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'The Rules of the Game are Changing': Fundamental Human Rights in Crisis After 9/11[1]

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Is there a crisis of legitimacy in relation to fundamental human rights commitments? At one level, the human rights regime has endured legitimacy problems from the outset, in part due to the scope and complexity of the standards but also as a result of the unwillingness of states to regard human rights norms as properly binding. I argue that September 11 and the responses this event triggered in the foreign policies of leading states in international society have taken the challenge to the regime to a new level. What makes it a crisis of legitimacy is the fact that those were crucial to the emergence of the regime, and the rights that are under siege are core 'rights of the person' and not aspirational rights. The closing discussion examines the possibility for a restoration of legitimacy. Consistent with the earlier theoretical discussion, the question of whether and how the legitimacy crisis can be resolved requires a differential response, depending on the site of the crisis, and the location of the audience. The concepts of international and world society provide analytical leverage in identifying both the causes of the crisis and the prospects for its resolution.
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Introduction

The idea that individuals have rights by virtue of being human beings is a very modern way of expressing political and ethical claims. The language of rights underpinned the doctrine of the French Revolution, was crucial to the anti-slavery movement, and in the 20th century, rights became entwined with the claims of racially subjugated peoples to equality and justice. By the post-1945 period, human rights talk had become so dominant that every significant issue of contestation was expressed in the language and grammar of human rights: one thinks here of the demands made by the West on the Soviet Union to respect the liberties of citizens in its sphere of influence, and also the landmark sanctions imposed by the United Nations on the apartheid regime in South Africa, and on white minority rule in Rhodesia. In all of these cases, a link was

being made between the internal practices of a sovereign state and its social exclusion from international society. Taken together, it is apparent that human rights ushered in a new standard of legitimacy in international society (Clark, 2005). This in turn generated a modified normative context that empowered liberal states and weakened their authoritarian counterparts.

The post-9/11 period has prompted many to ask whether human rights values and policies were as deeply entrenched as supporters of the regime had hoped. What marks the contemporary challenge out as being of particular concern is that its centre of gravity is inside the liberal western zone. This time the assault on the foundations of the regime is not from communist states who regard individual liberty as a bourgeois sham, or southern African states who want to exclude peoples on grounds of race, or even Asian states who believe community must precede liberty: the post-9/11 challenge is being led by western governments who openly question whether fundamental human rights commitments need to be changed or abandoned in the name of national security.

The response of British Prime Minister Tony Blair to the terror attacks on the London transport network on 7/7 typify the mounting scepticism in certain western capitals as to the validity of certain human rights norms. In Blair's words, 'the rules of the game are changing' (Blair, 2005). Specifically, the governments led by George W. Bush, Blair and John Howard have called for a re-appraisal of certain core civil and political rights, which include (among others) the right not to be tortured or suffer degrading treatment, the right not to be detained without trial, and the right of refugees and asylum seekers not to be returned to any country where their life would be threatened. In the article, I will refer to these rights of the person as 'fundamental rights'. One of the defining features of fundamental rights is that they are highly legalized norms (Sikkink, 2005, 4).

Why does this re-assertion of the primacy of national security over individual liberty constitute a legitimacy crisis for the human rights regime? After all, if we measure the regime against some reasonable criteria of effectiveness, we would be entitled to believe that human rights have been in crisis all along. In common with the volume overall, the notion of crisis deployed below is one that is related to disempowerment. Has the legitimacy of fundamental human rights declined to such an extent that a 'critical turning point' has been reached and the regime must either adapt or be disempowered? The opening part of the article draws on interpretive thinking to exact leverage on this issue.

In part two, I delve deeper into the paradox, neatly posed in the conclusion to this volume: how is it that 'the former norm entrepreneurs' of the post-1945 order 'have become the leading norm revisionists at the present time'? Here, it is important to reveal the complexity of the revisionist states' position. Both the

United States and the United Kingdom are adopting a revisionist position in relation to the rules, albeit in subtly different ways. I characterize the US administration as 'exemptionalist' and the British executive as 'modificationist'. Do such strategies have support in the domain in which the actor is exercising agency? How much is the human rights regime itself disempowered by this challenge? After all, the anti-apartheid regime grew in stature despite the absence of support (until the mid 1980s) from the United States and the United Kingdom.

Part three looks at the prospects for a resolution to the crisis. While revisionist states have the capacity to shore up their own power through threats and inducements, the only source of re-empowerment for the human rights regime is legitimacy itself. Adaptive strategies are more apparent than decay and disempowerment, principally because the global human rights culture is such an essential part of the narrative of late modernity. One key adaptive dynamic relates to the rejection of new legitimacy claims by domestic courts (drawing in part on transnational legal norms), forcing a re-calibration of state interests in line with international norms.

