OXFORD

James Griffin

our welfare duties arising from the amount of benefit that can be produced or from the domain of permitted partiality). And the reason is plain: the values that ground the right to welfare do not ground these particular limits. Their grounds lie elsewhere in the moral domain. So too do the grounds of desert.

10.6 HUMAN RIGHTS, LEGAL RIGHTS, AND RIGHTS IN THE UNITED NATIONS

Let us look again at the welfare rights in the Universal Declaration, this time, let us hope, with a more critical eye. The Universal Declaration was merely hortatory. The rights it declared acquired legal force only when the two Covenants of 1966, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights, were ratified, and then they acquired it only within the ratifying countries. But are all of these rights, in the light of the personhood account, really human rights? To show that they are, it is not enough to show that there is a successful moral case for granting people the right; rich societies have often found good reason to give legal entitlement to rather higher levels of welfare than human rights demand. There can be (legal) rights to welfare, even important ones, that are not also human rights.

There is a regrettable, and often remarked, tendency in the Universal Declaration to an uncritical generosity, which in general gets worse in later rights documents. Article 25.1 asserts a person's right to 'a standard of living adequate for ... the well-being of himself and his family'. It does not say 'a certain minimum level of well-being', and the term 'well-being' on its own is too generous: 'well-being' covers all levels of quality of life from the lowest to the highest. Article 24 plausibly announces that there is 'a right to rest and leisure', but then implausibly includes in it 'periodic holidays with pay'. Although some leisure is necessary for normative agency, paid holidays certainly are not. (Incidentally, Article 25.1, in a rare act of ungenerosity, restricts welfare rights to the deserving poor; a person's needs, it states, must be due to 'circumstances beyond his control', thereby entangling the United Nations in the inconsistency mentioned a moment ago.)

Also dubious is the Universal Declaration's wholesale inclusion of justice among human rights—though this, I should say, is less over-generosity than confusion. The Universal Declaration includes not only procedural justice,

but also distributive justice and fairness. It is not only the United Nations that does this; many philosophers do so too.[26] But this is an assumption I sought to challenge earlier.[27] Both the tradition and firm ethical intuitions, I argued then, regard procedural justice as a human right (e.g. a right to a fair trial), but do not admit all the other departments of justice. Our present subject, welfare rights, tends to reinforce that view. Article 23.2 declares a right to equal pay for equal work—a matter of fairness. Article 23.3 adds a right to 'just and favourable remuneration'.[28] But imagine two highly paid executives of a large multinational firm who are receiving the same remuneration, though one of them has both more work and more responsibilities than the other and resents not being more rewarded. There is a genuine issue of fairness here, but most of us would be reluctant to accept that either of these extremely well-paid executives has thereby had any human rights violated. The personhood account has an explanation for this: human rights have to do with a certain minimum—the minimum proximately necessary for normative agency. While the demands of human rights to material resources have a cut-off point, the demands of justice do not; or, if issues of justice lapse at high levels of affluence, the two cut-off points are at least not the same.

Suppose that I am right that there are several dubious items in the Universal Declaration. That leaves a question, which I turn to next: What, if anything, should be done about them?

This page intentionally left blank

PART III

APPLICATIONS

This page intentionally left blank

11

Human Rights: Discrepancies Between Philosophy and International Law

11.1 APPLICATIONS OF THE PERSONHOOD ACCOUNT

In Part I, I proposed a personhood account of human rights. In Part II, I described the three highest-level rights: to autonomy, liberty, and minimum provision. Now, in Part III, I want to work out the implications of the account for a selection of lower-level human rights.

11.2 BRINGING PHILOSOPHICAL THEORY AND LEGAL PRACTICE TOGETHER

We should be neither surprised nor especially troubled by some discrepancy between the list of human rights that emerges from a theorist's deliberations and the lists that are enshrined in law. If the discrepancy were very great, it is true, we might start doubting either the theory or the law. If it were less great, we should still want to explain it, still want to decide whether the theory or the law is in better order, or whether, perhaps because of their different functions, both are in good enough order.

I want, in particular, to reflect on discrepancies between two lists of human rights—the one from the best philosophical account and the other from the most authoritative declarations in international law. For obvious reasons, I cannot but take the personhood account as the best one.

The international law of human rights has been deeply influenced by both the natural law tradition and the Enlightenment. But there are only the slightest traces of theory explicit in the important twentieth-century declarations of human rights. The Preambles of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on

Civil and Political Rights, adopted by the General Assembly of the United Nations in 1966 in order to give legal force to the merely hortatory Universal Declaration of 1948, both contain the clause, 'Recognizing that these rights derive from the inherent dignity of the human person'.[1] So, here too the ground of these rights is said to be personhood, though the exact significance of the idea is not at all spelt out. This clause is, indeed, the only gesture at theory in the two documents. It is a feature of the international declarations in general that they pay little attention to reasons or justifications.[2]

That is not a criticism. It is common in law not to dwell on justification; different groups, particularly different cultures, might agree that there is such a thing as the dignity of the person, and largely agree on the rights that follow from it, but differ in their understanding of quite what that 'dignity' is. So silence on the subject is often simple wisdom, and the personhood account, even if it is indeed the best substantive account, should stay quietly in the background. But that sensible thought is in tension with the sensible driving thought of this book: namely, that, in order to avoid nearly criterionless claims about human rights, we must develop, and be guided by, a fuller substantive account of what they are. These are not contradictory beliefs, but we have to discover how to hold both, despite the tension between them.

