced Disappearance ('ICCPED') in 2006 and the Convention on the Rights of Persons with Disabilities ('CPRD') in 2006.

In addition, several amendments and optional protocols to these conventions have been adopted. In total the number of human rights instruments adopted by the UN by 2013 is 27⁵, amounting to 667 provisions to be complied with.

Various treaty-based bodies have been set up to monitor the implementation of the provisions of the above-mentioned human rights instruments⁶. These treaty bodies are expert committees that issue general comments, recommendations and annual reports regarding the interpretation of specific human rights provisions. There are currently ten monitoring bodies, including the above-mentioned CESCR.

The Committee on the Elimination of Racial Discrimination, which monitors the CERD, has, for example, given 34 general recommendations since 1972. As of yet, the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances have not issued any general comments.

If one aggregates the total amount of general comments, recommendations and annual reports issued by the human rights bodies, that number adds up to 137. The number of comments issued seems consistent over time across all the committees, with the older committees having issued more: for example, the two

⁵ A list is maintained at <http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> Six are not yet in force: Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (1992); Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1992); Amendment to article 43 (2) of the Convention on the Rights of the Child (1995); Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (1995); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008); Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011)

⁶ Cf. <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

oldest committees, the Committee on the Elimination of Racial Discrimination and the Committee on Civil and Political Rights, have both issued 34 general comments. As will be explored in a forthcoming report, several General Comments include extremely expansive interpretations of the respective conventions inventing new rights and obligations nowhere to be found in the wording or drafting history, and seemingly at odds with ordinary principles of interpretation under public international law.

Needless to say, there is a tremendous overlap among these treaties, principles, declarations, comments, and committees. As we discuss in greater detail below, the same person may have the same right guaranteed over and over again: first, rightly, by virtue of being human; again, redundantly, by virtue of belonging to a particular class of person. And the duplication continues. There are now calls for a further convention on the rights of the elderly, and even a declaration on the rights of peasants.⁷

B. The Council of Europe

The system of human rights instruments within the Council of Europe is not only on a par with that of the United Nations, but outnumbers it, both as regards the number of instruments and the total number of provisions.

The following overview of human rights instruments was compiled by a search by subject matter in the list of the Council of Europe's treaties⁸.

However, the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine and its protocols are also included here, as it clearly pertains to human rights.

The main human rights instrument within the Council of Europe system is the Convention on the Protection of Human Rights and Fundamental Freedoms, more popularly referred to as the European Convention on Human Rights ('ECHR'). Winston Churchill is often

⁷ <http://viacampesina.net/downloads/PDF/EN-3.pdf>

⁸ Cf. <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=44&CM=7&CL=ENG>

credited with having fostered the idea of the Council of Europe and the ECHR in a 1949 speech in Hague where Churchill advocated ‘the idea of a Charter of Human Rights, guarded by freedom and sustained by law’. The ECHR was adopted in November 1950 and came into force three years later.

Out of a total of 59 provisions, the first 18 provisions, section I, lay out the general obligation of contracting parties to respect human rights (cf. Article 1) and specify the rights and freedoms to be protected. Section II of the ECHR establishes the European Court of Human Rights and includes provisions of a more organizational nature for the Court. 1952 saw the adoption of a protocol to the ECHR containing provisions pertaining to, *inter alia*, the protection of property, right to education and right to free elections and 14 other Protocols have been adopted to date.

The ECHR has developed perhaps the strongest system of enforcement of any human rights instrument. Individuals from all ratifying states may take their complaint directly to the European Court of Human Rights (‘ECtHR’), provided they have exhausted all available domestic remedies. If the Court finds a violation, it may order remedial action and even award financial compensation. Compliance with the ECtHR’s judgments is supervised by the Committee of Ministers of the Council of Europe. Most significantly, and with some notable exceptions, its judgments are usually complied with.

