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What's Right with Human Rights

News flash: Human rights law has not altered human nature. But in numerous instances, it has altered human behavior.

THE TWILIGHT OF HUMAN RIGHTS LAW BY ERIC A. POSNER • OXFORD UNIVERSITY PRESS • 2014 • 185 PAGES • $21.95

In the last few years, we have been subjected to a relentless drumbeat of human rights violations. In Saudi Arabia, there has been a "systematic and ruthless campaign of persecution against peaceful activists" (to quote Amnesty International) to silence criticism of the state following the 2011 Arab Spring protests. In Brazil, the country's criminal justice system has been so overwhelmed that it semi-regularly resorts to extrajudicial justice. Here at home, we have all heard of the unlawful rendition of terrorist suspects to foreign jurisdictions where torture is likely.

Such horrors are recounted throughout Eric Posner's *The Twilight of Human Rights Law*, the latest salvo from one of the legal profession's most relentless—and prolific—opponents of international law. How can we tolerate an international legal system that has failed to expunge these practices, the book asks? Posner claims that the international legal system has burgeoned, and yet "rights are not

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respected more today" than 20 years ago. Like development economics, which he says failed in its mission to promote economic growth, human rights law has failed to end rights abuses.

But while much of Posner's critique is on target, especially his observation that international organizations are ill-equipped and states are uninterested in enforcing human rights around the world, the conclusion—that international human rights law is thus useless—is neither logically compelling nor supported by the evidence that Posner himself presents. The book announces the "twilight" of international human rights law by focusing overwhelmingly on states and intergovernmental institutions. This account misses most of the meaningful human rights action, which has taken place largely between stakeholders and their governments at the domestic level.

This volume is a variation on familiar tunes that Posner, a professor at the University of Chicago Law School, has been humming for the past decade, including his warnings of *The Perils of Global Legalism* and calls for "Human Welfare, Not Human Rights." An extension of Posner's work on the limits of international law more generally, *Twilight* begins with a history of international human rights law. Posner embraces the idea recently offered by Samuel Moyn and others that much-revered legal documents like the Universal Declaration of Human Rights have failed to "capture the imagination of voters, politicians, intellectuals, leaders of political movements, or anyone else who might have exerted political pressure on governments." States ratified the treaties that followed, Posner implies, without thinking much about what they were signing on to. Legal theorists hijacked what should have been a few simple commitments with talk of "a global constitution or international bill of rights" and international customary law (binding international rules that are not written down but that develop from practice). Somehow, the regime took on a life of its own, such that "[s]tates increasingly appear to regard ratification of the latest human rights treaty—with a few exceptions—as all but compulsory." The result, according to Posner: more vague law and more unenforceable, contradictory obligations than anyone ever intended.

Having thus cleared his throat, Posner launches his critique of international human rights treaties. First, he describes them as too hazy. For instance, the International Covenant on Civil and Political Rights (ICCPR), a 1966 UN treaty, spells out basic rights that all humans should enjoy, including a right to freedom of expression. But Posner judges it "too vague to rule out significant constraints on expression, including many that would be clearly objectionable from a U.S. (or even broadly Western) perspective." Meanwhile, international oversight

committees that might help to define treaty rights are weak, and their "reports overflow with sensible bromides that everyone can agree with but are unlikely to lead to specific action."

The UN Human Rights Commission was—and its successor, the Human Rights Council, still is—filled with members representing states that themselves are the worst human rights offenders. While Posner concedes that it is possible these institutions have done some good, he points out that they do not work like domestic courts: They lack the authority to interpret nebulous treaties and translate them into firmer, actionable obligations. Serious regional or international courts don't work well either: The European Court for Human Rights has too many cases and the International Criminal Court (ICC) has too few. Moreover, external enforcement is hopeless because states (and their citizens, according to Posner) don't care about human rights in foreign lands.

Fixated on state-to-state relations, Posner ignores the extent to which domestic actors can use treaties to make demands of their governments.

One can agree with just about all of this while drawing utterly different conclusions. Posner's complaints about how poorly international law and institutions work are well taken, but he never confronts the question: compared to what? Treaties are vague, but so are constitutions. International oversight committees fail to mandate and enforce actionable obligations, but, if one reads on, it is clear that Posner would be absolutely horrified if they did. Overworked courts, as in the European case, are hardly uniquely international. And it is absurd to criticize the ICC on the basis of cost per case or to complain that it is "impossible to try everyone who has committed one of these [ICC] crimes." Trying "everyone" is hardly the point. The point (aside from justice itself) is to make it clear that crimes such as the intentional killing of civilians are intolerable and that the risks to perpetrators of these crimes are increasing.

