THE HUMAN RIGHT TO RESIST IN INTERNATIONAL AND CONSTITUTIONAL LAW

The human right to resist is a contemporary legal concept with an ancient pedigree. Although it has received recognition in constitutions, customary international law and human rights treaties, and acknowledgment by leading publicists of international law, it remains obscure compared to other human rights. In this innovative and comprehensive book, Shannonbrooke Murphy addresses the perennial question of who has a 'right' to resist – and what, when, why and how, from a legal perspective. Using a systematic and comparative approach to analyzing both the theoretical concept and the provisions in positive law, this study aims to establish that a 'right to resist' can be recognized and codified as an enforceable 'human right', proposing a common conceptual language and an analytical framework for evaluating the legal basis of claims. Murphy makes a strong and detailed case for a firmer place for the 'right to resist' in the human rights lexicon.

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This work is dedicated to all those throughout history, both renowned and unknown, who, despite the risks and against the odds, have asserted the right to resist and through their actions changed our world for the better.

And in loving memory of my Ukrainian maternal grandparents, Mykhaylo (Mike) Chojcan and Maryna (Mary) Chojcan née Kowtun. Now more than ever, this is for you.

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Foreword

As I read this jurisprudentially fascinating and exceptionally learned book, the media was consumed by its daily accounts of the massive military operation conducted by Israel against the Palestinian civilian population of Gaza. It was a gruesome story rationalized on one side as self-defence against Hamas, cast as a terrorist organization that carried out a barbaric attack on 7 October 2023 and, as such, could be legitimately situated outside the protection that international law provides by setting limits on the violence of warfare, although compliance is often problematic. On the other side, criticism mounted that what was being called self-defence would be better understood if interpreted as a deliberate and unabashed recourse to genocide by Israel, whose slaughter of Gazans amounted to a humanitarian catastrophe affecting the whole of the Palestinian people. By and large, political leaders in the West endorsed Israel's shocking response to the horrific Hamas attack on 22 villages in southern Israel, which resulted in the death of an estimated 1,400 Jewish civilians and soldiers, as well as the seizure of an estimated 240 hostages, severe war crimes committed by Hamas that seemed to qualify as crimes against humanity.

In contrast were exceptionally large and aggressive public demonstrations in cities around the world, including in the United States, United Kingdom, and other states whose governments were giving unconditional support to Israel. These street protests were denouncing the scope, targeting, intensity, and severity of Israel's response as amounting to the crime of crimes, genocide, although the milder events in the West tended to confine their demands to calls for an immediate ceasefire, which Israel and the United States opposed at the UN and in their diplomatic stance. Both views, however contradictory their political outlooks seem, were connected by invoking law to justify and explain their impassioned partisanship.

A reading of Shannonbrooke Murphy's timely and conceptually brilliant book, while itself demanding a reader's sophisticated and dedicated attention,

is the most illuminating treatment of these and kindred issues, of how law can be used in good faith to uphold a politics of armed resistance while at the same time putting strict limits on the legally grounded human right of people to resist various forms of oppressive conditions. It is an unusual situation, but far from unprecedented, for law to exist in certain respects but still lack sufficient clarity to offer definitive guidance to parties in conflict as to what is behaviourally permitted and what is not, enabling the more powerful actors to engage in lawfare as part of their strategic approach.

Murphy does not examine specific cases of conflicts between the forces of order and the rights of resistance in trying to depict and improve upon the *conceptual* landscape that throughout history has surrounded this inherently controversial set of issues. Instead, she considers resistance from the perspective of human rights law as it currently functions in international law and constitutional law, while presenting a learned and relevant account of historical antecedents in the work of past celebrated jurists and other normative sources of reflection on the dual role of law in prohibiting and permitting resistance. A prominent feature of the human right to resist is that it functions as a *right of exception* to the normal *duty to obey*. It is a matter of varying circumstances that give rise to resistance in a variety of contexts because existing arrangements of governance are harming individuals, groups, and peoples in socially unacceptable ways, often reflecting changing or evolving societal values. Such a potential role for positive law affirms that the contested behaviour, in addition to being morally and politically deplorable, can be further stigmatized as sufficiently *legally* deplorable as to vindicate the existence and exercise of the human right of resistance. Domestic law typically wrestles with such issues at the level of the individual or group. These issues may be features of governance (for instance, colonialism, apartheid) of characteristics of civil society (for instance, homophobia, racial and religious prejudice, patriarchy).

Such a human right to resist became prominent in the United States in the 1960s due to the refusal of individuals to comply with the legal obligation to serve for a limited period of time in the US armed forces during the Vietnam War. Western democracies had previously wrestled with this issue during World War II, generally granting individuals and groups such a right if it derived from religious convictions and was directed against all wars, or warfare as such. During the Vietnam War an increasing number of secularly motivated young Americans developed a legal argument that became known as 'selective conscientious objection' in which justification for the refusal to join the armed forces was based on moral/legal/political objections to this *particular* war in Vietnam. Revealingly, as the Vietnam War became more unpopular

with the citizenry over time, courts in the United States looked with greater favour on this once novel secular rationale for conscientious objection. To be more attuned to Murphy's conceptual clarity, this set of issues of political propriety is addressed as a 'cognate' notion that influences but is distinct from the penumbra of the 'human right of resistance'. In such a spirit, Murphy subtly balances positivist concerns with achieving as much conceptual precision as possible against the importance of retaining enough flexibility to enable law to evolve as societal values and circumstances change. Her jurisprudential stance favours codification efforts that take sensitive account of changing conditions and societal values while recognizing the benefits of achieving maximum conceptual precision and stability with regard to prevailing expectations about the content of the human right to resist.