Human Rights and Legitimacy in International and World Society

A common misunderstanding in the popular literature about human rights is that they are claimed in relation to all other individuals and groups. Properly conceived, a human right is claimed against a state. For example, where the human rights regime asserts a human right to 'liberty and the security of the person', this means in practice that 'each state has the responsibility and authority to protect and implement the right to liberty and security of persons within its territory' (Donnelly, 2003, 34). In this sense, we should view sovereignty and human rights as being conjoined rather than categorically opposed (Reus-Smit, 2001).

It is in the global human rights regime that sovereignty and human rights are enmeshed in a system of rules and procedures centred upon the United Nations. The regime is geared up for standard setting and promotional activity: monitoring and enforcement capacities have always been weak. 'Such normative strength and procedural weakness is not accidental but is the result of conscious political decisions' (Donnelly, 2003, 135).

Before exploring further whether the regime is in crisis today, it is instructive to briefly look at these 'conscious political decisions' that enabled its emergence. An important initial point is to recognize the pre-eminent role played by sovereign states in championing the emergence of human rights. While the State Department supported the inclusion of human rights in the UN Charter for prudential reasons (as a side payment to Latin American states), an

additional driver was the intrinsic belief in the importance of individual rights in United States political culture. Support for human rights was a natural modification to this principle in an illiberal age. As Ian Clark argues, international society was able to accommodate human rights 'largely on its own terms'. This leads him to question the progressive liberal account of the UN Charter. 'The often-claimed revolutionary quality of the Charter with regard to human rights needs to be understood clearly in that context' (Clark, 2007).

The impact of these standards was minimal during the Cold War in part because of the priority accorded to national security by the leading protagonists (and their allies). Several factors converged in the mid 1970s, which together signalled a step-change in the development of the global human rights regime. In terms of legalization, many of the provisions of the 1948 Universal Declaration were incorporated into legally binding treaties which were potentially global in application: these were the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights, both coming into force in 1976. The denouement of the Cold War saw some western governments becoming more active in the diplomacy of human rights although this goal was often compromised by strategic considerations. Perhaps the most important development during the 1970s and 1980s was the alliance between civil society groups inside autocratic states and transnational advocacy networks such as Amnesty International. As Soviet rule was brought to an ignominious end, Cold Warriors on both sides of the East-West divide had to confront the pivotal role that normative power had played in rolling back communism.

One consequence of the end of communism was a re-empowerment of the human rights regime. Several interwoven factors made this possible. First, the number of democracies in the world expanded rapidly, supported by many western states that put democracy promotion high on their list of foreign policy priorities. Second, the 1993 World Conference on Human Rights made it more difficult for states to claim that cultural particularism prevented adherence to core commitments of the regime (the signing by China of the International Covenant on Civil and Political Rights in 1998 continued this trend). Third, there was a growing consensus in the post-Cold War period that armed intervention was permissible in cases where egregious human rights violations were taking place. Successive UN Security Council resolutions interpreted humanitarian crises as threats to regional and international security (Wheeler, 2000), reinforcing the suggestion that the end of the Cold War signalled a realignment of security and human rights (in so far as the denial of the latter was thought to be a cause of regional and global insecurity). Given these mutually reinforcing trends, it became clear by the end of the 20th century that the pluralist rules of the post-1945 period were undergoing significant revision.

Understanding a double movement in international legitimacy holds the key to unlocking the meaning of the revision that was underway. While structures of authority remained largely anchored in the inter-state realm, the normative standards which states were expected to uphold had become universal. It was no longer defensible for elites to claim the protection of non-intervention while they engaged in domestic policies based on racial, religious or gender-based forms of exclusion. The internal regimes of sovereign states were now exposed 'to the legitimate appraisal of their peers' (Vincent, 1986, 152). The double movement in international legitimacy was completed later in the post-Cold War era when it became clear that ethical states had to do more than monitor each others' compliance to human rights standards. In the shadow of the Rwandan genocide, and the ethnic cleansing in the Balkans, new norms of responsibility were emerging. This double movement is neatly captured by Christian Reus-Smit who argued that, for states to be in conformity with the new standard of sovereign conduct, they had to not only protect human rights inside their own borders, but also support basic rights externally (Reus-Smit, 2001). One example of the re-alignment of identity to the new standard of legitimacy is the British armed services re-branding of themselves as 'a force for good in the world'. The extent to which a government is able to change the identity of a state is open to question, and the discussion below about the British government's position on the war on terror and human rights shows that such makeovers are often only skin-deep.