Contrary to Posner's conclusion that the "actual impact [of the ICC and international criminal law] on the conduct of governments is… unclear," recent research suggests the opposite may be the case: As ratification of the ICC statutes has spread and the Office of the Prosecutor has begun to signal its resolve by commencing investigations, indicting alleged wrongdoers, and issuing warrants, episodes of intentional civilian killing by government agents (and to a lesser extent even some rebel groups) have in fact noticeably declined. One can completely agree that the UN Human Rights Commission/Council has been—and maybe still is—stuffed with bad eggs, but this criticism misses the central

explanation for how international human rights become relevant on the ground. Overall, these sections of the book feel intuitive in that they convey the idea that the international human rights machinery has long been widely understood as intentionally weak. But it is unjustified to conclude from Posner's account that once we have castigated the UN, the European Union, the ICC, and the major powers, nothing remains to be said about how international human rights law works. Nothing could be further from the *full* truth.

After a brief discussion about why states enter into human rights treaties (Posner's answer: the "ratification of a human rights treaty may seem like a costless propaganda exercise") we come to the heart of the book, where Posner asks, "Do States Comply with Human Rights Treaties?" In ten terse pages, he concludes that "a small number of treaty provisions may have improved a small number of human rights outcomes in a small number of countries by a small, possibly trivial amount." Using data compiled by Freedom House and CIRI, an academic database of human rights practices coded from U.S. State Department reports, he shows that what the former organization calls "Freedom in the World" has improved over time, but the tendency to torture has appeared to trend worse. From this we can conclude very little, however. As Kathryn Sikkink and Ann Marie Clark point out, raw torture data do not account for either better information (the more you know, the worse things look) or changing norms over time (what counts as torture in 2015 might not have even been mentioned in State Department reports on which the data are based for 1981). This means this measure almost certainly *underestimates* the influence of norms as codified in international human rights treaties.

Once Posner has decided that states do not comply with international law, he explains why they do not. For starters, strong states have no interest in enforcing international law in other countries. It is costly, meddling, and raises collective-action problems among potential enforcers. Furthermore, the treaties are imprecise, inconsistent, and so numerous that it is hard to know what to do. Finally, proliferating obligations make it impossible to comply with all of them, due to resource constraints. International organizations are little help because states disagree over human rights. And even if international actors had the will to interfere, Posner argues, to do so would undermine local decision-making: "[I]f human rights treaties really did bind, they would deprive people of their right to political participation." International human rights treaties are unlikely to be enforced from the outside in, and it would be anti-democratic if they were.

Posner's silence on the most plausible alternative to external enforcement—domestic pressure—is deafening. In three pages, he dismisses the idea that trea-

ties may be useful tools in domestic political contestations. Asserting simply that "there is a certain oddness to the argument" that actors may usefully deploy international treaties in their domestic political struggles, he directs readers to consider a simple dichotomy: "If domestic pressure can force a government to respect human rights, then it will do so regardless of whether the government enters into a human rights treaty. If it cannot, then it will fail to do so even if the government enters into a human rights treaty." Readers, look no further—these are your choices in *Twilight*!

Posner's gaze is far too fixed on state-to-state relations, which leads him to ignore the extent to which domestic actors reach for international treaties to enhance their political demands on their own governments. Treaties change politics—in particular, the domestic politics of the ratifying country. This happens because international human rights treaties have a singularly unusual property: They are negotiated internationally but *create stakeholders almost exclusively domestically.* The real politics of change is therefore likely to occur at the domestic level, which scarcely figures in Posner's account.

Can locals make their own demands and move their own governments without any normative assistance from international law? Sure, sometimes, where governments are responsive. In other cases, Posner is correct that waving a treaty around will not make any difference, since there is no reason to think that repressive governments will respond to appeals to the rule of law. But this leaves a whole range of states where governments will concede only when they are convinced or pressured to do so. In Chile, the ICCPR was a focal point for opposition to the Pinochet regime—and the Convention Against Torture (CAT), ironically, was responsible for Pinochet's arrest a decade later. (Chile, under Pinochet, had agreed to ratify the CAT in 1988.) In Colombia, women's groups used the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to convince government and society to reprioritize women's issues such as reproductive health care. Treaties add pressure because they suggest new ways for individuals to view their relationship with their government and with each other.

Moreover, treaties make useful strategic tools for domestic actors. Ratified treaties offer opportunities to increase the size of pro-rights coalitions in ways that would be less available without the ratified treaties. As a form of law, ratified treaties engage the interest of legal professionals, who often become active on treaty-related issues. "Internationalists"—individuals or organizations that have strong material interests in maintaining good public relations with the outside world—may also have an incentive to support a local pro-rights movement. A ratified treaty therefore provides critical resources to a nascent rights

coalition. It helps to focus demands around specific rights contained in the treaty, and can create a legal resource in the event of litigation. But the most important resource a ratified treaty provides is legitimacy, which in turn can be parlayed into further political support.

Domestic actors often demand treaty ratification precisely because they believe it may strengthen their cause in domestic debates. Women in Japan have used CEDAW, for example, to improve their rights to employment. Children's advocates in Ghana aren't likely to see much external intervention on behalf of rights, but they have cited the Convention on the Rights of the Child to argue the case to their government for making basic child health care a higher priority. Israeli pro-rights groups have leaned on international standards and the CAT to make the case for changes in detention practices. Certainly, these kinds of claims can stimulate counterreactions and conservative opposition. There is nothing inevitable about the triumph of treaty commitments over domestic practices, any more than it is inevitable that all rights appeals will prove irresistible. On balance, however, ratified treaties widen political openings for rights demanders that would be much smaller in their absence. By fixating on external enforcement, Posner misses the critical role that treaties have played in the politics of human rights improvements domestically.