Similarly to the development within the United Nations, the adoption of human rights instruments within the Council of Europe has experienced a steady increase since the 1960’s. A total of six protocols were adopted during this decade and as of today a total of 37 Council of Europe human rights instruments are in place⁹, which is ten more than the United Nations has adopted. Similarly with regard to the total number of provisions of the instruments, the Council of Europe outnumbers the United Nations 710 to 667.

⁹ 4 are not yet in force: Protocol amending the European Social Charter (1991); Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes (2008); Council of Europe Convention on Access to Official Documents (2009); Council of Europe Convention on preventing and combating violence against women and domestic violence (2011)

The Council of Europe system's effectiveness is further hampered by the seemingly unmanageable growth in the number of cases pending before the ECtHR, which peaked at over 150,000 but had been reduced to around 113,000 by June 2013.¹⁰ Efforts to reform the Court so as to make it more efficient are contested.

¹⁰ http://www.echr.coe.int/Documents/Stats_pending_month_2013_BIL.pdf

III. ANALYSIS OF THE INCREASE IN HUMAN RIGHTS INSTRUMENTS

There are three main mechanisms by which the inflation of human rights occurs. First, there is inflation by legislation: the brute increase in the number of provisions. Then there is inflation by interpretation, by which courts and treaty bodies read new rights into existing provisions; while outside the scope of this report owing to the complexity of measuring it, it is nonetheless important to note. Finally, there is inflation by ‘atomization’, whereby the same human right is guaranteed time and again to different specific categories of persons. While such a belt-and-braces approach may seem harmless, in fact it threatens great harm to the foundations of human rights, in that it **grounds them ever more in particular interests rather than the general human condition.**

Tables 1 and 2 show the scale of inflation by legislation.

Table 1. Aggregated number of binding instruments of the United Nations and the Council of Europe



Table 2. Aggregate amount of provisions in human rights instruments adopted by the United Nations and the Council of Europe



C. Conceptual implications

As is evident from the tables in section A, the sheer volume of new obligations has shattered the clarity that is necessary for human rights law to merit its central place in promoting the rule of law. This is as important for citizens as it is for professional lawyers: it is untenable that grand proclamations made in the name of people everywhere should have the accessibility of a tax code. If human rights are to be ‘owned’ by the people in the sense they ought, then it is axiomatic that they must be comprehensible by them: a heartfelt avowal

of what is ours and everyone's, not a bureaucratic tangle of administrative regulation.¹¹

The complexity of the international system, and its contrast to the underdeveloped nature of many national human rights systems, is also an inversion of the rational order of things. A healthily functioning relationship between the domestic and international orders ought to be a symbiosis whereby the international standard reinforces a common minimum that all states must meet; and it should then be for states to build on that in order to guarantee any idiosyncratic rights not provided for internationally. That has the benefit of ensuring that rights are most concentrated where they are most enforceable. The morass of unenforceable, high-rhetorical provisions that has emerged in the international sphere can be to no such avail.

Moreover, the added volume is frequently vain, since it adds no protection to what already exists. Tables 3 and 5 show how much effort has gone into simply replicating and refracting the protections of the ICCPR and the ECHR. A 17-year-old, disabled Kurdish girl in Turkey has her freedom of expression guaranteed by the Universal Declaration of Human Rights, the ICCPR, the ECHR, CEDAW, CRC, and the Convention on the Rights of Persons with Disabilities. The same goes for her protection from discrimination—and that is not to include the many more rights that are protected by *most* of the foregoing treaties.

What was deficient about protection mechanisms in the ICCPR, let alone the ECHR, as compared to the category-specific treaties that followed? Of course, nothing. But by their very existence those latter treaties raise the question and thereby rhetorically undermine the principal treaties' force, while fragmenting the system of protection and enforcement. It also perniciously

¹¹ Take article 20.1 of the International Convention for the Protection of All Persons from Enforced Disappearance:

Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

suggests that some groups are more worthy of universal protection than others, in stark contrast to the emphasis put by René Cassin, a French jurist who won the Nobel Peace Prize for his work drafting the UDHR, on ‘the fundamental principle of the unity of the human race’ as underpinning the whole human rights project.