The progressive enmeshment of human rights principles in international society is apparent across a range of indicators: the proliferation of standard setting in areas such as the rights of women and the rights of indigenous peoples; the progressive incorporation of multilateral treaties into the domestic law of sovereign states; the explosion in the number of human rights international non-governmental organizations (INGOs); the development of strong regional regimes for human rights protection; and the higher profile accorded to human rights inside the UN (evident in the appointment of a Human Rights Commissioner who reports directly to the UN Secretary General). Despite the ever expanding network of activists, advocates, institutions, authors, lawyers, INGOs, and so on, the problem of non-compliance to fundamental human rights norms continues. Millions of people around the world are denied basic economic and political rights. Freedom House, the US-based NGO, adds more countries to its democratic register every year, yet at the same time grinding poverty, dispossession, sexual violence and forced migration are of such magnitude that human wrongs have become normalized. In their 2006 report, Amnesty International documents human rights abuses in 150 countries in the world.

As Robyn Ekersley persuasively argues in her article on the Kyoto Protocol, it is useful to distinguish between the efficacy of a regime and its legitimacy. As

the preceding discussion of the context of human rights has made clear, the regime enjoys a high degree of legitimacy in world politics. Indeed, it is hard to think of a moral value, which can command anything like the same degree of consensus. The simple argument that human rights are a means to realize human dignity is one that has supporters the world over. No other idea in the modern world has travelled so far, and had such success in overcoming whatever obstacles have been put in its way. Yet how durable can a regime be if levels of non-compliance are high even in normal times?

One of the tasks of theory is to explain such puzzles. How do conventional international relations (IR) theories fare? Realists explain the disjuncture by dismissing the importance of international norms: covenants without the sword are, after all, just words. Leaders might stand in the halls of the UN buildings in New York and proclaim the importance of human dignity in the knowledge that talk is cheap and no one will force them to keep their word. Yet this is unsatisfactory because even great powers worry about their international reputation. Liberal institutionalism struggles to take seriously the failures of the human rights regime because it does not rest on reciprocity. The explanatory logic of neo-liberalism cannot encapsulate why rational egoists should cooperate out of concern for another country's citizens. Given the paucity of neo-realist and neo-liberal accounts of norms and institutions, it is not surprising that most of the articles in this volume draw on old and new forms of interpretive theory in IR.

Recent contributions from constructivism explain how norms constrain and enable social action. It would be unthinkable for a government to try and pass legislation permitting the ownership of slaves. What makes such an action unthinkable is the power of the anti-slavery norm within the human rights regime. Similarly, altering the priorities of a state's foreign policy such that socioeconomic rights move up the agenda is deemed to be acceptable because the norms of basic rights are widely shared and socially approved. Why might a state re-define its interests to support development goals? This is where the formation of identity becomes a crucial part of the constructivist story. Actors affirm their identities and legitimize their actions within a framework of prevailing norms. Significant deviation from the prevailing norms could lead to censorship and eventually exclusion from the wider community.

The older interpretivism of the English School complements constructivism. Of particular relevance to the legitimacy crisis in question is the institutional distinction between international and world society. This distinction alerts us to the possibility of contestation between co-existing normative orders. The former is composed of sovereign states and their shared rules and institutions, whereas the latter refers to a transnational domain that is composed of INGOs, social movements, and epistemic communities. What is striking about these two domains is the relative weakness of world society actors in terms of brute

power and soft power, while accruing a surplus of normative power. To borrow a phrase from Amnesty International, it is as though world society is the keeper of legitimacy's flame.

The contestation over human rights requires revisions to these English School categories. Principal among them is the recognition that there are strong sub-systemic communities that share a common identity. On the question of human rights *vs* national security, the Anglo-American-Australian position differs from the views held by most continental European states. On the legitimacy of force as an instrument for promoting democracy and human rights, Islamic governments are strongly opposed: to the extent that they embrace these values, they argue that it is up to individual governments to implement these norms.

Just as international and world society reveal important aspects of the legitimacy of human rights, a historical narrative about the emergence of the regime tells us some big and important things about the domains themselves. Ought we to understand the emergence of world society as an attempt by core states in international society effectively to create a universal language of human rights in order to constrain others from committing acts of barbarism? In other words, was world society created by core states in an alliance with their own civil society actors? Can the regime survive with support from world society, but without being bolstered by the core states, which were central to its emergence and survival during the Cold War?

