

RESCUING HUMAN RIGHTS

The development of human rights norms is one of the most significant achievements in international relations and law since 1945, but the continuing influence of human rights is increasingly being questioned by authoritarian governments, nationalists, and pundits. Unfortunately, the credibility of human rights is undermined by the proliferation of new rights, the linkage of rights to other issues such as international crimes or the activities of business, and the attempt to address every social problem from a human rights perspective. *Rescuing Human Rights* calls for understanding human rights as international human rights law and maintaining the distinctions between binding legal obligations on governments and broader issues of ethics, politics, and social change. Resolving complex social problems requires more than simplistic appeals to rights, and adopting a “radically moderate” approach that recognizes both the potential and the limits of international human rights law offers the best hope of preserving the principle that we all have rights, simply because we are human.

HURST HANNUM is professor of international law at The Fletcher School of Law and Diplomacy, Tufts University, Massachusetts. He has authored numerous books and articles on human rights and has served as counsel and advocate before European, inter-American, and UN human rights institutions.

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

Rescuing Human Rights

A RADICALLY MODERATE APPROACH

HURST HANNUM

The Fletcher School of Law and Diplomacy,
Tufts University, Massachusetts



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108417488

DOI: 10.1017/9781108277730

© Hurst Hannum 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Hannum, Hurst, author.

TITLE: Rescuing human rights : a radically moderate approach / Hurst Hannum, Tufts University, Massachusetts.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2019. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2018042533 | ISBN 9781108417488 (hardback : alk. paper) | ISBN 9781108405362 (paperback : alk. paper)

SUBJECTS: LCSH: Human rights. | Human rights—Government policy. | Human rights—International cooperation.

CLASSIFICATION: LCC JC571 .H347657 2019 | DDC 323—dc23

LC record available at <https://lcn.loc.gov/2018042533>

ISBN 978-1-108-41748-8 Hardback

ISBN 978-1-108-40536-2 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

*In memory and appreciation of Kevin Boyle
(1943–2010)*

Dear friend, colleague, and human rights visionary

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871), chap. 6

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

Contents

| | |
|--|------------------|
| <i>Acknowledgments</i> | <i>page</i> xiii |
| <i>List of Abbreviations</i> | xv |
| <i>Preface</i> | xvii |
| 1 Introduction: Assumptions and Principles | 1 |
| The Problem | 3 |
| The Context | 4 |
| Nationalism and Populism | 6 |
| Human Rights as Law | 8 |
| The General Approach | 9 |
| 2 Crime and (Occasional) Punishment | 11 |
| Confusing Violations with Crimes | 11 |
| Amnesty and Accountability | 16 |
| Peace and Justice | 22 |
| Concluding Remarks | 23 |
| 3 The Importance of Government, for Better or Worse | 26 |
| Business and Human Rights | 26 |
| A Note on Other Non-State Actors | 39 |
| Overselling Civil Society | 40 |
| Concluding Remarks | 43 |
| 4 Human Rights and ... Whatever | 44 |
| Trade and Globalization | 44 |
| Environment | 47 |
| Corruption | 51 |

| | | |
|----|---|-----|
| | Technology | 52 |
| | Concluding Remarks | 55 |
| 5 | Undermining Old Rights with New Ones: You Can't Always Get What You Want | 57 |
| | Where do rights originate? | 58 |
| | The Right to Development | 61 |
| | The Human Rights Council and Its Special Procedures | 67 |
| | Other Council Initiatives | 71 |
| | Regional Bodies, Governments, and NGOs | 74 |
| | A Brief Note on Migration | 75 |
| | Concluding Remarks | 77 |
| 6 | Women, Sex, and Gender | 80 |
| | Women | 80 |
| | Sex | 86 |
| | Gender | 92 |
| | Concluding Remarks | 94 |
| 7 | The Flexibility of Human Rights Norms: Universality Is Not Uniformity | 97 |
| | Regional Variations | 109 |
| | A World Court of Human Rights? | 114 |
| | Concluding Remarks | 115 |
| 8 | Human Rights Hawks | 119 |
| | Going to War: <i>Jus ad Bellum</i> | 120 |
| | The Responsibility to Protect | 121 |
| | Fighting the War: <i>Jus in Bello</i> | 129 |
| | Concluding Remarks | 132 |
| 9 | The Indispensable State? The United States and Human Rights | 135 |
| | A Brief Historical Introduction | 135 |
| | The War on Terror | 140 |
| | US Foreign Policy | 144 |
| | The New Normal? | 151 |
| | The Myth of Consistency | 153 |
| | Concluding Remarks | 154 |
| 10 | The Way Forward: Less Is More | 157 |
| | Why the Critics Are Wrong | 158 |
| | Are Some Rights More Equal Than Others? | 160 |