11.3 THE LIST OF HUMAN RIGHTS THAT EMERGES FROM THE PERSONHOOD ACCOUNT

According to my account, there are two grounds for human rights: personhood and practicalities. Personhood initially generates the rights; practicalities give them, where needed, a sufficiently determinate shape.

From a well-developed form of the idea of personhood, we should be able to derive all human rights. We have a right to autonomy. In private life, this means that, once we are capable of taking major decisions for ourselves, parents and teachers—in general, those in authority—must not make us, or keep us, submissive to their wills. In public life, this yields a right to some form of equal say in political decisions. Even a skilled benevolent dictator would be likely to infringe our autonomy; nowadays it is rare to encounter circumstances in which authoritarian rule is justified. So there would be a large range of human rights protecting our autonomy, because autonomy is one of the two essential components of agency.

We have a right to life and to some form of security of person. We have a right not to be tortured. There will be a large range of rights to certain necessary conditions of agency.

Then, we must be free from interference in the pursuit of our major ends. We must be free to worship, to enjoy ourselves, to form the personal relations we want, to try to arrive at certain basic forms of understanding, to create works of art. We must also be free to inform others of what we believe, to display our works of art. Freedom of expression is doubly protected. It is protected because we need it in order effectively to decide our ends in life. But though art may help us in this way, it does not always, yet it would be protected even then. It may be a part, not just of deliberating about, but also simply of having a good life. So there must be a large range of liberty rights, because liberty is the other essential component of agency.

Then, it is hardly surprising that there are rights that cut across these three major categories: autonomy rights, welfare rights, and liberty rights. We have a right to some degree of privacy, because without it we should not be secure or comfortable enough either autonomously to decide our own ends or to pursue some of them. We have a right to asylum, if exile is necessary to protect our lives or our status as agents.

This, of course, is only the start of a list. There are many more human rights, and even those that I have mentioned need to be brought into sharper focus. And there is the familiar problem of whether, once they are brought into sharper focus, one person's rights will be compatible with another's. But this brief account is enough to give some sense of the range of rights that would appear on my list, and why they would.

11.4 CURRENT LEGAL LISTS: CIVIL AND POLITICAL RIGHTS

The other lists I want to look at are, for the most part, the ones in the three major United Nations documents on human rights: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), and the lists in the three regional documents, the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and People's

Rights (1981). But now and then I shall introduce an example from other international documents.

Let me first take claims to civil and political rights. There are striking discrepancies between my list and the lists in these documents. Seen through the lens of my account, the majority of items on the other lists are acceptable, but there are some that are not, and several that are at least debatable.

(a) *Unacceptable cases.*

The International Covenant on Civil and Political Rights asserts: 'Any propaganda for war shall be prohibited by law' (Article 20.1). It is not clear that this even has the form of a right. It is the denial of a freedom: namely, the freedom to propagandize for war. There seem to be no issues of personhood here to justify the prohibition. And on any account of human rights, this is an almost incredible claim. Should one be prohibited from advocating even a just war? The African Charter makes a related claim that all people have 'the right to national and international peace and security' (Article 23.1).[3] It is plausible that there should be a collective right to security; such a right can be seen as grounded in individual rights to security of person. But a right to peace? Would a country that decides to defend itself against invasion violate its citizens' rights? These scarcely credible claims to rights are a manifestation of an often remarked propensity of the drafters to tack on to these international declarations of rights what are really just aspirations. Even worthy aspirations such as peace are not, thereby, human rights. They would not be rights on my account, and it is hard to think of any sensible account on which they would be.

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly in 1965, in the course of rehearsing what are for the most part standard, uncontentious civil rights, introduces 'the right to inherit' (Article 5. D. vi). This is not a right to bequeath goods, which one might or might not choose to exercise, but a right to be left them. But this too is scarcely credible. Would a multi-millionaire who knows that his children can look after themselves and leaves his money to charity violate their human rights? Even if this right is interpreted not as a claim-right of the potential heirs, but as a liberty-right of the testator, it is still highly dubious. Suppose a government decided not to allow transfer of goods between generations but to have each generation make its own way. Would this, if there were also adequate welfare provisions in place, violate anyone's human rights? Not on my account and intuitively

not as well. It might be less efficient socially, but that is different. And it would not violate a human right to property, if there is one, but merely restrict one kind of transfer.