The case study below suggests that newer interpretivists have good reason to revisit certain theoretical claims about norm diffusion. Thomas Risse-Kappen's influential five-stage process of norm internationalization reflects much of the optimism of liberal thinking at the end of the 1990s (Risse-Kappen *et al.*, 1999). What is not adequately conceptualized by this model is the possibility that what were once thought to be embedded norms may become contested and then possibly rejected.

At Legitimacy's Edge: The Human Rights Regime Today

When measured against the benchmark of achieving its goal of protecting citizens from abuse, or when measured against the development of an institutional capacity to enforce its rules, the regime is chronically weak. Despite this, the regime has survived for two basic reasons. First, a core of liberal states inside international society has built their constitutions upon a rights-based framework, and has also increasingly integrated a human rights dimension into their foreign policy. This is particularly the case with the band of so-called ethical states such as Sweden, Norway, and the Netherlands, among others. Second, the regime has survived because of the strength of the

human rights culture in world society. By this I have in mind the high level of overlapping consensus which exists around core principles, and the truly global nature of the networks and movements that cajole and embarrass governments into complying with the rules. What would happen if the regime lost support among the community of liberal states inside international society, or cultural strife between civilizations pulled the overlapping consensus apart? As we will see below, in the post-9/11 era, many of the countries whose identity is founded on the natural and inalienable rights of its subjects, and who succeeded after 1945 in universalizing these rights, seem to be disengaging from the regime in complex ways. Can it persist with chronically weak institutions *and* a challenge from within the liberal core? Or will this push the regime beyond the tipping point, such that it faces adaptation or disempowerment? The following sub-sections will answer this question by focusing on two leading states involved in the war on terror — the United States and the United Kingdom — which have sought to challenge aspects of the human rights regime.

After 9/11: The United States and the Regime

The position of the US in relation to human rights after 9/11 is both fascinating and complex. Do the attacks on American territory and its embassies and bases overseas justify a wholesale rethinking of the relationship between human rights and security? Is it the case that the interdependence ascribed to these values in the 1990s will dissolve as the United States embarks on a long war against Islamic extremism?

In the context of the war on terror, it is not hard to find examples where fundamental rights of the person have been trampled upon. Haunting images will remain with us forever, images of human pyramids made up of naked prisoners stripped of everything including their dignity. Abu Ghraib was not caused by 'a few bad apples' running amok on the night shift. Such official dismissals underestimate the extent to which 9/11 was viewed by the administration as an opportunity to re-evaluate the relationship between human rights and national security. The modalities of this discursive contestation tell us a great deal more than the media focus on the guilt or otherwise of the prison guards. Specifically, what does the torture debate tell us about the United States government's view of its obligations under, and the likely costs of operating outside, the prevailing understanding of the torture convention? It also allows us to penetrate the often simplistic dualities that are associated with America's role in the world — unilateralism *vs* multilateralism being a case in point.

The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is one of the most robust norms in the human rights regime. It defines torture as 'any act [committed by a public

official or with their consent] by which pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession …' (Echeverria and Wilmshurst, 2006, 2). The CAT specifies a number of prohibitions: orders from superiors are an unacceptable defence of the practice; statements made under torture must be made inadmissible; and the treaty accords any state jurisdiction over a case of torture if the accused is on its territory (the state must prosecute or extradite the suspect to a state that will). The strength of the prohibition on torture is such that it has the status of a 'peremptory norm' that is binding on all states, and does not permit any exceptional circumstances to be invoked 'as a justification for torture' (Article 2.2). Along with slavery, it is hard to find an international crime that 'is so unanimously condemned in law and human convention' (Henry Shue, quoted in Foot, 2006, 132).

Despite the robust legal character of the CAT, and the extremely high levels of legitimacy accorded to the ban in world society, the Bush administration offered up a new take on the norm. In what has become known as the infamous 'torture memo', drafted by John Yoo and signed by Office of Legal Council head Jay S. Bybee, the bar for what is considered torture was raised significantly. The infliction of physical pain only amounts to torture when it is equivalent 'to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death' (quoted in Danner, 2005, 115). Bybee's memorandum was repudiated after the Abu Ghraib scandal, but by then a 'torture culture' (Luban, 2005, 1456) had evolved such that arguments regarding executive authority, and the non-application of the convention to off-shore territory, were repeatedly proffered. Even after a succession of scandals at Guantánamo, Bagram and Abu Ghraib, the Attorney General Alberto Gonzales was still claiming in January 2005 that cruel and degrading treatment is forbidden 'only within US territory' (quoted in Foot, 2006, 138).

