
Dialogue on Human Rights in the Populist Era

Below is an edited version of a public lecture, given at the London School of Economics on 1 December 2016 to mark International Human Rights Day on 10 December, by Professor Philip Alston, John Norton Pomeroy Professor of Law at New York University (NYU) School of Law and currently UN Special Rapporteur on extreme poverty and human rights. It is followed by comments by Ron Duda and Vijay Nagaraj and the author's response to those comments.

The Populist Challenge to Human Rights

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Abstract

The nationalistic, xenophobic, misogynistic, and explicitly anti-human rights agenda of many populist political leaders requires human rights proponents to rethink many longstanding assumptions. There is a need to re-evaluate strategies and broaden outreach, while reaffirming the basic principles on which the human rights movement is founded. Amongst the challenges are the need to achieve more effective synergies between international and local human rights movements and to embrace and assert economic and social rights as human rights rather than as welfare or development objectives. It will be crucial to engage with issues of resources and redistribution, including budgets, tax policy, and fiscal policies. There is a need for collaboration with a broader range of actors, to be more persuasive and less didactic, and to be prepared to break with some of the old certainties. Academics should pay attention to the unintended consequences of their scholarship, and everyone in the human rights movement needs to reflect on the contributions each can make.

Keywords: civil society; economic and social rights; inequality and redistribution; international rule of law; local human rights movements; populism

1. The shape of things to come

The world as we in the human rights movement have known it in recent years is no longer. The populist agenda that has made such dramatic inroads recently is often avowedly nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the

human rights agenda.¹ As a result, the challenges the human rights movement now faces are fundamentally different from much of what has gone before. This does not mean, as scholars have told us, that these are ‘the endtimes of human rights’ (Hopgood 2013), that human rights are so compromised by their liberal elite association that they are of little use in the fight against populism (Hopgood 2016), or that we have entered ‘the post-human rights era’ (Wuerth 2016). Nor does it mean that we should all despair and move on, or that there is a ‘desperate need’ to find tools other than human rights with which to combat the many challenges brought by the new populism combined with an old authoritarianism with which we are all too familiar (Moyn 2016).

But it does mean that human rights proponents need to rethink many of their assumptions, re-evaluate their strategies, and broaden their outreach, while not giving up on the basic principles. As each new wave of bad news sweeps in, most of us are now suffering from commentary and analysis fatigue. But there has not been enough reflection by human rights advocates on the innovative thinking and creative strategizing that are urgently needed.

One justification for the absence of such analysis is that it is too soon. We need to wait and see what will happen before we can know how to respond. Sadly, it’s not true. We might not yet know exactly what policies the new Trump Administration will adopt either bilaterally or in multilateral forums, or how exactly the political chemistry among the leaders of the new world disorder will work, but we know the basics in terms of the challenges that will confront human rights advocates.

We know from President Trump himself because he has consistently advocated measures that would abrogate civil liberties for American citizens, not to mention non-citizens, a great many of whom were traumatized by the very act of his election. But at least his wrath won’t be directed only at minorities. Not long after election day, he tweeted that:

Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!

Almost every senior appointment he has made has been a person from the far right of the political spectrum. Many of his choices bring a total lack of expertise to the relevant portfolio, but they nonetheless are advocates of radical changes to existing policies. Those policies were summed up by President Trump’s Chief Strategist as designed to promote three overarching goals: national security and sovereignty, economic nationalism, and deconstruction of the administrative state (Rucker and Costa 2017). Each of those three sets of goals has immense implications in terms of the international human rights framework.

On the UN, his principal comment before the election was that:

We get nothing out of the United Nations. They don’t respect us, they don’t do what we want, and yet we fund them disproportionately (New York Times 2016)

The disproportionate funding critique is, of course, an old and justified one. The United States currently pays around 22 per cent of the UN regular budget and 28 per cent of the

1 There has been a huge literature in recent times on the meaning and origins of the term ‘populism,’ and I don’t intend to explore different definitions in this lecture. An excellent overview is provided by Müller (2016a), for whom its essence is a rejection of pluralism. Populists claim a ‘moral monopoly of representation’ to speak on behalf of the people, with the result that all other political contenders are accused of being illegitimate. See also Müller (2016b).

budget for peacekeeping. Although this has declined from its original peak, it still reflects the long-standing self-interest in exercising the power of the purse in multilateral institutions. In addition, the United States has been the principal voluntary contributor (some 12 per cent of the total) to the budget of the Office of the High Commissioner for Human Rights (OHCHR), albeit mainly for the Trust Fund for the Victims of Torture. Proposals to withhold contributions in response to UN positions that the Trump Administration does not share, such as the illegality of Israeli settlements in the Occupied Palestinian Territories, are likely to be replicated in a range of other areas as well.