A further twist is that the group-specific treaties guarantee particular configurations of existing rights in such a way as to impinge on the rights of others, but without clarifying how their protections relate to those in prior treaties. If that sounds a little abstract, take the example of article 4 of the Convention on the Elimination of Racial Discrimination. It obliges states to:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof

There is no attempt to reconcile this with the very reasoned protection that many developed democracies give to extreme speech, seemingly compatibly with the principal human rights conventions, nor indeed how such a categorical prohibition is supposed to sit with the much stricter test for prohibiting, *inter alia*, racial hate speech set out in ICCPR Article 20.

In fact, the problems go even further. Not only does rights inflation undermine the system, but it actually provides less free states with undeserved benefits. In her article *Why Do Countries Commit to Human Rights Treaties?*¹², Oona Hathaway makes the interesting argument that the costs of committing to the more radical human rights treaties is attractive to undemocratic countries precisely because the enforcement mechanisms are so weak. In other words, there is no real cost in doing so, but a potential reputational gain. This is supported by a forthcoming study by Mchangama & Freedman, which shows that member states of the UN Human Rights Council ranked as ‘Free’ by Freedom House are much more likely to vote in favour of nominating independent experts charged with reporting on civil and political rights, and against the adoption of such mandates on elusive “Third Generation Rights” such as “The Right to International Solidarity”. “Partly-Free” and “Non-Free” states on the other hand favour socio-economic as well as Third Generation Rights. This is an

¹² Journal of Conflict Resolution, Vol. 51, No. 4, pp. 588-621, August 2007

embarrassment to the human rights treaty system: at its Universal Periodic Review (UPR) before the UN Human Rights Council in December 2011¹³, the criticism of Zimbabwe by democratic countries was accompanied by acclaim from the likes of Angola, Sri Lanka, and North Korea for its efforts to promote socio-economic rights. Likewise at its 2010 UPR North Korea was praised by Iran, Cuba, Syria and Russia for, inter alia, working ‘to consolidate a socialist and just society, which guarantees equality and social justice’. Such a performance is also entirely unnecessary.

But the more fundamental conceptual problem that underpins these difficulties is that of what a human right ought to be. Though challenging to attain, it is only through conceptual clarity that we can properly address the systemic problems that have arisen. That conceptual clarity must then be married to a practical prescription for action.

The feasibility aspect highlights the limits of ‘human rights’, which we advocate embracing rather than denying. Issues such as global poverty and climate change are urgent and demand serious political action and commitment. But they cannot be solved through the relatively simplistic matrix of human rights adjudication—and arguably still less by those actually tasked with adjudicating them, since they are very likely to lack the requisite technical and policy expertise, not to mention popular mandate. That is the hubris of human rights inflation. Acknowledging this allows us to use more suitable economic and diplomatic tools to solve those problems and at the same time focus on what human rights *can* do. By targeting human rights protections on those interests that can be satisfactorily protected by adjudication, we not only enhance that protection but also in doing so reinforce the strength of the system.

A further, practical criterion must be the favour and support that a proposed right actually enjoys among the communities to whom it will be applied. That is by no means to say that it should be universal. Indeed, the point of protecting fundamental rights with legal protection is to entrench them against abuse by majorities. But rather than technocratic expressions of consensus among legal and diplomatic élites, human rights must derive their legitimacy just as Winston Churchill described them ‘from our sense of common spiritual values.’

¹³ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/174/78/PDF/G1117478.pdf?OpenElement>

Whether those common spiritual values are proclaimed rather than swamped by the 667 human rights provisions contained in UN treaties and 710 in Council of Europe ones is highly doubtful. Consider, by contrast, that Germany manages to capture most of its intricate system for protecting fundamental rights in the first 19 provisions of its Basic Law; the United States gets by considerably better than is often acknowledged with a 10-provision Bill of Rights (to which we might add four human rights-related amendments); the South African Constitution's thoroughgoing protection of both civil and political and socio-economic rights is achieved in 27 articles; India's Constitution devotes 30 articles to 'Fundamental Rights' and 19 to 'Directive Principles of State Policy'; and the Constitution of Chile has been able to safeguard the transition from brutal dictatorship to liberal democracy chiefly through the 26 sections of Article 19, given teeth by Article 5.