It ought to be self evident that when leaders begin to question what had previously been seen as uncontested, those directly below them in the institutional hierarchy will follow suit. For leading neoconservatives to express consternation at the 'news' that torture had become institutionalized in their detention centres is akin to the response of Captain Renault in *Casablanca* who, while collecting his chips, expressed disbelief that there was 'gambling going on' in Rick's casino. The impact of these images — and ongoing allegations of war crimes from witnesses in Iraq — has done irreparable damage to America's claim to be a responsible Great Power.

In addition to the question of whether interrogation techniques could be intensified, the other fundamental challenge to humanitarian law by the Bush administration concerns the status of detainees held at Guantánamo and other bases. As discussed above, the 'new paradigm' for United States security set

out by Bush, Dick Cheney, John Bolton, Donald Rumsfeld, and Gonzales, sought to revise the prohibition on torture. Arguably, the tactic used with regard to detainees goes even further, constituting rejection of the Geneva Conventions and other key human rights articles. In the words of Yoo, the United States Deputy Assistant Attorney General, 'what the Administration is trying to do [in Guantánamo] is create a new legal regime' (Sands, 2005, 153–154). Three arguments underpinned this new legal regime. First, various memoranda from the President's legal counsel sought in early 2002 to bypass the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War. The President's memo of 7 February 2002 reflects the casuistry of his legal advisors. In brief, the President determined that the Geneva Convention did not apply to the conflict with al-Qaeda as it was a non-state actor, and although it did apply in principle to Afghanistan, Taliban captives must be denied prisoners-of-war status as they do not meet the conditions of lawful combat. Yet Article 5 of the Geneva Convention on the Treatment of Prisoners clearly states that the status of captives is to be decided by a 'competent tribunal', which ought to be promptly convened. The status of detainees, if it is to be determined in ways that are consistent with international humanitarian law, cannot be decided by presidential decree.

Two other arguments were offered as to why the 650 detainees at Guantánamo could be detained without charge or access to a lawyer, or receiving a public hearing in court. As the detainees were not on sovereign United States territory, the International Covenant on Civil and Political Rights was not applicable (implying that no official could ever be responsible for crimes committed on non-sovereign territory). Also, the claim was put forward that various human rights treaties did not generate obligations beyond those already set out in American law. 'With these three arguments', writes Philippe Sands, 'the lawyers for the Bush Administration have, in effect, constructed a scheme which takes the United States beyond the constraints of international law' (Sands, 2005, 173).

Sands is implying that the United States is adopting a 'rejectionist' position in relation to international humanitarian law. There are two counter-arguments to this claim that ought to be considered. Although 9/11 made the antinomy between human rights and security starker, the US has always been hesitant in embracing international obligations. This is paradoxical given that the American constitution is grounded in commitments to individual liberty and judicial enforcement. No other country debates and defends liberty-claims quite like the United States. At the same time, the country's approach to ratifying human rights treaties is one that is best described as reluctant. It has not ratified the convention prohibiting the discrimination of women, neither has it signed the convention on the rights of the child (Somalia being one of the other states that is also outside this multilateral treaty), or a series of legal

instruments for protecting economic and social rights. Even when human rights norms are integrated into US law, certain qualifications virtually hollow-out the commitments that ought to be entailed. This is evident in the stipulation that human rights treaties are not self-executing: the United States does not accept international jurisdiction or enforcement by external institutions (such as the International Criminal Court).

The reluctance on the part of the United States to internalize various human rights commitments often provokes the charge of double-standards, particularly as the US always speaks from democratic scripts when justifying military interventions. However, this charge is misleading. American does not 'reject' the regime *per se*. Rather, its position in relation to fundamental human rights is one of 'exemptionalism'. In other words, it recognizes the rightness of the values — why else extol the values of freedom and democracy in documents such as the 2002 *National Security Strategy*? And why fight costly wars in the name of democracy promotion? Exemptionalism means that 'we think the values are right but they do not apply to us'. This approach is immediately recognizable when American soldiers are captured and their gaolers are reminded not to breach Geneva III.

Exemptionalism amounts to a claim that there ought to be a two-tier standard of legitimacy. For this to be sustained, it would require acceptance among other actors in international and world society. In the run-up to the 2003 Iraq War, there was little sign among the other Security Council members that they ought to acquiesce in an action that was in breach of the UN Charter simply because it was being carried out by the hegemonic power. (The support of the UK had more to do with the fact that the British Prime Minister agreed with the means and ends of the 'neocon' grand strategy: in this sense he was a willing follower of the hegemon's lead).