The Universal Declaration, though relatively restrained, still has its highly dubious items. It asserts that there is a right to protection against attacks on one's honour and reputation (Article 12), which is repeated in various later documents.[4] But could there be such a general right? An author cannot have a right not to receive reputation-shaking reviews, and a dishonourable person cannot expect protection against exposure. At most there could be a rather different right—a right to redress against libel and slander. But although in most countries there is such a legal right, even that rather different right is doubtfully a *human* right. Its concern is a matter of fairness, not of human rights, and, as I argued earlier, they are not the same.[5]

The Universal Declaration also claims that we have freedom of movement and residence within the borders of our own country (Article 13.1).[6] Is there a freedom of residence? One's personhood would not be threatened if one were required to live in a particular place, so long as the basic amenities were provided: a decent education, adequate material provision, access to art, and so on. Of course, some people prefer living by the sea and others in the mountains, some in cities and others in the country, and where one lives can be an important component of the quality of one's life, and so should be restricted only for the strongest reasons. But many things affect the quality of one's life; that they do hardly thereby makes them a matter of a human right. Imagine a slightly fictionalized Brazil of about fifty years ago. The coastal areas, especially the cities, are heavily populated, but the rich, beautiful interior is largely empty. The Brazilian government decides to open up the interior to settlement, and as a first step creates a new capital city, Brasilia, deep inland. But the citizens on the seaboard are reluctant to move, and the government is reluctant to force them because forced removal would be likely to break up families and friendships, upset settled expectations, and so on. But a boatload of new citizens, immigrants to the country, arrives in Rio, and they are informed that they must settle in the interior. Brasilia, let us assume, already has all of the amenities that I just desiderated. The immigrants, let us assume, would be able to choose between living in Brasilia itself or the country around it. The area has great natural beauty; life would be comfortable, and a free shuttle to Rio and São Paolo, let us add for the sake of the argument, would be laid on. Of course, some of the immigrants may have a general preference for coasts over interiors, and they will not therefore have

everything they want. But then life seldom provides everything one wants, and there is certainly no human right to the greatest possible satisfaction of one's preferences.

Would this policy violate a human right? The right that it would be most likely to violate would be liberty. But not every compulsion that stops one from getting what one wants—for example, parking restrictions—violates liberty. Living where one wants is much more central to a worthwhile life than parking where one wants. But if one is denied a choice between two options that offer equal prospects of a worthwhile life, then it is hard to see any case for claiming a violation of a human right.

The Brazil case, as I say, is fiction. But there are real compulsions, economic ones, to live in a particular place that may violate, or at least come close to violating, a human right. There have been such cases for thousands of years. But the most interesting examples are ones that are likely to arise in the near future, because they will be the result of deliberate political choice. With the introduction of a common currency in the European Union, and with the harmonization of various tax rates, the major tool for managing the economy left to the nations that have adopted the currency will be levels of unemployment. If welfare rates are fixed so as to force a migration of labour, then a Greek worker, say, may have to migrate to Germany. In Germany, because of the difference in language and hostile attitudes in the local society, the Greek worker might well have little effective voice in political decisions. The worker will therefore be subject to laws without having an equal voice in making them. This *begins* to make the sort of case—much more needs to be said—that would support a claim that a human right has been violated. The case would be very different if the worker had merely to migrate from the Greek countryside to Athens. And it is very different from my fictional case of the immigrants to Brazil having to settle inland rather than on the coast. So this example does not support the right, in all its generality, claimed by the Universal Declaration.

(b) *Debatable cases.*

Of all the putative civil and political rights in the major international documents, the most challenging to my account are the ones that come under the general heading 'equality before the law'.[7] This is how they appear in the Universal Declaration:

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. …

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal …

Article 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty …

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence … at the time when it was committed.

These articles are spelt out in more practical terms in the International Covenant on Civil and Political Rights, for example in Article 14:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   (*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (*c*) To be tried without undue delay;
   (*d*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing …;
   (*e*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (*g*) Not to be compelled to testify against himself or to confess guilt …
6. … the person who has suffered punishment as a result of such conviction [namely, a miscarriage of justice] shall be compensated.

Most of these are, according to my account, clear human rights, but I am inclined to say that some are not, though the case for saying so is not nearly as simple as in what I earlier labelled ‘unacceptable’ cases.

It is entirely plausible that we have a second-order human right to remedy for violations of our human rights. Human rights are meant to be protections

of our personhood, so we should be able to claim not only that others not violate our personhood but also that society in some way help in its protection. It is plausible, too, that we have a human right not to be subjected to arbitrary arrest, detention, or exile; those are extreme violations of our liberty, in the sense of the term that comes out of the personhood account. And everyone has a (human) right to be presumed innocent until proved guilty; if one's guilt were presumed, and action appropriate to that presumption then followed, such as serious loss of liberty or property, then one's capacity to live one's chosen life would be seriously impaired. It is true that not all cases of presumption of guilt need result in diminished personhood, but the line between those that do and those that do not would be hard to draw, and the sort of simplicity needed by both moral norms and civil laws is likely to result in a blanket presumption of innocence.

