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Introduction

In From the Margins

1.1 THE PROBLEM, THE STAKES, AND THE PURPOSE OF THIS BOOK

At any given moment, there will be individuals and groups all around the world, representing a wide variety of causes and using a wide variety of means, that will claim they have the 'right to resist'. Some will have a valid claim. Others will not. How can we tell the difference? Is the 'right to resist' really a human right, and can human rights law provide meaningful guidance when evaluating and distinguishing such claims? The answer to the latter two questions is yes. It is not only possible but crucial to conceptualize the 'right to resist' as a human right.

As this book will show, the 'human right to resist' is a contemporary legal concept with an ancient pedigree. It is domestically codified in constitutions from all regions. It has received recognition in general or customary international law, codification in human rights treaties, and acknowledgment by leading publicists of international law. Despite all of this, it remains obscure compared to many other human rights. It has been neglected by human rights scholarship, and is under-represented in mainstream human rights discourse. One does not find the human right to resist included in standard human rights curricula. The contemporary scholarly literature discussion of it is thin. It is not generally recognized in the standard human rights lexicon. In part because we still lack a common conceptual language and analytical framework by which to evaluate the legal basis of claims, most attributions of a 'right to resist' derive more from intuition than from systematic legal assessment.

Why does this matter? Recognition of this human right, and the ability to evaluate claims based on reasonable, consistent human rights criteria, can make a positive difference for human rights defenders. It can make a

difference at domestic level, in the outcomes of certain criminal trials, refugee exclusion or extradition proceedings, and constitutional cases. At international level, it can better inform and potentially make a difference in the outcome of deliberations and decisions at the United Nations Security Council, General Assembly and Human Rights Council, and at international courts and tribunals.

Understanding the right to resist as a human right has three effects. Those effects are exceptional authorization, constraint, and interaction. First, as is well known, most human rights are not unlimited, but rather subject to certain limitations. This means a right to resist will include simultaneous authorization and constraint functions. It is not equivalent to the idea of an unlimited freedom to resist 'by any means necessary'. It does not suggest that all individuals and groups have the right to resist at any time, for any reason, and by any means. Rather, there are conditions that must be fulfilled in order to trigger this extraordinary human right under exceptional circumstances. However, at the same time as it produces these regulatory effects, it also lifts the unreasonable constraints otherwise imposed by ordinary human rights law. That is, ordinary constraints can shift from 'reasonable' to 'unreasonable' when they inadvertently consign individuals and groups to ineffectiveness or martyrdom when faced with serious or grave human rights violations on the part of a state or other powerful entity, or a 'widespread and systematic attack' constituting crimes against humanity, or genocide, or other crimes of an international character such as aggression or war crimes. Because the human right to resist would necessarily interact with other well-established human rights frameworks, standards, and analytical tools such as 'necessity' and 'proportionality', it becomes possible to establish a flexible concept that creates a lawful exception covering a wide spectrum of 'otherwise unlawful acts', expanding and contracting depending on the immediate facts of any individual case.

To fail or refuse to recognize this exceptional right is to accept that human rights must give way when faced with an implacable state, corporation, or other opponent of human rights, or a biased or otherwise paralyzed international system that in any event cannot guarantee human security because its mechanisms for doing so trigger too late in the process of the experience of violations. We need to be able to distinguish between those who may have a sincere but objectively unfounded belief that they have a right to resist, those who consciously co-opt this human rights idea for ends antithetical to human rights, and those who can be determined to have an objectively well-founded basis to a claim to a human right to resist based on lawful exception. As it stands, individuals and groups frequently claim a right they do not have,

which can have the effect of degrading the perceived integrity of more well-founded claims. Conversely, categorical denial of the existence of the right, even where a specific claim may be demonstrably well-founded, contributes to greater uncertainty and a cynicism that degrades the credibility of the idea that distinction is possible.

Unfortunately, much of the existing legal scholarship is of limited assistance. Taken as a whole, it lacks conceptual definition and consistent usage. It also lacks the necessary forensic comparative analysis of both the concept and the law. A simplistic and erroneous assumption of obsolescence or relegation to 'sham law' sometimes features, reflecting a general failure to systematically build a coherent knowledge base. This may be the result of a determined liberal orthodox aversion to the idea, which became predominant in the discipline of human rights in the later part of the last century, or it may simply be due to a lack of familiarity with the concept resulting from its progressive marginalization over time. The law itself is equally limited, characterized by uneven recognition and indeed both ambiguity and some apparent ambivalence at international level, as well as uneven human rights compliance in provisions found at domestic constitutional level.