The second important counter-argument to Sands is that the institutions of the United States' government are not singular. In an important sense, he is making the mistake of treating sovereignty as being indivisible, a position wrongly taken by English School writers in their understanding of the history of international society. As discussed below, the United States Supreme Court has had considerable success in re-aligning the values of the human rights regime with the behaviour of government employees. Legal advocates in the United States do not accept that 'amid the clash of arms the law must remain silent' (Lord Atkins, quoted in Sands, 2005, 166).

What are the grounds for claiming exemptions in relation to fundamental rights? The United States believes it does not need to accede to international jurisdiction because of its special status in the hierarchy of states. This practice is many centuries old. The difference today is that non-western states, and peoples around the world, want a fairer international society. Such a sentiment was neatly captured by Ramesh Thakur: 'Washington cannot construct a

world in which all have to obey universal norms and rules, while it can opt out whenever, as often, and for as long as it likes' (in Forsythe, 2004: 81).

After 9/11: The United Kingdom and the Human Rights Norms

The British government's position in relation to fundamental human rights is instructive as it cannot go it alone, at least not without paying a high price for challenging accepted human rights norms. Britain is also a useful contrast to the United States in that it has sought to represent itself as a state which is committed to social democratic values at home and abroad. The commitment to put human rights at the heart of foreign policy was reinforced by a number of measures, including the publication of an annual human rights report and the passing of the Human Rights Act, which incorporated the European Convention into domestic law.

The war on terror prompted a recalibration of the 'ethical dimension' in British foreign policy. Having pushed hard for intervention in the name of human rights, Blair was now embarking on an assertive internationalism which was designed to protect western publics from an 'arc of extremism'. In the eyes of the Labour government, victory against extremism would only be delivered if the government passed a series of anti-terror laws. These policies have prompted widespread criticism on the grounds that they contravene human rights law. Senior cabinet ministers have skillfully wielded a discourse of danger in order to deport 'suspected' terrorists and hold others on detention without trial in the name of 'national security'. The 7/7 bombings, when 52 people were killed and hundreds of others wounded as a result of four bomb attacks on London's transport system, prompted the Prime Minister to announce a 12-point plan to deal with 'the terrorist threat in Britain'. What followed was important in terms of thinking about Blair's justification for why 'the rules of the game' had to change (Blair, 2005).

The British position on torture is distinct from that of the US. Britain has not sought to defend interrogation methods which openly flout international humanitarian law, but it has left itself open to the charge of being complicit in torture. One dimension to this is the policy of 'extraordinary rendition' where terror suspects are sent to countries that have a reputation for torturing such people. Manfred Nowak, the UN Special Rapporteur on torture, stated that diplomatic assurances 'are nothing but attempts to circumvent the absolute prohibition of torture and *refoulement*' (Amnesty International, 2006, 23).

Blair's rationale reinforces the pattern of claiming a new context within which rights thinking must be placed. In his words, 'the circumstances of our national security have self evidently changed' and he believed it was possible to get assurances from the countries where the deportees will be returned to that they will not be subjected to ill treatment. In the case of Britain, the normative

challenge to fundamental human rights is not to exempt the UK from the rules but to modify them. From his speech at the Labour Party conference in October 2001 through to the August 2006 speech to the World Affairs Council in Los Angeles, Blair has pushed the argument that the threat posed by apocalyptic terrorism demands new thinking on international relations.

There is scant evidence that Blair's modificationist strategy for humanitarian norms has been any more successful than the exemptionalism of Bush. Is this because the arguments are self-serving and unpersuasive, or is the negative reaction something that all norm entrepreneurs face when they seek to overturn pervasive expectations about right conduct?

The human rights regime is experiencing an acute crisis principally because an exogenous shock has opened up a space for the unipolar power and its allies to challenge human rights norms. What heightens the sense of crisis is the fact that the norms under seige are recognized as being legally binding — the right not to be detained without trial in detention centres, the right of suspects not to be deported, and the right of all prisoners (including prisoners of war) not to be tortured: these are robust international norms, unlike others in the international bill of rights where there can be said to be no universal jurisdiction.