While the aforementioned accounts of what constitutes a human right diverge, what is significant is their agreement that human rights claims should not be devalued by stretching them across all possible goods. In blunter terms, human rights ought to be few and targeted.

Of course, there are two possible practical outcomes where there is a conceptual overstretch of human rights: eventually a crisis will arise because 'trumping' value is given to an unsustainably wide array of claims, or it will arise—more limply, but no less tragically—because 'human rights' has become so bloated that letting it really constrain politics in all its distended manifestations would simply be unthinkable. It is towards the latter that we are headed.

No great moral victory was ever achieved by its champions' steadily retreating from their position. There is a worldwide treaty for the protection of civil and political rights, and an even more strongly enforced one for their protection in Europe. Yet we have moved away from what Eleanor Roosevelt considered the lynchpin of the human rights system: 'a common understanding of the *essential* human rights and freedoms.' (emphasis added). We have strayed from the common goal of establishing a baseline of shared values so that the world should not see another World War and now accord the same priority to wrangling over crucifixes in classrooms, or noisy nightclubs.

Or, rather, it is not we who have strayed. We, the authors of this report, believe that people still trust in the idea of a basic core of human rights that binds nations together in humanity. It is instead under the self-perpetuating stewardship of the international bureaucrats, pressure groups, and committees that the notion of human rights has seeped outwards, and in a fragmentary way that privileges certain groups at the expense of the ideal of universality.

If the conclusion of the previous section, then, was that rights ought to be limited in some way, what are the practical options?

First, the time has come to re-evaluate the mantra of the indivisibility of human rights¹⁴. As the outline in Part II shows, for one thing it is simply divorced from reality and continues to diverge from it. But inaccuracy is not its only flaw. More serious is that it tethers the success of the rights most susceptible of enforcement to the least, to the discredit of all human rights obligations. Thus, while there is room to argue over which human rights should find a place among the re-limited core that ought to be protected as such—and it is no aim of ours to compile such a list, if it were even possible to do so in the abstract—it is at least

¹⁴ The glossary of human rights principles maintained by the UN Population Fund at <http://www.unfpa.org/rights/principles.htm> provides the standard definition:

Indivisibility: Human rights are *indivisible*. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. Thus, the right of everyone to an adequate standard of living cannot be compromised at the expense of other rights, such as the right to health or the right to education.

crucial to recognize that some interests are more suited to the forms of protection and enforcement that ‘human rights’ offers than others.

We also advocate self-restraint, amounting to a ‘ban’ on the further duplication of human rights norms. This, of course, cannot undo all of the damage that, as adverted to above, has already been done, though it can stem the tide. Nor is it especially easy to conceive of its enforceability. But human rights rests more than anything else on an *ethos* of the sort Eleanor Roosevelt referred to. By reinforcing that *ethos*, and thereby reaffirming the strength of the principal conventions’ protection of the most essential human interests, we can hope to refocus activists’, politicians’, and lawyers’ attention on protecting core rights rather than simply reiterating the need to do so.

In particular, no further treaty should be concluded that privileges one group over another—whether by virtue of gender, ethnicity, or other status. Not only does such fragmentation have the practical difficulties attending the general problem of proliferation, but it is also by definition incompatible with the universalist idea underpinning human rights. Similarly, save for the principle of self-determination (which in any event is not simply a human right) the collectivist fad in human rights should be resisted: at best such rights as the right to international solidarity, development or peace make for no more than empty rhetoric; at worst they detract from other human rights. This is not to say that some of the ideas behind these ‘rights’ are unworthy. In many cases they represent important common goods but the language of rights is unsuitable to them.