| | | |
|--|----------------------------------|-----|
| | <i>Contents</i> | xi |
| | New Rights and Seeking Consensus | 165 |
| | Human Rights and Politics | 167 |
| | Concluding Remarks | 170 |
| | <i>Notes</i> | 173 |
| | <i>Index</i> | 213 |

Cambridge University Press
978-1-108-41748-8 — Rescuing Human Rights
Hurst Hannum
Frontmatter
[More Information](#)

Acknowledgments

The opinions expressed in this book have been shaped by a great number of conversations – some of them with individuals who would probably disagree with many of the views expressed herein. Among the constructive critics have been students and colleagues in a number of academic and other institutions at which I presented many of the ideas found in these pages over the past several years, and I wish to thank The Fletcher School of Law and Diplomacy; University of Hong Kong; Central European University; Harvard Law School; King’s College, London; Princeton University’s Woodrow Wilson School of Public and International Affairs; the University of Minnesota; the Hertie School of Governance, Berlin; Georgetown University Law School; the University of Glasgow Human Rights Project/Program; and the Legal Vice Presidency of the World Bank for allowing me to present my thoughts to a variety of audiences. I benefited greatly from each of these opportunities.

A great number of colleagues and friends have contributed in various ways to my thinking (sometimes encouraging, sometimes discouraging), including Malin Oud, John Shattuck, Kevin Boyle, Elsa Stamatopoulou, Nigel Rodley, Michael O’Boyle, David Weissbrodt, Patrick Thornberry, Richard Goldstone, Cecile Aptel, Allen Buchanan, Bert Lockwood, Anna-Maria Biro, Samuel Moyn, Achim Ladwig, Zohrab Mnatsakanyan, Maria Varaki, Benyam Dawit Mezmur, Ho-Ming So Denduan-grudee, Chip Pitts, Stephen Marks, Tom Hadden, Norah Niland, Antonio Donini, Janelle Diller, Shane Darcy, Dapo Akande, and Fletcher colleagues Eileen Babbitt, Michael Glennon, Joel Trachtman, and Alan Henrikson. For their comments on sections of the manuscript and/or the article that preceded it, I would particularly like to thank John Cerone, Christina Cerna, Meg DeGuzman, Patricia Fagen, Sofia Gruskin, Kathleen Hamill, David Harris, Banafsheh Keynoush, Mark Lattimer, David Kinley, Steven Koh, Siobhan McInerney-Lankford, Robert McCorquodale, Sean Murphy, Sejal Parmar, Tara Sepehrifar, Nadja Skaljić, Ivana Vuco, and

Alexandra Xanthaki. None of these individuals, of course, is responsible for any of the views expressed here.

Thank you to the two anonymous reviewers of the book proposal to Cambridge University Press, for both their supportive words and their good advice. Thank you, too, to John Berger of CUP for his encouragement, help, and good humor over the years, and to Emma Collison for her help during the editorial process. Elodie Graham, Jeanne Koré Salvato, my wife, Ann, and CUP's excellent design team helped to select the title, cover, and design for the book.

I also thank my research assistants at Fletcher during the earlier phases of the book, Alliya Anjum, Casey Hogle, Aruni Jayakody, Nida Paracha, and Kathrin Strobel, without whom I never would have surfaced from beneath the stacks of materials in my office.

This manuscript was written in part in autumn 2017, while I was a visiting fellow at Mansfield College and a research visitor at the Bonavero Institute for Human Rights, Faculty of Law, University of Oxford, and I wish to thank the director, Kate O'Regan, as well as the always helpful staff, Annelen Micus and Zoe Davis-Heaney, for their warm welcome and assistance. I also thank my fellow fellows at the time, Johanna Gusman, Malcolm Wallis, and bob watt, for their enjoyable and intellectually stimulating company.