While the finer details of President Trump's human rights policies remain to be worked out, there is an essential antipathy and even hostility. During the election campaign, there was a constant drumbeat of comments demanding a return to methods of interrogation that constitute torture ('I'd bring back a hell of a lot worse than waterboarding'), notwithstanding an offhand comment by Trump that General James Mattis, now his Secretary of Defense, had told him that waterboarding was not actually productive. Similarly, the oft-repeated promise to 'load up' the number of prisoners in a rejuvenated Guantánamo prison camp hardly bodes well.

Assuming then that the general thrust of the future policy on rights is what Donald Rumsfeld would call a 'known known', the other important variable is that an increasingly diverse array of governments have all expressed a desire to push back against key pillars of the international human rights regime. While it is certainly true that the nature and extent of the challenges differ greatly from one country to the next, it also seems that they have much in common. For the purposes of considering the implications for the international regime I would foresee, with considerable confidence, the emergence of a powerful and energetic 'coalition of the willing', to reprise an infamous phrase from the not so distant past. The coalition will consist of governments of many different stripes which are keen to challenge and dilute existing human rights standards and especially to undermine existing institutional arrangements which threaten to constrain them in any way.

There have always been coalitions of would-be wreckers, but in the past they have met with at least some pushback from the United States and other leading Western and Latin American governments. The prospect of effective pushback in the future is now evaporating before our eyes. We will soon know what sorts of coalitions from hell will emerge in the context of the UN Human Rights Council, the International Criminal Court, the Inter-American human rights system, and so on. Unpredictability is certain, but few targets will be off limits. In contrast to the past, the coalitions will be more diverse, less focused on particular issues, more willing to depart from established understandings and conventions, and less constrained by appeals to behave responsibly or in line with their legal obligations.

2. Mindset

Before reflecting on how best the international human rights community can respond to challenges that will undoubtedly be more severe and sustained than anything we have witnessed since the depths of the cold war, it is useful to keep some general principles in mind.

First, we need to maintain perspective, despite the magnitude of the challenges. Defending human rights has never been a consensus project. It has almost always been the product of struggle. The modern human rights regime emerged out of the ashes of the deepest authoritarian dysfunction and the greatest conflagration the world had ever seen. It has duelled with and been shaped by the eras of reluctant decolonization, the cold war,

neoliberalism, and now populism. Dejection and despair are pointless and self-defeating. It's assuredly not a lost cause, but we should not be fooled into thinking that it's ever going to be a winning cause; it's an ongoing struggle.

Second, this is the start of a long-term effort; it won't be over in four years. I don't need to read out the 'honour' roll of recently triumphant populists, nor the list of those waiting in the wings, shortly to gain their moment of glory. But there are many, and no continent is immune—unless we count Antarctica, but even there I suspect that there are some very alienated and angry penguins! The main characteristic of the new populist—authoritarian era is disdain for social conventions, a currency on which respect for human rights norms has long been heavily dependent. The devaluation of that currency opens up immense horizons for the enemies of human rights.

Third, the human rights movement needs to develop a spirit of introspection and openness. Historically, it has not responded well to criticism. As long as the critics were mainly governments seeking to defend themselves or despairing deconstructionist scholars, it was not difficult to continue with business as usual. Going forward, it will be highly desirable for the movement to be open to reflecting on its past shortcomings and to involve a broader range of interlocutors in its reflections than has been the case in the past. Most 'lessons learned' exercises seem to have been solely or largely internal affairs, and it is most unclear how many lessons have actually been learned. Perhaps the starting point is greater transparency in acknowledging what lessons we think we need to learn.

3. Some key issues

In terms of specifics, there are a great many issues that will demand our attention in the years ahead. I want to focus on just five, all of which seem to me to be central to the challenges that we now confront.

The first is the populist threat to democracy. While this is a complex phenomenon, much of the problem is linked to post-9/11 era security concerns, some of which have blended seamlessly into an actual or constructed fear and hatred of foreigners or minorities. The resulting concerns have been exploited to justify huge trade-offs. This is not only a strategy pursued by governments of many different stripes, but one that has been sold with remarkable success to the broader public. People are now widely convinced that security can only be achieved through making enormous trade-offs, whether in terms of freedom of movement, privacy, non-discrimination norms, or even personal integrity guarantees. The new era of internal threats, which have dramatically increased in recent years, is bringing with it a move to normalize states of emergency. For example, remarkably little attention has been paid as the French government continues to extend and enthusiastically implement a rather draconian state of emergency. This is not for a moment to suggest that the seriousness of the threats that may have been identified, and the horrors that have taken place, should be downplayed, but the fact that the depth and scope of the emergency provisions have been so little debated is both stunning and instructive.