It is important to underscore what this understanding does to Posner's "treaties are anti-democratic" claim. Indeed, there is a "certain oddness" to Posner's argument that international human rights treaties are so weak that they cannot possibly matter in domestic political contestation and yet so strong that they endanger domestic democratic discussion about the rights of individuals vis-à-vis their own government. Treaties stoke such democratic conversations; they do not stamp them out. They are political and legal ammunition for locals in making demands, not commandments from on high. Posner's whole discussion about how international treaties displace participatory decision-making bears little resemblance to what really happens on the ground.

But it's not just lack of external will to enforce international law that's the problem, says Posner. States don't comply with their human rights obligations because they *can't*. And they can't because governments are supposedly overwhelmed by their wildly proliferating obligations: "The number of human rights increased from 20 in 1975, to 100 in 1980, to 175 in 1990, to 300 today." Later in the book, he warns us not to take his count of rights literally; indeed, a quick look at the appendix shows how misleading it is: It lists every rights statement in every treaty, without any attention to the ample overlap, elaboration, or mutual reinforcement that one finds across different treaties. For

example, each criterion for a fair trial is detailed as a separate right. The right not to be tortured is listed as distinct from the right to complain about it. (Note that whenever a treaty avoids Posner's objection that it is vague, it runs into his other gripe that rights are proliferating.) Principles of non-discrimination are triple counted across mutually reinforcing treaties. The whole counting exercise is totally orthogonal to the way law really works.

But it is not just a matter of proliferation, says Posner. The more serious problem is that you really can't have it all. More precisely: You can't *afford* it all. Rights are expensive, and budgets are fixed.

It's an obvious point. Once again, however, Posner puts unwarranted bounds on the way we are supposed to think about rights. A large chunk of the list he presents is not especially costly—a right to privacy, a right to enjoy one's own culture, women's right to participate in community activities, to name just a few. That said, some are—health care, housing, education. But no one thinks the expensive items have to be achieved in the next budget cycle. And further, such rights contribute to productivity and to development; they can be expected in the medium-to-long run to contribute to the growth and development approach that Posner advocates. Finally, such a rights approach calls for a rethinking of national priorities. A treaty calling for childhood immunization can be used in a debate about the relative value of providing basic health care versus renovating the presidential mansion. The point is this: Human rights obligations are useful tools for a populace to demand more attention to basic human rights and needs than the state may be currently devoting. Posner insists rights are on a fixed budget and that advocates will have to fight it out among themselves for funding. But if there is any way to strengthen domestic demands for more humanely targeted resources, international treaties could help—and certainly cannot hurt—in making the case.

Are human rights "no better respected" than they were in the 1800s? The 1930s? The 1960s? "Not perfect" is hardly a damning criticism of law.

Reflection on the matter of how rights enforcement is funded leads to a much different conclusion than that offered in *Twilight*. An investment in one "rights sector" can be considered a sunk cost with positive externalities elsewhere. If a state spends money to implement fair trials under the ICCPR, then it has invested in a justice infrastructure that supports rights under the CEDAW as well. If a government spends money on transportation to get children to school to fulfill its Convention on the Rights of the Child obligations, then it is only a marginal cost to let girls get on the bus as well, in compliance with CEDAW. Many "costs"

in developing a system that respects human rights are not "unit"-based (because one investment may service many people) and are not even rights-based (the capacity to investigate torture may facilitate the investigation of a wide range of unlawful detentions). Counting rights and thinking additively, rather than in terms of positive spillovers, leads to misguided conclusions.

Who is the intended audience for *The Twilight of Human Rights Law*? One possibility is that the book was written to disabuse legal idealists who write about "a global constitution or international bill of rights" of their high hopes. But little is new in this volume that would move the needle on sophisticated debates about the effectiveness of international human rights law. Rather, the book seems to have been written for an audience that is new to the debate altogether. The language is simple, the examples "truthy." Posner leads his readers patiently, if tendentiously, through the history of international human rights law and the institutional lay of the land. But it is precisely the less initiated who should be most wary.

I recommend reading *Twilight*, but doing so with a critical eye. Consider the counterfactuals. Are rights "no better respected" than they were in the 1800s? The 1930s? The 1960s? Are we at the twilight because "good" states like the United States, Canada, Australia, New Zealand, and most European countries are "far from perfect from a human rights perspective"? "Not perfect" is hardly a damning criticism of law's effects, at any time or place. Also, ask about evidence. Legal scholars are known for hobbling their prose with dense footnotes. Posner's book is relatively free of this tendency. Even when you might love to know where some of the information came from—30 million people are forced against their will to do work?—this book does not distract readers with sources or citations. Most importantly, ask about where the book is silent. What are we missing in this account? High noon may appear as twilight if we refuse to remove our dark glasses. **D**