I could not have completed this book without the support and encouragement of my wife, Ann Barger Hannum, and I thank her as well for her extremely helpful comments and suggestions on parts of the manuscript. Now that this particular task is completed, I promise to become more social in the months to come, and I hope that our next voyage will be somewhat less hectic than this most recent one has been.

List of Abbreviations

| | |
|--------------------|--|
| ACHPR | African Charter on Human and Peoples' Rights |
| AfCommHPR | African Commission on Human and Peoples' Rights |
| AfCHPR | African Court on Human and Peoples' Rights |
| AmConvHR | American Convention on Human Rights |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CEDAW Committee | Committee on the Elimination of All Forms of Discrimination against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CERD Committee | Committee on the Elimination of All Forms of Racial Discrimination |
| CP | civil and political |
| CP Covenant | International Covenant on Civil and Political Rights |
| CRC | Convention on the Rights of the Child |
| ESC | economic, social, and cultural |
| ESC Covenant | International Covenant on Economic, Social, and Cultural Rights |
| Eur. Ct. Hum. Rts. | European Court of Human Rights |
| Eur. Ct. Justice | European Court of Justice |
| ECHR | European Convention on Human Rights and Fundamental Freedoms |
| GA | UN General Assembly |
| HR Committee | UN Human Rights Committee |
| HR Council | UN Human Rights Council |
| IACommHR | Inter-American Commission on Human Rights |
| IACtHR | Inter-American Court of Human Rights |

| | |
|-------|---|
| ILO | International Labor Organization |
| NGO | nongovernmental organization |
| OHCHR | Office of the UN High Commissioner for Human Rights |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UK | United Kingdom |
| US | United States |
| WTO | World Trade Organization |

Preface

Human rights are in danger of becoming the victims of their own success. The purpose of this book is to support human rights and human rights advocacy and to argue for their continuing relevance in the twenty-first century and beyond. For this relevance to be sustained and even increased, however, the human rights movement must evaluate its strategies, successes, and failures in an open and honest fashion. Similarly, politicians, diplomats, donors, and the public need to understand more clearly what human rights intend to achieve and how their advocates propose to do this. Many critics simply don't understand the purpose of human rights and mistakenly attack them for not being imagined in a different way, rather than analyzing them on their own terms.

Understanding human rights includes recognizing that their goals and capabilities are limited. Human rights were never intended to provide a solution to all of the world's problems, and those who offer human rights as a panacea for such problems do a disservice both to human rights and to the causes they seek to promote. Many of the criticisms in this book are directed at the unrealistic expansion or overreach of human rights, which undermines their legitimacy and acceptance.

The primary contribution of the book is to reconsider the basic purposes of human rights from a normative perspective, taking into account the treaties and other legal texts that set forth the rights in detail, in the context of today's domestic and international political realities. This is not an easy task, since the phrase *human rights* has come to mean almost anything that anyone thinks that it should mean. No ideology or political movement will survive long if it means all things to all people – that is the problem with contemporary appeals to vague concepts such as populism, nationalism, self-determination, and national security. Activists may be disappointed to discover that human rights do not provide simplistic solutions to sincerely felt, legitimate grievances, but their response should not be to twist human rights to suit their own agendas.

While there are many critical comments in the book about the ways in which advocates and supportive governments have understood and used human rights as

part of their campaigns, this should not imply any lack of appreciation or respect for human rights defenders, advocates, and NGOs, many of whom carry out their work not only with tremendous dedication but frequently at tremendous risk to themselves, their colleagues, and their families. There would be no human rights regime without this work, and human rights defenders deserve much more credit for bringing about positive change than they generally receive. Their impact may be difficult to measure, but the work of human rights advocates, international and domestic, is absolutely crucial to continued progress in making human rights a reality.

The thesis of this book is grounded in law and legal concepts, but the arguments are pragmatic, not technical. There are frequent references to treaties, declarations, and the judgments and decisions of international human rights bodies, but the goal is to understand the proper role of human rights in the world, not to win a case or parse legal theories about the role of international law.

There is little discussion of the sources of human rights norms; we can read the texts agreed to by diplomats and governments, and we can leave it to the drafters to explain where their formulations originated rather than speculate about their antecedents. This does not mean that the existing texts are perfect or even good, but formal international agreements do give specific (if not always clear) content to human rights. As the co-author of an international human rights law textbook, I have spent a great deal of time understanding and writing about the institutions that have been created to encourage and oversee compliance with human rights norms. This book devotes very little space to these mechanisms, which have been the subject of innumerable analyses, both inside and outside the United Nations.¹ I also make no attempt to trace the history of human rights, whether from time immemorial or since 1945.