We should focus on improving respect for existing standards rather than assuming that new conventions would cure all ills. Clearly, in the case of human rights, the cure has often been worse than the perceived disease.

APPENDICES

Appendix 1: United Nations; human rights instruments.¹⁵

No.	Title	Opening of the treaty	Entry into force	Number of Provisions
1.	Convention on the Prevention and Punishment of the Crime of Genocide	1948	1951	17
2.	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	1966	1969	25
2.a.	Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination	1992	Not in force	N/A
3.	International Covenant on Economic, Social and Cultural Rights (ICESCR)	1966	1976	31
3.a.	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	2008	Not in force	N/A
4.	International Covenant on Civil and Political Rights (ICCPR)	1966	1976	53
5.	First Optional Protocol to the International Covenant on Civil and Political Rights	1966	1976	14
6.	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	1968	1970	8
7.	International Convention on the Suppression and Punishment of the Crime of Apartheid	1973	1976	19
8.	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1979	1981	30
8.a.	Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women	1995	Not in force	N/A
8.b.	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	1999	2000	21

¹⁵ United Nations; Treaty Collection, Chapter IV

9.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1984	1987	33
9.a.	Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1992	Not in force	N/A
9.b.	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2002	2006	37
10.	International Convention against Apartheid in Sports	1985	1988	21
11.	Convention of the Rights of the Child (CRC)	1989	1990	54
11.a.	Amendment to article 43 (2) of the Convention on the Rights of the Child	1995	2002	N/A
11.b.	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict	2000	2002	13
11.c.	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	2000	2002	17
11.d.	Optional Protocol to the Convention on the Rights of the Child on a communications procedure	2011	Not in force	24
12.	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989	1991	11
13.	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)	1990	2003	93
14.	Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean	1992	1993	15
15.	Convention on the Rights of Persons with Disabilities (CPRD)	2006	2008	50
15.a.	Optional Protocol to the Convention on the Rights of Persons with Disabilities	2006	2008	18

16.	International Convention for the Protection of All Persons from Enforced Disappearance (ICCPEd)	2006	2010	45
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Appendix 2: Council of Europe; human rights instruments.¹⁶

No.	Title	Opening of the treaty	Entry into force	Number of Provisions
005	Convention for the Protection of Human Rights and Fundamental Freedoms	04-11-1950	03-09-1953	59
009	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	20-03-1952	18-05-1954	6
035	European Social Charter	18-10-1961	26-02-1965	30
044	Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions	06-05-1963	21-09-1970	5
045	Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention	06-05-1963	21-09-1970	4
046	Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto	16-09-1963	02-05-1968	7
055	Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention	20-01-1966	20-12-1971	5
067	European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights	06-05-1969	17-04-1971	11
114	Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty	28-04-1983	01-03-1985	9
117	Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms	22-11-1984	01-11-1988	10
118	Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms	19-03-1985	01-01-1990	14

¹⁶ Acknowledgement: © Council of Europe

126	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	26-11-1987	01-02-1989	23
128	Additional Protocol to the European Social Charter	05-05-1988	04-09-1992	13
140	Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms	06-11-1990	01-10-1994	8
142	Protocol amending the European Social Charter	21-10-1991		9
146	Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms	25-03-1992		4
148	European Charter for Regional or Minority Languages	05-11-1992	01-03-1998	23
151	Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	04-11-1993	01-03-2002	9
152	Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	04-11-1993	01-03-2002	4
155	Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby	11-05-1994	01-11-1998	7
157	Framework Convention for the Protection of National Minorities	01-02-1995	01-02-1998	32
158	Additional Protocol to the European Social Charter Providing for a System of Collective Complaints	09-11-1995	01-07-1998	16
161	European Agreement relating to persons participating in proceedings of the European Court of Human Rights	05-03-1996	01-01-1999	11
162	Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe	05-03-1996	01-11-1998	10
163	European Social Charter (revised)	03-05-1996	01-07-1999	31
164	Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine	04-04-1997	01-12-1999	38
177	Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms	04-11-2000	01-04-2005	6