This situation leads to inconsistencies that tend to generate anomalies and sometimes absurd results. For example, by the standards of the United Nations Declaration on Human Rights Defenders, which does not acknowledge an exceptional right to resist under certain conditions, human rights luminary Nelson Mandela himself would not have qualified for recognition as such.[1] That is to say, at present, persons validly exercising the human right to resist in defence of human rights may not always be protected by the formal orthodox international human rights concept of human rights defenders, on the basis that their actions render them 'not deserving of protection'. This creates a situation prejudicial to those most vulnerable and therefore most desperate because they lack the effective remedies or human rights defence options available to those with the least to lose.

[1] See UN General Assembly, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' UNGA Res 53/144 (9 December 1998) articles 12 and 13; UN Special Rapporteur on the Situation of Human Rights Defenders, 'Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' (July 2011) 5–6, 8–11, 25–26, 31–32, 70–74, 88–90; and an earlier analysis of this particular paradox in Shannonbrooke Murphy, 'The Right to Resist Reconsidered' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 92–95.

It also leads to uncertainties and gaps that can generate paralysis. That is, the fairly significant certainty gaps remaining in the law of the human right to resist as it stands, when taken as a whole, too often yield insufficient guidance for action or reaction. This is the consequence of an apparent formal asymmetry in the international human rights legal regime, whereby a rule of exception provides a degree of flexibility for states exempting them to a certain extent from certain human rights duties, under certain conditions, but there is no generally recognized analogous exception for the holders of those human rights allowing that, under certain conditions, certain ordinary limitations on the scope of their lawful rights-enforcement action likewise do not apply.

The ensuing legal certainty and uncertainty varies by degree. This can be expressed as categories of claimants according to greatest certainty, reasonable certainty, and uncertainty warranting clarification and confirmation. For example, as of 1970, the greatest certainty is that a 'people as a whole' have the right to resist 'forcible denial of the right to external self-determination', meaning aggression, unlawful occupation, colonization, or apartheid. There is also reasonable certainty that the right to resist 'forcible denial of the right to internal self-determination' is recognized for ethnic minority 'peoples' under 'racist regimes' as defined in international law. What still needs clarification is whether a 'people as a whole' have the right to resist 'forcible denial of the right to internal self-determination' by coup d'état, by 'tyranny or other oppression', or by violations of the right to economic self-determination through economic domination and exploitation. What needs confirmation is that all individuals have the right to resist 'internationally criminal acts' legally constituting aggression, war crimes, genocide, crimes against humanity, or laws and policies leading to these outcomes. Uncertainty remains as to whether individuals and groups have the right to resist 'other violations' of human rights or international law. If so, does this authorize resistance against patterns of only grave or also lesser human rights violations? Does it extend to all unlawful use of force by the state, including individual resistance to police violence or harassment? There is even less certainty regarding the right to resist other violations of economic, social, and cultural rights, including where these amount to interference with the right to internal self-determination as a result of oligarchy, kleptocracy, or corruption. Is there a right to resist violations of environmental rights and related international law, including where grave violations of environmental rights affect the right to life? Do indigenous peoples have the right to resist violations of their particular economic, social, and cultural rights, where these violations may fall short of 'genocide' according to the Genocide Convention, or forcible imposition of a 'racist regime' as legally defined under the Apartheid Convention? All these

remaining certainty gaps need further scholarly exploration and legal clarification, whether by new codifications or by new interpretations and applications of the law as it stands. This book shows that there is potentially room for both approaches.