These fundamental human rights also matter because they are liberties, which undergird the constitutions of the same states who are seeking either exemption or modification. Attacking liberal values internationally is opening up to scrutiny the identity of the revisionist powers, specifically the claim by the US to be a global leader, and the claims by Britain and Australia to be good international citizens. By selectively engaging with the human rights regime, liberal states who are challenging fundamental rights are encouraging inconsistent behaviour among other members of international society. Highly respected INGOs report copy-cat breaches of fundamental rights in China, Pakistan, Russia, Israel, Egypt and elsewhere. Egypt is an example of a country that is highly dependent on US aid and considerable leverage could be exerted to end the cycle of torture, which has become institutionalized in the name of a decade-long national emergency. One State Department official neatly describes the limits that are now operating in terms of the diplomacy of human rights: 'how can we raise it when the Bush administration's policy is to justify torture?' (Human Rights Watch, 2006, 9).

In arguing that a particular element of the human rights regime is in crisis it is important to specify who it is in crisis *for*? It is a crisis for the Convention Against Torture, given that the United States and countless others have ceased to ascribe 'rightness' to its prohibitions. It is also a crisis for international order in that the American government's position on fundamental rights has massively discredited its self-identity as a Great Power, with a right to lead and a duty to protect. In the case of Britain, Blair's failure to secure legitimacy for his conception of 'new rules' has constrained the UK's agential power, as was

evident in the Israeli-Lebanon war when Blair's interventions were dismissed as being 'unhelpful' by senior figures in the United Nations Secretariat and by many in the European Union.

The human rights regime is not in crisis overall, however, if we take world society as the referent. For activists writing letters, lawyers contesting deportations, and citizens voting in elections, human rights retain their legitimacy as an idea. But the power of this idea is being trumped by the power of sovereign states seeking to change the normative context and in the process disavow themselves of their obligations under international humanitarian law.

Resolution?

Reus-Smit persuasively argues that a legitimacy crisis prefigures either adaptation or disempowerment. In a non-trivial sense, it is possible to trace both kinds of paths in relation to the human rights regime.

Although the idea and practice of human rights is flawed in many respects, the late Hedley Bull was surely right to argue that its development constitutes a remarkable change in our moral sensibilities. Most of all, it delivers a language of moral legitimacy to the weaker members of the human race, the stateless people, prisoners of conscience, and ethnic minorities who are hounded for being different. For this central reason, adaptation is morally preferable to disempowerment.

What, then, are the possibilities for adaptation? Given the significant agential power wielded by the US, norm realignment could only be established if the United States rejects exemptionalism. By pulling on material levers, the United States *could* buy back some of its decaying legitimacy through, for example, tying aid more closely to the delivery of human rights goals. But this is not going to happen when the pursuit of national security supposedly requires the building of alliances with countries that have appalling human rights records.

After the dire consequences of the experience of forcible regime change, might the United States be driven to adopt a different grand strategy, and in the process, open up more space for human rights? Although supporters of the regime might take heart from such optimistic notes, others will remain sceptical as to whether regime change in the United States will alter the very limited social basis of support which exists for human rights inside domestic public opinion.

If re-alignment of American grand strategy is unlikely, what other resources exist for resolving the legitimacy crisis? Intriguingly, law courts have emerged as sites of resistance. The defeats of the executive branch of government by the United States Supreme Court and the UK High Court show that there are

limits to the range of possible legitimacy claims. The message from these courts is that a necessity claim cannot override norms that are legally binding. Let me illustrate this process with reference to two important legal cases. In July 2004, the Supreme Court ruled that Camp Delta detainees can take their allegation of wrongful imprisonment to an American court. The rationale offered by the Court was the ancient principle of *habeas corpus*, which compels the holder of the prisoner to bring him or her to trial. The Supreme Court dealt the Bush administration another blow on 29 June 2006 when it ruled — by a 5:3 majority — that the executive had over-reached its authority in seeking to try suspects by military tribunal. In the UK, the case of unlawful detention at Camp Delta was also heard. Lawyers working for detainee Ferroz Abbassi claimed that his imprisonment was in breach of the 1966 Covenant, and that the UK government had a duty to protect those rights. Set against the government's position that it can have no meaningful view about matters of United States jurisdiction, Nicholas Blake QC dismantled this argument, referring to it as 'an old view which takes no account of modern developments in international law and human rights' (Sands, 2005, 165–5). The Court of Appeal rejected the British government's attempt to advance a Westphalian justification for remaining silent about the treatment of its citizens in far away places.