And it is not just in countries that are already in turmoil that there is a declining faith in democracy. Foa and Mounk (2016), building on their earlier work, have recently suggested three tests that should be applied in order to assess the robustness of democracy. The first is the extent of public support. In other words, how important is it for people that their country remains democratic. The second is the openness of the public to the possibility of a non-democratic government, gauged in terms of whether individuals would countenance

military rule 'if needs be'. If things went really wrong, would we countenance a role for the military in the governance of the UK? Would we countenance that in Australia? The third test is the extent to which anti-system parties and movements have grown in the society. Based on these criteria, the authors argue that there has in fact already been a radical diminution in the support for democracy in many of the established democracies. In other words, there is a growing openness to considering alternatives which might be seen to offer a happier future.

The second major issue is the role of civil society. It is now fashionable among human rights proponents to decry the fact that the 'space for civil society is shrinking'. But this phrase is all too often a euphemism, when the reality is that the space has already closed in a great many countries. The opportunities for civil society to operate are being closed down, and very effectively so in many countries. I was in Mauritania earlier this year in my capacity as UN Special Rapporteur on extreme poverty and human rights. In principle, one can set up a human rights NGO in Mauritania. All that is needed is prior authorization from the Ministry of Interior, which takes a very, very long time to get; and if you are serious about human rights, it is unlikely ever to come. Many organizations thus have to operate without authorization, which brings the possibility of being arrested and imprisoned at any moment. The one sector that is absolutely thriving is that of government-sponsored NGOs. I have had meetings in Geneva with NGO representatives who flew over to Geneva just to meet me. They let me know that I had completely misunderstood all that was going on in the country and that in fact the government was totally dedicated to promoting respect for human rights and was the best chance there is in this regard; this was the NGO sector. A month or so after my visit to the country, during which I met with some of the most prominent and respected activists, four of them from the *Initiative pour la Résurgence du Mouvement Abolitionniste*, the leading NGO fighting against the rather considerable 'remnants of slavery', were arrested on charges that are widely considered to have been trumped up. They were charged with participating in a demonstration at which they claim they were not present, but which turned violent. For their troubles, they and several others were sentenced to terms of between three and fifteen years in prison. So much for civil society's shrinking space. In many countries it has shrunk to the size of a prison cell.

I also visited China, in August 2016. It was appropriate for the government to have invited a rapporteur dealing with poverty given the immense and certainly admirable progress it has made towards eliminating extreme poverty. But a visit by an independent expert to China was an interesting experience, if I can put it that way. Through research and suggestions, I obtained the names of a range of distinguished scholars, some of whom worked on human rights issues but most of whom were in development-related fields. I contacted them by phone, email, text, or whatever and sought meetings. But almost to a person, they informed me that my visit would coincide with time they had set aside to visit their parents in the countryside. Now I know that the values of familial loyalty are highly prized in China, and indeed are enforceable by law, but this seemed like a very strange coincidence. The reality was much more likely that a loud and clear message had been sent by the authorities that none of them was to speak to a UN Special Rapporteur. One of those who did manage to meet with me, a well known human rights lawyer named Jiang Tianyong, was subsequently arrested and has been charged with crimes that are sure to bring very severe penalties. Others were subsequently harassed systematically immediately after meeting with me. And in case the powers of the security services prove insufficient, the government has adopted a law making it virtually impossible for any but entirely innocuous foreign

NGOs to work in China, and a separate law regulating charities which leaves funding for human rights work entirely at the government's discretion. Between them these new laws and regulations have basically succeeded in closing all space for any groups that consider themselves to be working on human rights. As I noted in my end of mission statement, the overall strategy involves 'a carefully designed law and order Pincer Movement' (UN OHCHR 2016).²

Other countries are excellent students in this domain. Egypt recently passed a law limiting NGO activity to social and development work, and banning all NGOs from cooperating in any way with any international body without governmental approval. This effectively marks the end of authorized human rights-related NGO activity in Egypt. So much for the prescription of those authors who say that we need to abandon the international human rights regime and move all of our efforts back to the national and local level. Good luck with that endeavour.

The third issue is the linkage between inequality and exclusion. Populism is driven in part by fear and resentment. To the extent that economic policies are thus critical, it is noteworthy that mainstream human rights advocacy addresses economic and social rights issues in a tokenistic manner at best, and the issue of inequality almost not at all.³ Similarly, the focus of most human rights advocacy is on marginal and oppressed individuals and minority groups. From our traditional perspective, that is how it should be—they are the ones who most need the help. People like me do not need help—elderly white males are fine thank you, we are doing well. But the reality is that the majority in society feel that they have no stake in the human rights enterprise, and that human rights groups really are just working for 'asylum seekers', 'felons', 'terrorists', and the like. This societal majority seems far less likely today than it might have been in the past to be supportive of the rights of the most disadvantaged merely out of some disappearing ethos of solidarity. I believe that a renewed focus on social rights and on diminishing inequality must be part of a new human rights agenda which promises to take into account the concerns, indeed the human rights, of those who feel badly done by as a result of what we loosely call globalization-driven economic change.