Why is such clarification important? The ambiguity problem in the current law has potentially serious consequences at the international level. It permits inconsistency in UN Security Council decision-making with respect to rebellions or other resistance against oppression, illustrated by its contrasting approaches in comparable contemporaneous cases. It perpetuates a situation whereby there is no clear basis in law for those resisting oppressive or corrupt regimes to request, and thus for the international community to provide, lawful assistance on the basis of a meritorious claim. It also means that there is too much room for disagreement as to the basis upon which a state can be banned from requesting and receiving assistance from other states in suppression of a rebellion or other resistance. Clarification of the right to resist could encourage instead decision-making informed by a transparent legal framework and a consistent regulatory standard. It could help set more appropriate limits on providing UN or UN-authorized assistance to states in suppressing rebellion or other resistance, or in rarer instances provide a sounder legal basis for UN authorization of assistance to those challenging a human rights violator state. Stronger legal recognition of self-help resistance rights of individuals, groups, and peoples under exceptional circumstances, combined with the correlated international obligation to lawfully assist or not obstruct, could thus provide an alternative or complement to the emerging 'responsibility to protect' doctrine. It could provide clearer and firmer guidance to domestic and international courts, tribunals, and quasi-judicial bodies, dealing with relevant cases. It could also provide guidance to international independent experts adjudicating in truth and reconciliation processes. At the level of individual cases, in challenges to exclusion from refugee protection on the basis of alleged criminal conduct, it could provide a clearer and more consistent basis for establishing and distinguishing protected political activity. In challenges to extradition requests, it could provide an international human rights law basis for appropriate political offence exceptions that would not be negated by overbroad counterterrorism clauses. And it could assist criminal defences in appropriate cases.

Ultimately, failure or refusal to recognize the right to resist perpetuates unequal patterns of access to universal human rights and unequal distribution of protections. It does so in a manner prejudicial to those faced with oppressive conditions who do not have legal options available, including those whom

Baxi has identified as the 'human rightless'.[2] Conversely, recognition of the right has 'counter-hegemonic' equalizing potential.[3] This idea is in keeping with Falk's contention that law is a tool – of the powerful certainly, but one also capable of appropriation by the ostensibly powerless, as history has shown. Indeed, this book demonstrates that, upon closer inspection, the ostensible asymmetry in the law is not as absolute as it first appears.

The human right to resist is a concept that deserves a more prominent place in our human rights lexicon. Indeed, reconsideration of the viability of this concept as a human right has become timely and necessary in light of a failed second attempt at United Nations codification in 2016, despite prior endorsement by the UN Human Rights Council's expert Advisory Committee. This book makes the case for reconsideration of the right to resist, its reinstatement in human rights discourse, and firmer recognition in international law. Its theoretical purpose is to establish a sound basis for this reconsideration and reinstatement and for the scholarly dialogue necessary to further develop the legal concept. The book aims to establish why and how a 'right to resist' can be conceptualized as an enforceable 'human right' and positivized as such in law through codification and other recognition. Beyond this, its practical purpose is to offer guidance in utilizing the concept, and to promote greater respect for enforcement of human rights through extrajudicial means 'from below',[4] reflecting what Heyns has called a 'struggle approach' to human rights.[5] That is, in both theoretical and practical ways, this book urges an expanded notion of what constitutes human rights 'defence' or 'enforcement' worthy of recognition and protection. It provides definitional, conceptual, and legal status clarifications, as well as analytical tools to assist both further assessment of theories and application and further development of the existing law. The ultimate purpose of the book, therefore, is to identify an agenda for reconsideration of the right to resist that will enable us to bring this human right in from the margins, to assume its rightful place in the human rights lexicon. In doing so, it invites other scholars, practitioners, and advocates to join this mission.

[2] He defines the 'rightless' as those who are, if not stateless, then 'unclaimed and [treated as] eminently disposable', who 'amidst … plentiful forms of dehumanization … somehow eke out their "existence"'. Upendra Baxi, *The Future of Human Rights* (2nd edn, Oxford University Press 2008) 130–134.

[3] On 'counter-hegemonic' human rights see Richard Falk, *Achieving Human Rights* (Routledge 2009) 35–38.

[4] This corresponds to the more general idea developed in Balakrishnan Rajagopal, *International Law from Below* (Cambridge University Press 2003).

[5] Christof Heyns, 'A "Struggle Approach" to Human Rights' in Arend Soeteman (ed), *Pluralism and Law* (Springer 2001).