However, there is a general point that should be recalled here. There is no inference from something's being a matter of justice or fairness to its being a matter of human rights. This is a major point of conflict between my account and certain international law. Some international lawyers write as if the domains of justice and of human rights are identical.[8] But they are clearly not. Human rights do not exhaust the whole domain of justice or fairness. Recall the examples I used earlier.[9] If you free-ride on the bus because you know that no harm will come, as the rest of us are paying our fares, you do not violate my rights, though you do, clearly, act unfairly. If when we play our occasional game of poker, you use a marked deck of cards, you are again acting unfairly, but you are not violating my human rights. This explains why the tradition regards procedural justice as a matter of human rights, but not several forms of distributive justice. Procedural justice protects our liberties. Distributive justice, for all its importance, often does not bear on our personhood—so long, that is, as the human right to minimum provision is respected. In fact, as most people in most societies never attract the attention of police or courts, their interests are likely to be affected far more by matters of distributive justice than of procedural justice. But matters of justice can be highly important in our lives without being matters of human rights.

If, therefore, we want to say that some human rights are grounded in justice, we have to explain which considerations of justice ground human rights and which do not. One possible answer would be mine: the considerations that ground human rights are those of personhood, understood as I have explained it. But not all of the putative rights that I have just quoted can be found a rationale in personhood. For instance, the right to compensation

following a miscarriage of justice cannot be. In a society with proper welfare provisions, not to be compensated will not undermine the *personhood* of the victim of a miscarriage of justice. There is, all the same, a different but perfectly strong reason to compensate the victim: justice demands it. But the case for it is based in the victim's desert, not in the protection of the victim's personhood.

On the face of it, there is a similar case for rejecting several other of these proposed rights to fair procedure: for example, rights to be informed of the charge against one promptly and in detail, to have adequate time to prepare one's defence, not to be compelled to testify against oneself, and so on. There is, of course, a very strong justification for these guarantees—namely, in justice or fairness. It is true that when one is being tried for an offence, one's liberty or some other component of personhood might be at stake, and then these procedural guarantees could be seen as protections of one's personhood. But not all charges carry the risk of loss of liberty—the worst penalty might be a fine that one can easily afford or a suspended sentence. But justice and fairness would still be very much at stake, so these guarantees would retain their rationale even if no component of personhood were in the slightest jeopardy. Their rationale, this line of thought goes, is justice itself, not the more specific matter of human rights. And accepting this line of thought need not bring with it any loss of expressive power. We do not have to speak in terms of human rights, or even of rights, in order to specify fair legal procedure, and generations of philosophers and jurists have managed to say all that must be said on the subject without them. And there need be no loss in moral power either. The case for these procedures is that they are quite plainly matters of justice. What more powerful backing would one want? Human rights have been proliferating at such a suspect rate because we all want to cash in on the power of the language of rights. But why not instead recover and protect the power of the language of justice? It is a great mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right.

Still, this line of thought succeeds only very occasionally. To my mind, it succeeds in threatening the supposed right to compensation for a miscarriage of justice. But it does not threaten these other rights to fair legal procedures. These other rights were originally introduced as protections of liberty, autonomy, and the material basis of life as an agent. They were seen as defences against the arbitrary behaviour of governments. They were meant as

defences against death, imprisonment, and confiscation of property without due process. The right to be informed of the charges against one promptly and to have adequate time to prepare one's defence are obvious protections against arbitrary denials of liberty. The right not to be compelled to testify against oneself is protection against threats and torture, which undermine autonomy. It does not matter that the penalties for some offences do not involve loss of liberty or damaging confiscation of property. One has to expect a certain simplicity in norms, both legal and moral. The historical motive for the introduction of these rights was to protect personhood.[10] But, to repeat, not all of the rights to fair legal procedures claimed in the International Covenant can be defended in this way. The supposed right to compensation for unjust punishment, for example, cannot be.

There is this objection to my conclusion. The drafters of these international covenants might say, as I do, that the considerations of justice that ground rights are those of 'personhood'. But they might want to employ a rather more generous interpretation of 'personhood' than I do. We should concentrate, as most of these documents do, on the notion of the *dignity* of the person. If one is accused of a crime and then subjected to unfair treatment by a court, even to a failure in compensation after unjust punishment, one's dignity as a person, the drafters might say, is not respected. And thus one's human rights, not just one's legal rights, are violated. These procedural guarantees, including the right to compensation, are meant to define what it is, in the legal context, to treat someone with the basic dignity due to a person. For that reason, the drafters might say, they are properly regarded as *human* rights. Free-riding and cheating at cards are real enough cases of unfairness, but they differ from not getting a fair hearing in court. The latter unfairness is so fundamental to our life that protection against it is part of what it is to accord us our dignity as persons, while protection against trivial free-riding and cheating at cards is not.