If we look specifically at one of the institutions of the global human rights regime we again see how a crisis inside the regime has precipitated adaptation. The UN Commission on Human Rights was from the outset the most important body in the regime. Through the 1990s it became increasingly discredited, not least because its geopolitical method of membership enabled the election of countries, which had appalling human rights records (in recent times membership has included China, Libya, Cuba, Saudi Arabia, Sudan, Venezuela and Zimbabwe). Opponents of the decaying Commission brought together unlikely allies such as John Bolton, United States Secretary of State, and Kenneth Roth (Director of Human Rights Watch). The UN Secretary General proposed replacing the Commission with a Council which was marginally smaller in size, but whose criteria for membership required majority support within the General Assembly. The new Council came into being in March 2006 after an overwhelming vote in favour. The United States voted against the establishment of the Council. What is more significant than the voting pattern (170 in favour, four against) is the rationale that was put forward by Bolton. His script set out the US's long history of support for human rights, before explaining that his country would not support the proposal because the link between membership and support for human rights policies was not strong enough (United Nations, 2006). The fact that so few other states supported the United States in its opposition to the Council suggests that the 'audience' of international society attaches greater legitimacy

to the regime than to the objections mounted by the United States. It also shows a strong consensus that adaptation is regarded as being far preferable to disempowerment.

It would be premature to discount what impact another 'spectacular' might have on the way in which the legitimacy crisis is unfolding. If it transpires that we really are in the first decade of what Paul Kennedy is calling a new 30 years' war, then it is possible that opinion in international and world society will re-align itself to the views that are being put forward by the revisionist powers today.

Conclusion

The extension of international law from the exclusive rights of sovereign states towards recognizing the rights of all individuals by virtue of their common humanity is one of the most significant normative shifts in the history of world politics. This article began by broadly endorsing the argument that legitimacy in international society had been profoundly altered by the emergence of a new standard of 'right conduct'. In the light of the changing discourse of national security after 9/11, have we reached another tipping point beyond which the space for fundamental human rights has contracted?

The war on terror, as it has been construed by leaders in the United States and Britain, has elevated national security issues on the agendas of core states such that the goals of security and liberty are represented as being in collision. In this climate, it is not surprising that respected INGOs such as Amnesty International have documented a decline in attention around the world to human rights. The crisis is heightened by the salience of the rights that are in dispute. The convention against torture, the right to a fair trial, the right not to be deported — these are the most highly legalized norms in the entire human rights regime.

The relegation of human rights down the agenda of those states which were once the architects of the regime reminds us that compliance to human rights norms is contingent and reversible: human wrongs — such as torture in the name of anti-terrorism — can 'cascade' throughout global politics just as quickly as human rights enhancing norms can be diffused. The overall impact of the normative contestation has been the weakening of the human rights project such that governments believe almost any breach of the rules can be justified in the name of counter-terrorism.

The effect of the strategies of exemptionalism (the US) and modificationism (the UK) has been to diminish the constraining capacity of key norms and in the process give a green light to other states who may think it convenient to deviate from the standards. It is no accident that governments in Asia have

strengthened counter-terrorist laws in recent years, and some have managed to become significant allies of the United States, despite their records as human rights violators (Indonesia, Pakistan, and Uzbekistan are three illustrations).

While the path of disempowerment lies ahead, so too does an alternative path leading to adaptation. What is needed here is the kind of independence shown by the judiciary. Already, domestic courts have won important victories. The Bush administration has had to concede that its earlier statements on torture tactics were out of line with the Convention Against Torture. The Blair government has been reprimanded for its complicity in supporting United States detention and interrogation in Guantánamo, and engaging in extraordinary rendition. There is a very real prospect that Camp Delta will be closed in the near future and the unrelenting media scrutiny of other detention centres shows no sign of letting up. All these factors dramatically illustrate the power of the alliance that has been forged between legal institutions inside liberal states and world society institutions buttressed by world public opinion.

Domestic law courts will continue to scrutinize claims to 'necessity' that revisionist governments try and legitimize. There might be another role for the courts that is germane to the case examined above. By 2008 Bush, Cheney, Rumsfeld and Blair will all be out of office, but the gradual extension of universal jurisdiction heightens the prospect that they will one day be back in court.

Note

1 Participating in two workshops on the thematic of legitimacy crises was a very enriching experience: many thanks to Ian Clark and Christian Reus-Smit for organising the project and to the British Academy for funding it. In addition to the guidance of the editors, I received extremely valuable comments from two anonymous referees and all the other workshop presenters (in particular Ian Clark and Ian Hurd). David Armstrong, Ken Booth, Rosemary Foot, and Nick Wheeler provided advice and guidance. The usual caveats apply.

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