The fourth issue that I want to highlight is the undermining of the international rule of law. This is a potentially huge area and I will focus on just two aspects of it. The first is the systematic undermining of the rules governing the international use of force. Western countries, and particularly the United States through the global operations of the Central Intelligence Agency (CIA) and the Joint Strategic Operations Command (JSOC) and its ever-supportive, never-questioning allies such as the United Kingdom and Australia, have set us up very nicely for the era of Syria, Crimea and Yemen in which countries wishing to use force can more or less write their own rules. Having stood by and let those different agencies operate around the world carrying out targeted killings and other dubious acts, we are not well placed to then turn around and say that some of the tactics used by countries we do not like are in violation of international rules. The assiduous efforts of government legal advisers in countries like the United States, the United Kingdom, and Australia to

2 A dictionary definition of a pincer movement is 'a military maneuver in which simultaneous flank movements are used to converge upon an enemy force, and cut it off from support and supplies'. See <https://www.collinsdictionary.com/us/dictionary/english/pincers-movement>.

3 For a report on the relationship between extreme poverty and extreme inequality, see UN Human Rights Council (2015).

rationalize these incursions are now reaping the rewards that they so richly deserve. It's tragic. When I was involved in my capacity as UN Special Rapporteur on extrajudicial executions in the debate over targeted killings, I warned that the countries justifying these practices were setting precedents that would inevitably be invoked by much less well-meaning forces in the future, and by administrations that had even fewer qualms about legality (UN Human Rights Council 2010). Those practices are now coming back to haunt us.

The second aspect of the international rule of law concerns the shocking breakdown in respect for the principles of international humanitarian law. In a 2016 opinion poll undertaken by the International Committee of the Red Cross (ICRC), a mere 30 per cent of American respondents considered it to be unacceptable to torture a captured enemy combatant 'to obtain important military information'. In the same poll, taken in 1999, the figure had been 65 per cent. In Nigeria, 70 per cent supported such torture and in Israel 50 per cent did (ICRC 2016: 10). Systematic targeted attacks on medical facilities, on operations by *Médecins Sans Frontières* and other humanitarian groups are commonplace and barely remarked upon. The United States did apologize for one very direct and inexplicably precisely targeted attack, but its denials are not credible in the absence of any independent inquiry. At the same time, the UK Prime Minister is promising to liberate British forces from the constraints imposed upon them if they have to respect the European Convention on Human Rights. And during his campaign, President Trump made similar noises about how US troops had fought 'very politically correct' wars implying that they should not be constrained by laws and standards that their enemies don't fully respect. His most specific proposal for dealing with terrorists was the insight that 'you have to take out their families'. International humanitarian law is in for a rough ride.

The fifth and final issue concerns the fragility of international institutions. The International Criminal Court (ICC) is under sustained attack with various African states announcing their planned withdrawals. And the announcement by the Office of the Prosecutor that she is actively investigating the activities of the CIA and other forces in Afghanistan and related countries will also further endear the court to the Trump Administration. We are in for an extremely tough ride in terms of trying to withstand and protect what has been achieved by the ICC and its immense potential.

An institution of central importance is the Office of the High Commissioner for Human Rights. One of the few bright spots in the overall situation is that the High Commissioner, Zeid Ra'ad Al Hussein, has been speaking up forcefully, courageously and with insight. Fortunately, he still has another couple of years left in his mandate. He is doing what a High Commissioner should do. He is acting as the world's moral conscience and he is in office until at least September 2018.

For its part, the Human Rights Council has been operating in a way that is surprisingly balanced in the last few years. When I was Special Rapporteur on extrajudicial executions, a period which finished in 2010, I left in despair at the inability of the Council to achieve very much at all. One of the key problems at that time was that the countries forming the Organization of the Islamic Conference did not hesitate to exercise their considerable powers to block initiatives which sought to address pressing problems. That changed with the Arab Spring, and it has not returned since. So in recent years the Council has been able to operate in surprisingly constructive ways in certain areas. But the new populism is certain to change this dynamic and China and Russia have both made it clear that they stand

ready to introduce or to re-introduce major 'reforms' of the Council, a prospect which is hardly grounds for cheer.

Another key institution is the European Court of Human Rights, for which we know that there is a waning affection in the United Kingdom, not to mention many other states. We also know that Russia and Turkey are virtually unresponsive members these days, and that there is increasing pushback from a range of other states. The Inter-American Commission on Human Rights announced in mid-2016 that it was going to have to lay off 40 per cent of its staff, a fate that was headed off at the very last moment by new contributions. But there is no certainty that this rescue operation will be sustainable in the future and it is noteworthy that the United States has traditionally played an outsized role in funding the Commission's work. And finally in institutional terms, the slashing of developmental assistance budgets, which is an ongoing process, is likely to be accelerated in the years ahead. Governments that are driven by nationalistic and xenophobic agendas are unlikely to want to send a lot of money to other states, unless to support their authoritarian friends. In the past, much development assistance has gone to support human rights institutions in different places. That funding will soon be under threat.