The originality of this learned discussion of the human right to resist, which should be of particular interest to common law countries such as the United States, is the decision of the author not to address specific cases of collective resistance such as the Irish or Palestinian struggle for human rights including some form of self-rule, or even the radical forms of opposition to Nazi genocide. In this sense, Murphy's jurisprudentially impressive study can be fruitfully read as a complement to Noura Erakat's fine *Justice for Some: Law and the Question of Palestine* (Stanford University Press 2019). What Erakat gains by way of readability and context is somewhat offset by her fully acknowledged substantive sympathies that become part of the policy analysis that underpins her critique of the ways international law has failed the Palestinian people. In this same sense, what Murphy, despite the lucidity of her prose, loses by way of readability is fully redeemed by a fundamental rethinking, with partisan undertones, of what is at stake when a right of exception is given to individuals, groups, and peoples to violate the law *legally*, but within a secondary framework of more or less authoritative *legal* limits.

I am a great admirer of both works, but for different, yet interlinked reasons. In Erakat's case because I share her compelling concern for delegitimizing Palestinian victimization via lawfare, while in Murphy's case because I am made far more aware of the complexity of the issues involved in legalizing resistance, taking account of its continuing evolution and persisting conceptual gaps, and explicating and exploring linkages to other kindred issues that bear centrally on limiting the power of the state. These linkages pertain both to incorporating the right to resist authority into domestic constitutional texts and by way of applicable international human rights standards that have evolved from being moral aspirations to become legal obligations. In this latter instance, for example, such crimes as apartheid and genocide are not conceptually insulated from legal accountability by invoking claims of unlimited

sovereignty over territorial governance or by constitutional provisions that accord superiority to domestic sources of law whenever clashes with international law are present.

In one important respect, Murphy's positivist presentation of issues associated with resistance legality takes our attention away from the political contexts of enforcement. We could end up with an admirably coherent conceptual framework but with a useless or even regressively opportunistically legalistic approach to various categories of grievances emanating from those who are deemed as class adversaries or international rivals. The authority of law has radically uneven limits in its functioning within and among sovereign states. For instance, such 'legal' developments as the Nuremberg and Tokyo war crimes trials accepted the taint of 'victors' justice' because of foreclosing inquiry, much less accountability, into the crimes of the victors. Even more consequential for evolving a humane global rule of law was the right of veto inserted into the UN Charter, thereby both hampering and tainting the operations of the United Nations. International law is weak when it comes to vital issues because its implementation tends to be disrupted by and subordinated to the primacy of geopolitics, which rests protection of rights on such unreliable restraints as imposed by deterrence threats and prudence, if at all. This results in major resistance claims being manipulated to reflect the interests and policy priorities of powerful states and domestic elites. What is evident is that the selective implementation of human rights law in general creates images of moral hypocrisy and double standards as diluting the authority of and respect for international legal discourse. True, some creative tension has emerged internationally due to the collapse of European colonialism, although Israel is a reminder of what colonialism has meant for oppressed native peoples. This is expressed by the establishment of counter-hegemonic legal arenas, including among jurists as exemplified by TWAIL (Third World Approach to International Law) scholarship, reflecting the Global South's experience of the hegemonic uses of international law relied on by colonial Europe in exploiting native resources while dehumanizing non-Western peoples. Resistance to colonialism has, in the post-colonial era of international relations, inspired the determined effort to generate support for a counter-hegemonic approach to international and constitutional law, which is expressed by the transnational inclusion of Global South jurists in the TWAIL enterprise.

Shannonbrooke Murphy is fully aware of the incompleteness of a purely positivist focus on the human right to resist, while here setting for herself this already Herculean challenge of conceptual clarification. Her contributions to contemporary jurisprudence are profound, and rendered in ways that permit

and encourage diverse inquiries into other bodies of human rights pertaining to a range of topics, including rights of self-defence, freedom of expression, and freedom of religion, in relation to such sensitive policy questions as recourse to war, rights of secession by ethnic or religious minorities, as well as the more sensitive personal issues of gender parity and identity.

Fifty or so years ago a British graduate student at the Yale Law School, Rosalyn Higgins, who like me fell under the charismatic influence of Myres McDougal, was troubled by the subjectivity and seeming ideological bias of a jurisprudential approach that gave legal hegemony to the Cold War values prevalent in the West. I was also troubled, but on different grounds. I questioned the jurisprudential necessity for such an ideological bias and instead sought a contextually sensitive approach to law that was guided by the type of secular humanism that infuses the Universal Declaration of Human Rights.

Professor Higgins, who later became a distinguished judge at the International Court of Justice, organized a conference in London to explore these rifts between the British and American approaches to law. Without the benefit of Murphy's conceptual mapping, I found the conference most intriguing because of the gathering of fine legal scholars for such an unusual conversation, yet intellectually unrewarding as it merely reproduced the tensions between a British insistence that the subjectivity of the New Haven School of International Law undermined the authority of law and the American claim that law without a political and ethical context is artificially cut off from reality. If we were to arrange such a meeting in 2024, I would insist that Shannonbrooke Murphy's book be required background reading, believing that both sides could valuably learn from it. Also, I cannot imagine a better beginning for an advanced course in human rights, resistance claims, or the interplay of international and constitutional law than by assigning this demanding yet remarkably imaginative and profound contribution to an improved understanding of the interactions between law, resistance, and human rights in a variety of substantive contexts.

Richard Falk

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