The proposal that I attribute here to the drafters is like mine, in that we both ground rights in the dignity of persons. But my account puts its stress on *persons*, whom it understands as normative agents. The dignity is then to be seen as deriving from the value we attach to our normative agency. That is why my account is more restrictive: human rights have to be protections of one or other component of agency. The drafters' account—at least as I have just imagined it—puts its stress on *dignity*. It leaves *person* a more intuitive notion: our dignity as a person may encompass more than just the components of agency. But the very elasticity of this notion of

dignity causes problems. If dignity is not to be understood in my way, how is it to be understood? One promising place to start is with the closely connected notion of *respect* for persons. On everyone's understanding of it, the moral point of view consists in having equal respect for all persons. This need not be the same as treating them all equally, one's own children no differently from a stranger's. It is, rather, giving them all some form, still to be spelt out, of equal weight in our deliberation. One prominent way of spelling out the idea of respect for persons is Kant's: everyone must be treated as an end, and never merely as a means. But this whole approach, no matter how it is spelt out, will not help us. It is spelling out a notion of the dignity of persons that underlies moral obligation as a whole. If we adopted this understanding, human rights would expand to fill that whole domain, which is so counter-intuitive a consequence that we must avoid it.

Taking a cue from the examples of free-riding and cheating at cards, which we want to keep out of the class of infringements of human rights, we might amend this last proposal. We might introduce the distinction between minor or trivial violations of respect for persons, which these examples might be taken to represent, and major or serious violations. But, as we have already seen, this does not help either. We should not let human rights expand to fill the whole domain of major or serious affronts to respect for persons either. A husband might have been cold and unpleasant to his wife throughout their marriage, causing her great unhappiness. He might thereby have done her a gross moral wrong, but he would not have infringed her human rights. A plutocracy might perpetuate an unjust distribution of goods, thereby denying a majority of the population of substantial benefits. But if everyone in the population has at least the minimum provision for life as an agent, the government does not infringe anyone's human rights. It is deeply counter-intuitive to regard all serious moral wrongs, even all substantial injustices, as infringements of human rights.

The distinction we need is not between major and minor violations of respect for persons, but something along the line of fundamental and non-fundamental ones. But apart from my way of spelling out the 'fundamental' features of the dignity of persons, what kind of well-motivated, workable account is there? And we cannot leave the notion of 'dignity' as elastic and intuitive as it is now because, unless we have tolerably clear criteria for whether the term 'human rights' is being correctly or incorrectly used, the term will remain as seriously degraded as it is now.[11]

(c) *Acceptable cases.*

Despite the unacceptable and the debatable cases, most of the claims to human rights that one finds in the Universal Declaration come out on my account, as I have said, as entirely acceptable. That is partly because the Universal Declaration is brief, does not go into fine detail, and is relatively restrained in the claims it makes to economic, cultural, and collective rights. My own list, which I made a start on earlier, contained only the most obvious rights, and much more needs to be added to it. Many of the items in these international documents I should want to add to my list. I shall mention just one. Article 15.1 of the Universal Declaration says: 'Everyone has the right to a nationality.' There is a powerful case for this. Everyone must live within the boundaries of one country or an other. If one cannot vote, one lacks the only form of autonomy that political life within those boundaries allows. And states are the main agents of security of person. And so on. It is true that in some states one can vote and enjoy the protection of the police and army without being a citizen, but only citizenship makes their possession secure. The case for saying that there is a human right to a nationality is powerful.

11.5 INTERLUDE ON THE AIMS AND STATUS OF INTERNATIONAL LAW

The exercise I have just been through—examining discrepancies between my list and the lists in major international documents—might be thought to be in various ways misconceived. Do the drafters of these documents and I not have different aims? I am trying to understand what a human right is; I am trying to make the sense of the term determinate enough for it to be a clear and helpful addition to our moral and political reflection. The drafters of these documents were trying, in the aftermath of two devastating World Wars, to establish a basic code of conduct for the behaviour of states towards those subject to their power, in the belief that the promotion of human rights contributes to the promotion of peace.[12] There is not the slightest doubt which is the more important, more noble ambition. My aim is, at best, a contribution to their much larger aim. But then the drafters were not interested in arriving at a narrow list of human rights with impeccable semantic credentials. They were interested in an ampler list, in a way the ampler the better, with some claim to being, or decent prospects of becoming, a standard that crossed

cultures, religions, borders, and power blocs. And so they made use, without too much worry, of a deeply obscure, largely undefined notion of 'the dignity of the human person'.[13] But in an important way its obscurity does not matter—indeed, is an advantage—because different cultures can understand different things by it. Their lists have succeeded in crossing at least some borders, and they have been, all things considered, a substantial force for the good. The rights on their lists, even if it turned out that they were not all strictly speaking *human* rights, have become, once embodied in treaties, basic international *legal* rights. That is a status hardly to be scorned.