4. Towards an agenda

Perhaps that is enough gloom and doom, so let me try to be a little bit more constructive. What sort of strategies does the human rights community need to start considering in response to the fundamentally new circumstances that we are now confronting?

4.1 Local/international synergies

We need to reflect on how better to ensure effective synergies between international and local human rights movements. The large NGOs have still not achieved the right balance. Human Rights Watch is perhaps the classic example, but it is by no means alone. Its original model relied heavily on the assumption that the US government or congress or both would be responsive to reporting and lobbying, at least in response to significant violations in a reasonable range of countries. It then broadened its template so that recommendations were also addressed to as many other entities as possible, but the basic assumptions remained. As it became more apparent that there is no substitute for (also) advocating at the country level, it made a huge effort to establish national offices at the country level. But it is not clear that the fundamental model has changed significantly, even if the geographical scope has expanded. The deeper challenge is to see how the activities of international NGOs can have less of an extractive character (extracting information and leaving) and focus more on building or complementing national capacity. Of course, this is not always possible, but where it is, it is the key to sustainability. For its part, Amnesty International has undergone dramatic decentralization, but it is far from clear that it has yet found the best formula for strengthening local and national capacities. And it is increasingly clear that we can no longer rely on one level or the other operating in isolation. There will be times when only international groups can function effectively; but there will also be situations in which exclusively international advocacy will be ineffective and perhaps counterproductive.

4.2 The economics of rights

Economic and social rights must be an important and authentic part of the overall agenda. In a recent report to the Human Rights Council I argued that a surprisingly small proportion of self-described human rights NGOs do anything much on economic and social rights (UN Human Rights Council 2016, on the marginality of economic and social rights). Is that a problem? The United States government and many others have argued that this is how it should be because if people enjoy political freedoms they can stand up for their social rights. But empirically, the argument does not stand up. The enjoyment of civil rights has not brought social rights to a great many residents of the United States; and it has not on its own brought them to most other countries. We need to start insisting, in fidelity to the Universal Declaration of Human Rights, that the catalogue of human rights includes equally both categories of rights. That does not mean that every human rights group must suddenly devote itself to economic and social rights, but all groups should reflect on ways in which they can constructively contribute to both sides of the agenda. Amnesty International has tried, but they have not yet succeeded. They have been reluctant to grasp the real nettle which is the need to treat economic and social rights as full-fledged human rights. What is not needed is to move the focus to the blight of poverty, or to denials of dignity, or even to the need for more resources for development.

What is needed, in broad outline, is to follow the recipe that we have developed for civil and political rights promotion at the domestic level. Take the fight against torture, for example. The first thing we say to a state is that we do not just want blind assurances that it will not torture; rather we want legislation in place to ban the practice. We then ask for institutions that are able to follow up by promoting good practices and monitoring. And finally, we insist upon accountability, so that torturers can be prosecuted and governments held to account.

In terms of these essential elements of recognition, institutionalization, and accountability, economic and social rights are no different. Yet they remain fundamentally misunderstood by the great majority of governments and I would say even by most human rights activists. The rights are conflated or confused with development, or poverty alleviation. As a result, the agenda seems huge and overwhelming, and so it is unsurprising that when governments are called upon to respect economic and social rights their reaction is that it is impossible because it would be too costly. But economic and social rights proponents should not be focusing their attention initially on, for example, ensuring that everyone actually enjoys immediate access to all types of health care. Instead, we need to start by constructing an appropriate human rights framework. That involves the same three elements as does a campaign against torture: recognition, institutions, and accountability. So we need to start with legislative and other forms of recognition of a right to health. Next we need to build up specialized institutions which are going to promote the right in ways that are meaningful in that society. And finally, we need to build up accountability mechanisms.⁴

A great many human rights proponents still resist this sort of analysis by insisting that economic and social rights are fundamentally different because of the resources they require for their full implementation. But this distinction has long ago been discredited. All rights cost money and society is always called upon to make choices. The current choice whereby civil and political rights are privileged and economic and social rights are all but ignored works fine for the elites. It suits me, for example. As an older white male, I suffer no

4 This framework is developed in some detail in UN Human Rights Council (2016).

discrimination, I have a generous pension and excellent health insurance, my children's schooling is provided for. All I really need is that my civil and political rights are protected so that I am not arbitrarily arrested, nor prevented from expressing my views, and that I am secure in public. But that list of priorities does little to capture the principal threats facing the great majority of the population. If the concept of human rights is to have strong universal appeal, the other side of the balance sheet also needs to be promoted.

What might be termed the new or resurgent neoliberal agenda is, of course, all about resources, but this time around there will be more direct and aggressive targeting of funds spent on fulfilling various human rights. The Brazilian government which came to office by impeaching Dilma Rousseff and whose leaders will not face elections until October 2018 has shown the way on this front. President Michel Temer, who is ineligible to stand for election in 2018, and his supporters in Congress recently passed legislation amending the Brazilian Constitution to cap all public spending for the next 20 years. Given that major cuts in defence expenditure are highly unlikely, the *de facto* goal is to freeze spending on education, health, and social protection for two decades to come, until 2037. This will apply regardless of population growth, regardless of changes in circumstances or priorities, and regardless of even dramatic changes in the political makeup of the government. The justification for this extraordinary and unprecedented assault on the general welfare is to assure the 'market' that spending will be firmly controlled in the years ahead.