I am a lawyer, not a social scientist, and I leave it to the quantifiers to measure the impact that various human rights instruments and mechanisms have had on the behavior of states. As methodology improves and findings of correlation permit us to judge causation with greater confidence, such work may become even more important. For the moment, however, I simply offer my agreement with the following conclusion that human rights norms and advocacy have had a generally positive impact, at least under certain conditions:

International human rights law has not failed or succeeded, and we should stop thinking in such dichotomies. Based on a variety of studies using a good deal of newly uncovered evidence, we are comfortable arguing that human rights protections have improved over the last three decades, and that the development of international human rights law is associated in multiple ways with that change.²

A BRIEF BIOGRAPHICAL NOTE

The opinions in this book are derived from more than four decades of experience in international human rights, as a practitioner, academic, and consultant. I began my

career with the Northern Ireland Civil Rights Association in the 1970s, where I was co-counsel in cases brought to the European Commission on Human Rights concerning ill treatment by British security forces during the “Troubles” in Northern Ireland. In the early 2000s, I was lead counsel in a case argued before the Grand Chamber of the European Court of Human Rights that challenged (unsuccessfully, I should add) the use of force by NATO countries in the 1999 bombing of Serbia and Kosovo. I also have contributed to complaints brought in the inter-American and UN systems and testified on human rights and refugee issues on several occasions before US Congressional subcommittees in the 1980s and 1990s.

I have been active in several human rights NGOs, serving as a member of the International Council of Minority Rights Group International (London); on the board of directors of Amnesty International–USA; as president of Survival International–USA; and as an adviser to the International Human Rights Law Group (now Global Rights, based in Abuja, Nigeria), International Service for Human Rights (Geneva), and Chittagong Hill Tracts Commission (Dhaka). As executive director of the Washington-based Procedural Aspects of International Law Institute prior to moving to Fletcher, I participated in numerous meetings of the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights throughout the 1980s and 1990s; I have also attended meetings of the UN Human Rights Council, Universal Periodic Review process, treaty body sessions, Permanent Forum on Indigenous Issues, and UN working groups or forums on minorities and business and human rights. Other NGO work, focusing primarily on human rights and conflict resolution, has concerned Aceh, Afghanistan, Bosnia and Hercegovina, the Caucuses, China, Kashmir, and Sri Lanka.

While I have never worked full time for any government or international organization, I have been a short-term paid consultant for the US State Department (on the meaning of autonomy in international law), the UN Department of Political Affairs (on Portuguese-Indonesian talks on East Timor and as an adviser to former US Secretary of State James Baker on Western Sahara), and the UN Office of the High Commissioner on Human Rights (as author/editor of a handbook on minority rights). In 1990, I was a public member of the US delegation to the Copenhagen Conference on the Human Dimension of the Conference on Security and Cooperation in Europe.

I have been professor of international law at The Fletcher School of Law and Diplomacy, Tufts University, since 1990 and have also held full-time visiting positions at the University of Hong Kong (2006–2008) and Central European University (Budapest, 2010–2011). I have published widely and am on the editorial advisory boards of *Human Rights Quarterly* and *Human Rights Law Review*.

Other than the United States, I have lived for periods ranging from roughly three months to two and a half years in Guam, US Virgin Islands, France, Northern Ireland, England, Hong Kong, and Hungary. I have traveled for talks, meetings,

and other human rights-related activities to Morocco, Rwanda, Egypt, Israel and the Occupied Territories, Italy, Spain, Scotland, Greece, Serbia, Bosnia and Herzegovina, Czechoslovakia, Austria, Germany, Netherlands, Åland Islands, Finland, Norway, Sweden, Greenland, Poland, Switzerland, Georgia, Russia, China, India, Sri Lanka, Philippines, South Korea, Macao, Malaysia, Indonesia, Australia, Singapore, Canada, Haiti, Argentina, and Nicaragua.

I offer this bio not to impress but to ensure transparency; we all have our biases, and I am sure that I have mine. At the very least, my experiences have exposed me to a wide range of issues, personalities, and politics, all of which have informed the opinions set forth in the following pages. Some of these people are further recognized in the Acknowledgments.