What is more, does not international law have its own perfectly coherent conception of a human right? I have said that we badly need criteria for deciding when the term 'human right' is used correctly and when incorrectly. But does not international law in a way supply them? It does not supply them as I do, by putting more normative substance into the notion of personhood. It supplies them, rather, with something more in the nature of a rule of recognition. There are various procedures which, if carried far enough, establish a human right in international law. For instance, an international group alarmed at the degradation of nature might declare there to be a fundamental right to live in a healthy environment. Other groups, say regional organizations of nations, sensing the same threats, might include a similar right in their charters or conventions. In this way, a fair measure of consensus may develop. Next a committee of the United Nations—say the United Nations Sub-Commission on Human Rights—may define the right more fully and embody it in a set of draft principles. If matters had proceeded only so far (as, in fact, as I write, they have), then one might say that a human right to a healthy environment has begun to emerge in international law, though it is not yet clearly established. It is a matter of judgement and convention when the right *is* established. If, say, the General Assembly were to adopt in some hortatory form the draft principles from its Sub-Commission, then the case for the existence of the right would be strengthened. If it were to embody the right in a legally binding international convention, which was then widely ratified, the case, one might say, would be conclusive.[14]

Still, my project in this book should not be underestimated. Many persons have still to be convinced of the case for human rights. There is cynicism about the whole discourse, which, being so fatally malleable, is exploited as a weapon in power politics. Some governments maintain that economic and social rights are prior to classic civil and political rights. Some say that the

rights of certain groups—a people, a nation, a culture—limit the human rights of individuals. And there are doubts, not always groundless, about how firmly based some of the claims to human rights are. One way to join in advancing the cause of human rights is to make the case for them as intellectually compelling as one can.

It is not that the job can be left to international law. It is not that over the last fifty years or so the body of treaties and decisions of international courts has grown large enough for those courts now to be able to tell us definitively whether a certain human right exists and what, fairly precisely, its content is. The most authoritative sources for the courts' decisions are the treaties, and we must be able to ask whether the lists of rights in the treaties are themselves correct. And the treaties supply the terms of the argument on that subject: an item on the list is acceptable if, and only if, it can be derived from the idea of 'the dignity of the human person'. But that is precisely the idea that cries out for clarification. Has the reasoning that has gone on at the various stages in the emergence of a supposed human right been persuasive? Widespread doubts about certain reputed civil rights, objections to the lavishness of some welfare rights, scepticism about the whole class of group rights, have a rational force that cannot be countered simply by showing that these rights appear in international treaties. Part of the ambition of international law is to incorporate rights that exist independently of positive law. So international lawyers need a grasp of the existence conditions of these rights. In 2004 a group of Inuit, seal-hunting people of the Arctic, announced their intention to seek a ruling from the Inter-American Commission on Human Rights that the United States, by being a substantial contributor to global warming, is threatening their existence.[15] They and other groups (some inhabitants of tropical atolls and of the Himalayan slopes, for example) claim that the issue is not just about prudent environmental policy but about violation of human rights. These testingly difficult cases may eventually go to the international courts. What materials will the judges have to decide them? Our hope is that international law will help overcome the indeterminateness of sense of the term 'human right' by being part of the process of establishing a settled use for it. But the judges in international courts will not bring this about by deciding a case like the Inuit's by fiat; no one is going to follow that sort of lead. Their decision will have to be backed by sound reasons.

In any case, treaties are not the only source of international law. The Statute of the International Court of Justice announces (Article 38. 1) that, in settling disputes submitted to it, it shall apply (1) treaties, (2) customary

law in the international sphere, (3) general principles of law recognized by civilized nations, and, as 'subsidiary means', (4) judicial decisions, and (5) the teaching of the most highly qualified publicists (i.e. experts). Some legal scholars go on to add (6) considerations of humanity (e.g. especially basic principles that appear in the preambles to conventions, prominent among which would be 'the dignity of the human person'), (7) *ius cogens* (i.e. basic principles that do not rest on the consent of nations, a notion reminiscent of 'natural law'), and (8) legitimate interests.[16] These sources overlap. Some may even collapse into others; it may be possible, for instance, to regard any *ius cogens* as an especially basic customary law.[17] None the less, an international court willing to heed expert opinion or considerations of humanity or *ius cogens* is driven to take seriously basic considerations of justice, the meaning of 'the dignity of the human person', and how justice and rights are related. The decisions of international courts are not an alternative to answering my questions; they require it.

They require, crucially, fuller understanding of the notion of 'the dignity of the human person'. I have already said that it would be a mistake to interpret it so broadly—say, as respect for persons, when that idea is meant to capture the moral point of view itself—that human rights expand to fill the whole moral domain. And if one wants something in between this overly broad account and my narrower account, then one must identify and justify it. Looking for the best understanding of 'the dignity of the human person' is precisely my project, which is why I say that it should not be underestimated.

Now, all of this seems obvious to me, but not to many international lawyers. Some writers see international law as depending at points on ethics (the incorporation of human rights would be an obvious such point), and they therefore see its bindingness as deriving, at these points, from ethics.[18] But other writers see international law as entirely independent of ethics, as occupying its own autonomous domain.[19] They could say that its bindingness, when it has it, derives from, say, the national self-interest of the participating nations.[20] They could also repudiate my concern about the indeterminateness of the sense of the term 'human right'. Our culture, our tradition, has given us the discourse of 'human rights', they could say, and whether the term has a determinate sense does not matter; we put it to use, and generally to good effect.