In the United States the Trump Administration has appointed officials at the head of the bureaucracies dealing with health, education, housing, energy, and budget who are deeply committed to radically reducing the role of government in providing social services, and the Speaker of the House and thus key player in the Republican-controlled Congress has long advocated major cuts in welfare and the privatization of various functions currently entrusted to government. The President's own major campaign initiative involved major new infrastructure spending, but that is almost certain to be achieved primarily through tax relief and other concessions to the private sector, in return for a governmental loss of ownership and control of public infrastructure. Many other examples could be given of a similar set of reforms being promoted by various neoliberal governments around the world. The point for present purposes is that despite all of their past resistance to doing so, human rights proponents need to start looking at budgets, at tax policy, and at fiscal policies in general. This is where a huge amount of the action is going to be and if the major human rights groups persist in their view that issues of redistribution are beyond their realm of concern, they will soon find that many of the things they care most about have been redistributed out of existence.

4.3 Broadening the base

The next challenge is for the human rights community to start expanding its horizons in terms of thinking about which other actors it can work with. The renewed push for privatization, along with the continuing abdication of governmental responsibility for various functions, guarantees that the huge role already played by corporate actors will only grow in the years ahead. I must confess that while I think engagement with corporate actors is necessary and indispensable, I have always retained a fundamental scepticism about the proposition that businesses are going to be persuaded to act as great proponents of human rights. While the Guiding Principles on Business and Human Rights and other such initiatives have achieved a breakthrough in some respects, we also need to begin more of a big-

picture conversation with the larger corporations about whether an authoritarian, anti-rights, and anti-welfare future is really in their interests. They, but also we, need to start thinking about where, how and when they can legitimately and constructively stand up to policies that cross certain lines and how they can use their influence and power to make the case for more human rights-friendly approaches. And it is not just corporations. We need to start thinking more creatively about other potential allies with whom the human rights movement can cooperate.

4.4 Persuasion

Next, we need to acknowledge the need to devote more time and effort to being persuasive and convincing, rather than simply announcing our principles as though they were self-evidently correct and applicable. By way of example, I recently wrote a report on the responsibility of the United Nations for bringing cholera to Haiti. In that report I started by observing that ‘arguments based on human rights or international law often do not suffice to convince Member States, or even the United Nations, to take the necessary steps’. I added that those ‘in authority also need to be convinced of the unsustainability and costliness of existing policies, and of the feasibility of change’ (UN General Assembly 2016). A human rights defender, for whom I have immense respect, and who saw the draft, suggested that the statement be taken out on the grounds that the role of human rights proponents is to state principles and remind actors of their responsibilities, not to acknowledge that they might need more broad-based encouragement as well. I demurred because I strongly believe that we need to be much more instrumentalist than we have been in the past. I think we need to start thinking why the other side is not doing what we consider to be the right thing. While there are egregious violations to which this doesn’t apply, a great many human rights issues are quite complex and a concerted effort to understand the other side, to address their formal as well as their real concerns, and to seek to identify constructive ways forward, will bring much greater results.

An example of this, which is by no means an ideal model, is the approach that the World Bank has long adopted to women’s rights. The Bank generally refuses to have anything to do with the formal rights dimension or the relevant international human rights framework. But it has made very effective use of instrumentalist arguments in trying to persuade governments that even if they don’t care in the least about women’s rights for reasons of dignity, humanity and law, there are nevertheless strong economic reasons for moving towards greater gender equality in order to unleash the economic potential of women to contribute to the labour force and so on. I hasten to add that this is not my own preferred way to go, as I have made clear in my critique of the Bank’s role as a human rights-free zone (UN General Assembly 2015), but I accept that such instrumentalist reasoning is not a bad secondary argument to use to persuade reluctant governments to do the right thing. In general, I think there are many instances in which human rights proponents do not take enough time to outline all of the other arguments that might be more successful at the end of the day in persuading governments.