1.2 THE APPROACH AND METHOD

This book approaches the perennial question of who has a 'right' to resist – and what, when, why, and how – from a legal perspective, intended to complement other scholarship on the subject by philosophers and political theorists. To establish that a 'right to resist' can be recognized and codified as an enforceable 'human right', it uses a systematic and comparative approach to analyzing both the theoretical concept and the provisions in positive law. The findings of this analysis ultimately form the basis of its practical proposals regarding a common conceptual language and an analytical framework for evaluating the legal basis of claims.

Although the right to resist is not a 'new' human right, and indeed predates the concept of 'human rights' as such, due to its relegation to the margins of the discipline it will likely be unfamiliar and therefore 'new' to many readers.[6] With skeptics and those who caution against unnecessary 'rights-inflation' in mind, the book adopts Philip Alston's 'quality control' method for assessing proposed new or otherwise marginalized human rights.[7] This demands first a forensic analysis of the rights concept, followed by a forensic analysis of its status in both constitutional and international law. This Alstonian analytical framework is reflected in the book's two-part structure. Part I on 'The Concept' considers problems of contemporary term usage and legal definition, the right's hypothesized nature and legal function, and identifies the elements that determine its legal content. Part II on 'The Law' examines the right's sources by way of domestic provision in constitutional law, recognition in general or customary international law, provision in treaty law, and other attempts at international codification.

Bringing all these aspects together in an integrated coherent analysis gives this book a distinctive scope. In particular, the positive law examination is wider in scope than other available studies, insofar as it is comparative across international and constitutional sources, and also comparative across historical periods. The conceptual examination emphasizes the excavation of positions

[6] On the need to distinguish degree of actual novelty from degree of recognition, acknowledging that a right may be simultaneously considered 'new' and 'not new', see Andreas von Arnauld, Kerstin von der Decken, and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 1–3.

[7] Philip Alston, 'Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29(3) *Netherlands International Law Review* 307; Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607; Philip Alston, 'Peoples' Rights: Their Rise and Fall' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001).

on the right to resist taken by the 'most qualified publicists' – however briefly stated – consolidated with the work of established and emerging legal scholars who have taken up various aspects of this topic or conducted otherwise relevant adjacent research. As such, it provides a comprehensive introduction to this human right for specialist and non-specialist readers, from within or outside the discipline of law.

Another distinctive feature of this book's approach and method is that it deliberately does not use case studies. Rather, it is intended as a general theory of the right. In this regard, the book proposes tests for its practical application that can assist in assessing real-world claims relying on international and/or constitutional law.

One limitation of this study must be acknowledged here. It was not possible to comprehensively treat the separate and no less important literatures on the right to resist in French and Spanish particularly, or those in German, Arabic, Chinese, and Russian. Given its reliance on literature in English, it necessarily focuses on the western origins of the concept of the right to resist, and their subsequent influence on provisions in domestic constitutional law within and beyond the West, as well as on recognitions within international law to whose development states and scholars of all regions now contribute. However, for this reason, it can only tell part of the story. A similar study of the eastern origins of the concept and its analogues in ancient Confucianism, Islamic legal thought of the Middle Ages and since, and the modern advent of Soviet legal theory is necessary to complete the picture of the history and evolution of the right to resist as a human rights concept. Such further study would invite fruitful collaboration with specialists in the preceding disciplines, particularly where a language barrier would otherwise pose access challenges. Systematic comparative treatment of the literatures and case law in other languages would also enable further comparative constitutional research.

1.3 THE STRUCTURE OF THE BOOK

Following Alston's two-part method, the first part of the book examines the legal concept. Responding to the lack of an agreed contemporary legal definition of the 'human right to resist', Chapter 2 compares definitional treatments in ordinary construction with those in legal construction, identifying two related problems of conflation in contemporary term usage. It explains the term's distinction from antecedent concepts such as the *exceptio tyrannoctonos* or exception of lawful tyrannicide, and from corroborative concepts including the *lex generalis* or ordinary 'right of (peaceful) assembly' and 'right to protest' in human rights law, 'resistance movements' in

international humanitarian law, and 'insurgent' or 'belligerent' status in customary international law. It also clarifies the conceptual relationship between the 'right to resist' and its cognate terms – the 'right to oppose', 'right to disobey', 'right to rebel', and 'right of revolution' – identifying both points of differentiation and a 'common core'. It finally proposes a consolidated contemporary working definition of the superordinate term 'right to resist'.