But the price one pays for taking this second, reductivist line is high. Human rights become largely devoid of content, except for what the tradition

has already supplied or, say, national self-interest might add. But to what do we appeal to decide how much the right to welfare, or to health, is actually a right to? How would an international court go about adjudicating the Inuits' claim against the United States? I have already said that deciding these questions by fiat would drastically reduce the influence of the decisions; and so would deciding them by appeal to the self-interest of various nations. This reductivist line of thought would purge international law not only of ethics but also of explanatory capacity and action-guiding authority. It would gratuitously trivialize international law.

11.6 CURRENT LEGAL LISTS: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

I just remarked in passing that some writers are deeply sceptical about the whole class of welfare rights.[21] They see them as often admirable social goals, but without the peremptory force or universal scope of human rights. Welfare rights are, they think, for each society to decide for itself in light of its resources and its own scale of values. None of them is a human right. But that seems to me not so. What seems to me undeniable is that there is a human right to the minimum resources needed to live as a normative agent.[22] That is more than the resources needed simply to keep body and soul together, but it is a good deal less than the lavish provision that many of the international documents have in mind.

So I think that there are acceptable claims to (human) welfare rights in the major international documents. But, on my account, there are also a large number of unacceptable and debatable claims, many more than in the case of civil and political rights, and that great discrepancy also needs explaining.

(a) *Unacceptable cases.*

Some of the claims to welfare rights are hardly credible. Article 7c of the Additional Protocol to the American Convention asserts that there is a right of every worker to promotion or upward mobility in his employment. But some perfectly good jobs have no career structure. It was common a few decades ago in Oxford to be appointed to a tutorial fellowship as one's first job, and virtually everyone expected, and was content, to finish up in the same job. There are, perhaps, drawbacks in having no change of duties or

responsibilities in the course of a whole career, but it is incredible that these jobs violate a human right. Nor would it be credible of a lawyer whose career is passed in a one-person practice doing much the same work, nor a GP in a similar position. Nor would a right be violated if the salary in these jobs never changed over the career. There are many issues of justice or fairness about jobs (unattractive or dangerous jobs should perhaps be shared or highly compensated, promotion should be on merit, and so on), but these issues are not addressed by this proposed right to promotion. It is hard to think of any plausible account of human rights that would justify it.

Take now a more important and more plausible claim. In his State of the Union message in 1944, which I have quoted earlier,[23] President F. D. Roosevelt spoke of 'a second Bill of Rights':

> Among these are:
> The right to a useful and remunerative job in the industries, or shops, or farms, or mines of the Nation.
> The right to earn enough to provide adequate food and clothing and recreation …

The Universal Declaration of 1948 proclaims, in the spirit of Roosevelt's address, a right to work (Article 23.1), and many subsequent international documents have repeated the claim.[24] Yet, on my account, there is no right to work. There is certainly a right to the resources needed to live as an agent, but those resources do not have to come from work. If in an advanced technological society there were not enough work for everyone, and those without it were adequately provided for, then, on the face of it, no one's human rights would be violated. Work is valuable to us, it is true, in more than one way. The most obvious way is as a means to an end, as Roosevelt clearly acknowledges; what, ultimately, we need, as he puts it, is adequate food and clothing and (even) recreation. We need them, he says, in order to live as 'free men'. All of this seems to me exactly right. Still, for most people on the face of the earth, work is the expected, and sometimes the only, means to that end. Roosevelt and the drafters of the Universal Declaration, and of all the other documents that claim a right to work, reasonably enough wanted to state the right they had in mind in a form relevant to the social reality of their time. What their post-Depression societies had to do to ensure adequate provision was to ensure the availability of jobs.[25] And most societies today still have to do the same. But some societies are nearing conditions in which a job will not be, even for a large proportion of the population, the necessary means to the end.

But the value of work is far more complex than this means–end story makes out. Most people want the dignity of earning their own keep. They want to contribute something to their society. Their enjoyment of life depends upon their having something absorbing, demanding, and useful to do. One of the most important components of the quality of life is one's accomplishing something of substance in the course of it. Idleness is a close cousin of boredom; absorption in projects is a close cousin of enjoyment. So if there are not enough jobs of the old sort to go around (butcher, baker, candlestick maker ...), then a community must discover, for those who cannot discover them for themselves, jobs of a new sort (there is still plenty of scope, for example, to improve our present communities). But the advocates of a right to work meant jobs of the old sort, and that seems wrong. Strictly speaking, the right is to adequate material provision—adequate for life as an agent—and to options to live one's life in a productive, interesting, enjoyable way. But I think that the discrepancy between that right, which is what follows from my account, and the right to work, which appears in these international documents, can be reconciled. They are formulated at different levels of abstraction, the one in universal form and the other when the universal form is applied to a particular time and place.[26]