Linked to this approach of seeking to be more persuasive, I think we need to take a step back from the absolutism that sometimes manifests itself. We pride ourselves, sometimes rightly and unavoidably, on being uncompromising. We fear that if we make any concessions along the way we are selling out on the basics of human rights. As an antidote to this type of thinking, it behoves us to recall a lecture given some 25 years ago by José (‘Pepe’)

Zalaquett. He is a very distinguished human rights defender, former head of Amnesty International's International Executive Committee, and a member of the Chilean National Commission for Truth and Reconciliation. In it he explained the choice that the commission had made in giving priority to truth over justice (Zalaquett 1992). His lecture conveyed in a thoughtful and nuanced manner a number of messages that today's human rights movement needs to keep very much in mind. First, the path forward in strongly contested situations is rarely straightforward. There are many dilemmas to be confronted and choices to be made. There are, as Pepe said, 'no hard and fast rules on how to proceed'. Second, the politics of absolutism and ideological purity can easily be self-defeating:

In the face of a disaster brought about by their own misguided actions, politicians cannot invoke as a justification that they never yielded on matters of conviction. That would be as haughty as it would be futile

Third, there is a need to strike a balance between the principles involved and the 'actual political opportunities and constraints'. And fourth, while none of this should involve compromising on fundamental principles, it requires a creative exploration of the art of the possible.

He finished his lecture by urging us to have 'the courage to forgo easy righteousness, to learn how to live with real-life restrictions, but to seek nevertheless to advance one's most cherished values day by day to the extent possible. Relentlessly. Responsibly.'

Although his exhortations emerged within the context of transitional justice, specifically the debate over truth versus justice in the Chilean context, his approach has a far broader resonance and a continuing relevance to many of the challenges that we face today.

Adopting a more calibrated approach that acknowledges the times in which we live and the context in which we function might also mean breaking with some of the old certainties. Let me give an example which I expect will be highly controversial within the human rights community. It concerns the potentially existential threat to the International Criminal Court. In championing opposition to the Court a number of African governments in particular have been motivated by their opposition to the principle that sitting Heads of State are subject to the Court's jurisdiction. A number of states that are planning to leave, or contemplating the possibility, claim that it is because they consider it to be unacceptable that a Head of State can have charges brought against him or her, and then be required to appear before the Tribunal at The Hague. Let me note immediately that one of the great achievements of the Rome Statute is precisely the principle that no one is immune, and that everyone is subject to the Court's jurisdiction, if they are alleged to have committed any of the grave crimes listed in the statute. In principle, it seems clear to the human rights community that few individuals could be more deserving of such an indictment than a president who is in office and who is undertaking such criminal acts. But we might also need to step back for a moment and acknowledge the extraordinary importance of the ICC enterprise in historical, legal, cultural and other terms and the fact that there is a huge amount at stake which goes far beyond the principle of Head of State immunity. The fact is that in a great many countries sitting Heads of State are not able to be prosecuted. France is a well-known example in this regard. And in some such contexts, there even continues to be a deep reluctance or unwillingness to bring the full force of domestic law to bear against a former President. So the question is whether supporters of the ICC should not contemplate making some sort of concession? It would not and should not involve an amendment to the Statute, but it could well involve a readiness to consider agreeing that the Security Council can use

its existing authority to defer the commencement of any proceedings in such circumstances. This can only be done on a year to year basis, but it would respond to the concerns that many states have that international practice has moved dramatically ahead of what many countries are prepared to accept. I don't want to exaggerate the importance of this particular example, but I do think that we need to start thinking more creatively about what it is that might take some of the wind out of the sails of the principal opponents to some key initiatives. As Pepe Zalaquett's comments suggest, this does not mean a surrender. We cannot give up on fundamental principles but there are strategies for moving in the right direction and they might not be all or nothing approaches.

4.5 The role of scholars

What role do scholars have in all of this? As teachers, as researchers, as publicists, we have obligations to our students and to our readers. It has become fashionable, especially at elite universities in the West, to disparage human rights by accentuating in dramatic and sometimes destructive ways the undoubted shortcomings of international human rights norms and institutions. At a range of law schools that I have visited I have encountered students who have become deeply disillusioned or cynical because they have been taught that the human rights enterprise is largely an illusion, that it is not something that they really should be putting their time into, that it is built on sand, and that it has no future. I remember a talk given at New York University by one of the world's leading international legal scholars which was essentially about the illusion of human rights; why there can be no such thing as a valid meta-norm and why there could not reasonably be universal rights to strive for; that there could be no way of proving or justifying any particular rights; and that most are heavily contingent and subjective. A student stood up and explained that she found the lecture rather distressing and was seeking a solution because she had come to law school hoping to make a career working to defend and promote human rights. The professor responded that he was sorry she felt that way, but that his role was only to show the audience that there was an abyss in front of anyone seeking to take human rights seriously; it was not to suggest alternative strategies but simply to ensure that students were aware that the abyss was there.

Now I do not underestimate the extent to which the best of critical scholarship in this field has taught us important lessons. Some of those are doubtless reflected in my earlier remarks. But I also do not underestimate how much of critical scholarship is formulaic, and unfocused in meaningful or instructive ways on the real challenges that confront us and on the challenges that are becoming more and more real by the day in our world. I am not suggesting that all human rights scholars should become activists, or cheerleaders. But I do think that all scholars should take responsibility for what many of the critical scholars warn others about, which is the problem of unintended consequences. It is a common and sometimes relentless refrain that human rights proponents do not take account of the unintended consequences of the positions they advocate. I suggest that critical scholars too need to take account of the 'unintended consequences' of a lot of the work that they do. This is not for a moment an attempt to diminish the importance of critical scholarship. As I have noted, many of my own ideas have drawn from some of the best of that scholarship. But there is a great deal of unenlightening dead-end scholarship which simply leads us to despair and does no favours to our students, let alone our fellow humans.