186	Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin	24-01-2002	01-05-2006	34
187	Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances	03-05-2002	01-07-2003	8
189	Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	28-01-2003	01-03-2006	16
194	Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention	13-05-2004	01-06-2010	22
195	Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research	25-01-2005	01-09-2007	40
197	Council of Europe Convention on Action against Trafficking in Human Beings	16-05-2005	01-02-2008	47
203	Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes	27-11-2008		28
204	Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms	27-05-2009	01-10-2009	10
205	Council of Europe Convention on Access to Official Documents	18-06-2009		22
210	Council of Europe Convention on preventing and combating violence against women and domestic violence	11-05-2011		81

APPENDIX 3

INSTRUMENT/ ARTICLE	RIGHT
ICESCR	
Art. 1	Right to self-determination
Art. 6	Right to work
Art. 7	Right to the enjoyment of just and favourable conditions of work
Art. 8b	Right of trade unions to establish national federations
Art. 8c	Right of trade unions to function freely subject to no limitations other than those prescribed by law
Art. 8d	Right to strike
Art. 9	Right of everyone to social security, including social insurance
Art. 11(1)	Right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.
Art. 11(2)	Right of everyone to be free from hunger
Art. 12	Right to the enjoyment of the highest attainable standard of physical and mental health
Art. 13	Right to education
Art. 15a	Right to take part in cultural rights
Art. 15b	Right to enjoy the benefits of scientific progress
Art. 15c	Right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author
CEDAW	
Art. 13a	Right to family benefits
Art. 13b	Right to bank loans
Art. 13c	Right to participate in recreational activities, sports and all aspects of cultural life
Art. 14(2)g	Right to have access to agricultural credit and loans

CAT	
Art. 14(1)	Right to fair and adequate compensation
CRC	
Art. 18(3)	Right of children of working parents to benefit from child-care services and facilities for which they are eligible.
Art. 23(2)	Right of the disabled child to special care
Art. 25	Right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child
Art. 31	Right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
Art. 32	Right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child.
CMW	
Art. 15	Right to property
Art. 32	Right to transfer their earnings and savings
Art. 38(2)	Right to be fully informed of the terms on which such temporary absences are authorized

APPENDIX 4

ICCPR		CERD	CEDAW	CRC	CMW	CPRD
Article	Right	Article	Article	Article	Article	Article
Art. 6	Right to life			Art. 6	Art. 9	Art. 10
Art. 7	No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.			Art. 37	Art. 10	Art. 15
Art. 8	No one shall be held in slavery				Art. 11	Art. 27 (2)
Art. 9	Everyone has the right to liberty and security of person				Art. 16	Art. 14
Art. 10	All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person			Art. 37	Art. 17	
Art. 11	No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.				Art. 20	
Art. 12	Right to liberty of movement and freedom to choose his residence				Art. 39	Art. 18
Art. 13	An alien lawfully in the territory of a State Party...may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall... be allowed to submit the reasons against his expulsion...				Art. 22	
Art. 14	All persons shall be equal before the courts and tribunals.				Art. 18	
Art. 15	Nullum crimen sine lege				Art. 19	

Art. 16	Everyone shall have the right to recognition everywhere as a person before the law.				Art. 24	Art. 12
Art. 17	No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.			Art. 16	Art. 14	Art. 22
Art. 18	Right to freedom of thought, conscience and religion			Art. 14	Art. 12	
Art. 19	Right to hold opinions without interference;...right to freedom of expression.			Art. 13	Art. 13	Art. 21
Art. 21	The right of peaceful assembly.					
Art. 22	Right to freedom of association with others.		Art. 7c	Art. 15	Art. 40	
Art. 23	The right of men and women of marriageable age to marry and to found a family		Art. 16			Art. 23
Art. 24	Rights of the child		Art. 16	Art. 7		
Art. 25	Right to take part in the conduct of public affairs, right to vote		Art. 7a			Art. 29
Art. 26	Prohibition of discrimination					
Art. 27	Minority rights					