I want to mention only one more dubious welfare right—an example of a particularly lavish right that I mentioned earlier.[27] The International Covenant on Economic, Social and Cultural Rights, followed by other documents, claims that we have a right to 'the highest attainable standard of physical and mental health'.[28] On my account, there is no such right. Societies *could* mount crash programmes in the case of illnesses for which cures are attainable, but they often regard themselves as free to decide when they have spent enough on health, even if they are still short of the highest attainable standards, and may devote their inevitably limited resources to education, preservation of the environment, and other important social goods. On my account, we also have a right to life, because life is a necessary condition of agency, and to the health care necessary for our functioning effectively as normative agents. This statement of the right to life and the right to health is still very loose, and work would have to be put into making these two rights determinate enough for political life. But there is nothing in my explanation of the ground of those rights that implies that life must be extended as long as possible or that health must be as rude as possible. And that seems right.

(b) *Debatable cases.*

I have the same doubts about the inference from justice to rights in the case of welfare rights that I had before in the case of civil and political rights. Equal pay for equal work is only fair.[29] Just conditions of work are, obviously, a requirement of justice.[30] And promotion on merit is, equally, a matter of simple fairness.[31] But they are not thereby also matters of human rights. I should put all of these claims to rights in the class of the debatable, merely because the relation of justice and rights is not easy to settle. But, as I said before, I think that in the end the argument goes against their being human rights.

11.7 THE FUTURE OF INTERNATIONAL LISTS OF HUMAN RIGHTS

Suppose that I am right. What should we do about the debatable and unacceptable items on the lists in international law?

Not much, at least on a grand scale. A solitary author, especially a solitary philosopher, is most unlikely to be able to bring about a rethinking of the whole of the international law of human rights. International law is too well established, too widely institutionalized, too much in the middle of its important business, has altogether too much momentum, for that to be feasible. In any case, the law has its own ways of dealing with its errors. It can turn a cold shoulder to laws or sections of treaties that it thinks deeply flawed; it can sometimes eventually make dead letters of them. Or it can wait for courts to remedy ambiguity and confusion in the law. The cold shoulder is probably what is needed for the widely rejected 'right' to periodic holidays with pay. Many rights can be, and already are, demoted to the status of mere aspirations rather than rights proper (e.g. the 'right' to peace); a pejorative term has been coined for them: 'manifesto rights'. No doubt, some other 'rights' should be subject to demotion: for instance, the 'right' to the highest attainable standard of physical and mental health (though that will need redrafting before it can be accepted even as a reasonable aspiration) and perhaps the 'right' to freedom of residence within the borders of one's country (though that is a more debatable case). Many 'rights' are so badly drawn that they need interpretation tantamount to redrafting: for example, the 'right' to inherit and the 'right' to protection against attacks on one's honour and reputation. To this gradual critical process, even single authors can make a contribution.

After those exercises in downgrading and re-defining have been completed, there would still remain what most of us in any case regard as the core of the list. But even at the core are rights that I earlier labelled 'debatable': for example, the right to compensation for a miscarriage of justice. What should we do with those cases?

The sensible answer, I think, is this: accept them as human rights. Their defect, such as it is, is that they cannot be seen as defending personhood. They cannot be brought under what I am proposing as the canonical heading 'protection of a component of normative agency'. But very few words in our language are governed wholly by a canonical formula; very few can be defined in terms of essential properties. Many geometrical terms, such as 'triangle', can be. But the word 'game', to take Wittgenstein's example,[32] cannot be. Most words in a natural language cover some of the ground they do for reasons of utility and historical accident. Their lack of essential properties does not matter; their having a settled use is enough for there to be criteria for determining whether or not they are used correctly.

It is not hard to see how a 'right' to compensation for a miscarriage of justice should have come to be included in a list spelling out procedural justice in the law. The original impetus for these rights seems indeed to have been the urgent need to protect liberty, autonomy, and property against arbitrary government. But if society decides to entrench these protections by listing them in especially solemn form—in, say, a United Nations Covenant—it is understandable that it will aim at a certain measure of completeness. And if those who compile the list have only a vague sense of a 'human right' in mind at the time, one would not expect to find any sharply bounded set of defining properties running through all the items included on the list.

But why, then, not simply accept all the claims of human rights that appear on these lists in international law, even the ones I called 'unacceptable'? But the term 'human right' is not like the word 'game'. It does not have nearly as well settled a use as 'game' has. It is a theorist's term; it was, as words go, introduced relatively recently. It succeeded to the position of an earlier term, 'natural right', but the metaphysical background of the successor was radically different from that of its predecessor, and this meant that new criteria of use were needed. And because it is the introduction of philosophers and political theorists, they have the responsibility, not yet discharged, of giving it a satisfactorily determinate sense. And a canonical formula is, for that reason, going to play a large, if not sole, part in the way they do discharge it. It is precisely our further understanding, which a substantive account of