4.6 What each of us can do

A crucial element in responding to the populists and autocrats is for each one of us to reflect carefully on what contributions we can make. All of us can stand up for human rights, but each in our own way. In my travels around the world as a UN Special Rapporteur one of the most instructive questions that regularly pops up about half way through my time in the country concerned is something along the lines of ‘Who invited this bastard?’ It is usually a very good question and the answer informative. An invitation rarely comes on the personal initiative of the Foreign Minister; it is almost certainly not the presidency. Eventually it emerges that a less prominent minister or a behind the scenes bureaucrat has taken the initiative because he or she believes that it will be beneficial to have the scrutiny that comes with such a visit. The simple point is that each one of us is in a position to make a difference if we want to do so. Despondency or defeat is not the answer, because there is always something we can do. It might be a rather minor gesture in the overall scheme of things, but it makes a difference. It might be merely a financial contribution. It does now seem time to be contributing to human rights groups and advocates in ways that most of us probably have not been in the past. It is absolutely essential for us to strengthen the frontline organizations that are going to be best placed to stand up and defend human rights against the threats posed by the new populism.

I want to finish by adapting the old admonition by Pastor Martin Niemöller made during the period between the two world wars. Today’s version, at least for a New York resident like myself, would be simply:

First they came for the Hispanics, and I did not speak out—because I was not a Hispanic.

Then they came for the Muslims, and I did not speak out—because I was not a Muslim.

Then they came for the Black Lives Matter activists, and I did not speak out—because I am not Black.

Then they degraded and belittled women, and I did not speak out—because I am not a woman.

Then they came for me and there was no one left to speak for me.

The point is simply that we cannot wait, we need to start acting; we need to do whatever we can to strengthen respect for international human rights. We need to commit to the principles in our own lives, in our own areas. We are going to need to operate in a much more creative fashion both internationally and locally. There is going to be a complex relationship between these two levels but there are always places where we can make a difference. These are extraordinarily dangerous times, unprecedentedly so in my lifetime. Even during most of the cold war there was a degree of certainty, but today we have lost much of that and almost anything seems possible. The response is really up to us.

References

- Foa, R. S., and Y. Mounk. 2016. The Democratic Disconnect. *Journal of Democracy* 27(3): 5–17.
- Hopgood, S. 2013. *The Endtimes of Human Rights*. Ithaca, NY: Cornell University Press.
- . 2016. Fascism Rising. Open Democracy. 9 November. <https://www.opendemocracy.net/openglobalrights/stephen-hopgood/fascism-rising> (referenced 26 February 2017).
- International Committee of the Red Cross (ICRC). 2016. People on War: Perspectives from 16 Countries. <https://www.icrc.org/en/document/people-on-war> (referenced 26 February 2017).

- Moyn, S. 2016. Trump and the Limits of Human Rights. Open Democracy. 14 November. <https://www.opendemocracy.net/openglobalrights/samuel-moyn/trump-and-limits-of-human-rights> (referenced 26 February 2017).
- Müller, J.-W. 2016a. *What Is Populism?* Philadelphia, PA: University of Pennsylvania Press.
- . 2016b. Capitalism in One Family. *London Review of Books* 38(23): 10–14. <https://www.lrb.co.uk/v38/n23/jan-werner-muller/capitalism-in-one-family> (referenced 27 February 2017).
- New York Times*. 2016. Transcript: Donald Trump Expounds on His Foreign Policy Views. 26 March. <http://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html> (referenced 27 February 2017).
- Rucker, P., and R. Costa. 2017. Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State’. *Washington Post*. 24 February.
- UN, Office of the High Commissioner for Human Rights (OHCHR). 2016. End-of-Mission Statement on China, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20402&LangID=E> (referenced 26 February 2017).
- UN General Assembly. 2015. Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston. A/70/274.
- . 2016. Report of the Special Rapporteur on extreme poverty and human rights. A/71/367.
- UN Human Rights Council. 2010. Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Study on Targeted Killings. A/HRC/14/24/Add.6.
- . 2015. Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston. A/HRC/29/31.
- . 2016. Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston. A/HRC/32/31.
- Wuerth, I. 2016. International Law in the Age of Trump: A Post-Human Rights Agenda. Lawfare blog. 14 November. <https://www.lawfareblog.com/international-law-age-trump-post-human-rights-agenda> (referenced 26 February 2017).
- Zalaquett, J. 1992. Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations (The Mathew O. Tobriner Memorial Lecture). *Hastings Law Journal* 43: 1425–38.