Chapter 3 examines the contours of theories and debates about the nature and function of the right to resist as a legal concept. Firstly, it identifies four main approaches to conceptualizing the nature of the right: as moral, legal, both, or other. It then considers three main theories of the concept's relationship to the rule of law. Concerning its other key characteristics, the chapter considers possibilities including that it is: a fundamental 'human right' in the political rights cluster; an 'unenumerated', 'implied', or 'latent' right; an enforceable 'claim' right; a 'right' or 'duty' or hybrid 'right-duty'; a primary or secondary right, or both. Secondly, the chapter identifies possibilities for the legal function of the right, including as: a self-help remedy for enforcement or prevention; an exceptional immunity, justification, or temporary permission by licence; a form of *jus ad bellum*; and a lawful exception and *lex specialis* rule. It concludes non-exclusively that the nature of the contemporary right to resist is a potentially enforceable human right, functioning as a *lex specialis* rule of exception.

Chapter 4 identifies and examines the elements determining the legal content of any given theory of, or positive law provision for, the human right to resist. It reviews the primary triggers or conditions for activation, indicating the 'right to resist *what*', including 'tyranny', 'oppression', and 'other violations'. It reviews the secondary triggers or conditions for activation, indicating the 'right to resist *when*', in particular the necessity condition. It also reviews both aspects of the personal scope, being the rights-holders, indicating '*who* may resist', and also the duty-bearers, indicating '*who* has a corresponding duty'. It identifies a four-fold typology of legitimate 'object and purpose', or 'right to resist *why*', being for human rights enforcement, for self-defence, for self-determination, and for 'peace' or human security. The final element examined is the material scope of application, or 'right to resist *how*', identifying three competing approaches to permissible means, and affirming proportionality limitations and other applicable limitations in international human rights law and international criminal law, as well as grounds for discretionary non-exercise. This general analytical template for identification and comparison of elements and therefore content is then applied to the evidence of legal sources of the right considered in the second part, which examines the positive law.

Chapter 5 assesses the richest source of positive law on the right to resist, domestic constitutional provision in its historical and contemporary iterations. It first considers several examples of antecedent provisions for lawful tyrannicide in 'ancient constitutions' or equivalent law including customary law. It then reviews examples of provisions for a right to resist unlawful exercise of power in Middle Ages 'constitutions' or public law equivalents including customary law, and other quasi-constitutional sources such as coronation oaths, as well as intervention appeals rooted in custom. It concludes consideration of the historical right to resist provisions with a review of key modern revolutionary republican and anti-colonial foundational declarations and constitutions. The remainder of the chapter concerns approximately forty contemporary constitutional provisions for the right to resist in African, Asian, European, and Latin American constitutions. Using the template developed in Chapter 4, it provides comparative analysis of their legal features and content. Finally, the chapter evaluates the provisions' legal meaning by way of a two-fold typology, and their legal value against the question of 'sham law'.

Chapter 6 addresses the status of recognition of the human right to resist in general or customary international law, and the problem of clarifying this absent express provision in material sources. It first considers theories of recognition in customary international law predating the United Nations Charter, followed by theories of implied recognition under the Charter as customary international law or as a general principle of international law, including the generally accepted albeit narrow implied recognition of the right in UN General Assembly Resolution 2625. It then examines the possibility of a broader implied recognition of the right in the Universal Declaration of Human Rights. Applying the analytical template from Chapter 4, it identifies the elements and content of the theorized right in these sources. Finally, it reviews the third material source, the implied recognition of a customary right-duty to resist internationally criminal acts in the Nuremberg Principles. The chapter concludes by reviewing the corroborative sources potentially indicative of customary recognition, including: the customary laws of insurgency and belligerency, recognition, and responsibility; the regulation of 'resistance movements' and 'national liberation movements' by international humanitarian law; the political offence exception in extradition law; and the persistent non-equation of the 'right to resist' with 'terrorism' in international instruments.

Chapter 7 addresses the status of recognition of the human right to resist in conventional international law, and the outcome of recent other international codification efforts. It first considers the universal human rights system, and the theory of implied recognition as an unenumerated right in the