SERBIAN ACADEMY OF SCIENCES AND ARTS

UNIVERSITY OF BELGRADE, FACULTY OF LAW

HUMAN RIGHTS IN THE 21st CENTURY

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SERBIAN ACADEMY OF SCIENCES AND ARTS
COMMITTEE FOR NATIONAL MINORITIES AND HUMAN RIGHTS
UNIVERSITY OF BELGRADE, FACULTY OF LAW

INTERNATIONAL CONFERENCE

HUMAN RIGHTS
IN THE 21st CENTURY

November 09 2018
SASA / Knez Mihailova 35/II, Belgrade

November 10 2018
University Belgrade, Faculty of Law / Bulevar Kralja Aleksandra 67, Belgrade

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PROGRAMME

Friday, 9 November 2018
SASA, Main Hall

10.00–10.15 OPENING CEREMONY

Academician VLADIMIR S. KOSTIĆ,
President of SASA

Academician TIBOR VÁRADY,
President of the Organising Committee

10.15–10.45 INTRODUCTORY LECTURE

Do Human Rights Still Have a Chance?
Professor BEN FERENCZ,
former prosecutor at the Nuremberg Trials

10.45–11.00 Coffee break

SECTION ONE – GENERAL THEORETICAL ISSUES

Chairperson: Academician TIBOR VÁRADY

11.00–11.20 International Law: A Friend or a Foe of Human Rights as Moral Entitlements?
Prof. Dr. BAŞAK ÇALI

11.20–11.40 Human Rights and the Constitutionalisation of International Law
Prof. Dr. MIODRAG JOVANOVIĆ, Prof. Dr. IVANA KRSTIĆ

11.40–12.00 Human Rights Politicised: Welcome and Unwelcome Developments
Prof. Dr. DANIEL SMILOV

12.00–12.30 Discussion

12.30–12.50 Non-Citizens and Human Rights: Ceasing to Be Strangers in a Global World
Prof. Dr. JEREMY McBRIDE

12.50–13.10 International Human Rights Law in East Asia
Prof. Dr. SHIN HAE BONG

13.10–13.40 Discussion

13.45–15.00 Lunch, SASA Club

SECTION TWO – MINORITY RIGHTS IN THE 21ST CENTURY

Chairperson: Prof. Dr. TAMÁS KORHECZ

15.00–15.20	Status and Rights of Languages in Culturally Complex Societies Academician VALERY TISHKOV
15.20–15.40	International Protection of Religious Minorities, with an Emphasis on the Use of Religious Symbols – Rise or Decline Prof. Dr. IVANA JELIĆ
15.40–16.00	The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds? Prof. Dr. KRISTIN HENRARD
16.00–16.30	Discussion
16.30–16.50	Coffee break
16.50–17.10	Convention on the Rights of Persons with Disabilities as an Instrument for Implementing the Universal Human Rights of Persons with Disabilities Dr. DAMJAN TATIĆ
17.10–17.30	Are 'Minority' Rights Human Rights? Dr. GORAN BAŠIĆ
17.30–18.00	Discussion
20.00	Dinner

Saturday, 10 November 2018
Conference room, University of Belgrade, Faculty of Law

SECTION THREE – HUMAN RIGHTS IN CORPORATIONS

Chairperson: Prof. Dr. TANASIJE MARINKOVIĆ

10.00–10.15 Welcome session

10.15–10.35 Corporate DNA, Human Rights and the Emerging Institutions of the Commons
Prof. Dr. UGO MATTEI

10.35–10.55 Home State Regulation of Transnational Corporations to Protect Human Rights
Prof. Dr. MARKUS KRAJEWSKI

10.55–11.15 Fundamental Rights of Employees, through the Lens of the European Convention on Human Rights
Prof. Dr. PAUL LEMMENS

11.15–11.45 Discussion

11.45–12.00 Coffee break

12.00–12.20 Can a New Treaty Tame Transnational Corporations?
Prof. Dr. ANITA RAMASASTRY

12.20–12.40 Pigeonholing Human Rights in International Investment Arbitration: A Claim or Defence?
Prof. Dr. VIOLETA BEŠIREVIĆ

12.40–13.15 Discussion

13.15–14.30 Lunch

SECTION FOUR – ENVIRONMENTAL RIGHTS AND BIOETHICS AS HUMAN RIGHTS ISSUES

Chairperson: Prof. Dr. MARIJANA PAJVANČIĆ

14.30–14.50 Environmental Rights as a New Wave of Human Rights
Prof. Emer. VUKAŠIN PAVLOVIĆ

14.50–15.10 Bioethics as a Tool for Extending the Human Rights Discourse
Prof. Dr. JUDIT SÁNDOR

15.10–15.30	Bioethical and Legal Challenges of Harari's Future *Homo Deus* – Need to Prepare Doc. Dr. SUNČANA ROKSANDIĆ VIDLIČKA
15.30–16.00	Discussion
16.00–16.20	Coffee break
16.20–16.40	Moral Duties of Posthumans Prof. Dr. VOJIN RAKIĆ
16.40–17.00	Protection of Biodiversity from the Perspective of Human Rights and Human Security Prof. Dr. IVICA RADOVIĆ, Prof. Dr. SVETLANA STANAREVIĆ, Prof. Dr. VANJA ROKVIĆ
17.00–17.30	Discussion
17.30	Closing remarks Academician TIBOR VÁRADY
19.00	Dinner

BOOK OF ABSTRACTS

INTERNATIONAL LAW: A FRIEND OR A FOE OF HUMAN RIGHTS AS MORAL ENTITLEMENTS?

Başak Çali

Berlin and Koc University, Hertie School of Governance, Istanbul, Turkey

The relationship between human rights as moral rights held by all human beings and human rights as legal rights under international law have been attracting considerable attention in legal and moral theory, as well as in the practice of human rights. The paper seeks to outline four ways in which the role of law in protecting moral human rights can be conceptualised. Two of these views see international law as a friend of human rights as moral entitlements and the other two perceive it as a foe. In this context, the paper puts forward the argument that the approach to the position of international law regarding human rights as moral entitlements matters and that distinct interpretative consequences for international human rights law arise from these conceptualisations, leading the interpreters of international law in different directions.

Those who perceive international law as a friend of moral rights come from two camps: those who see international law as a necessary instrument in implementing human rights as moral rights and those who see international human rights law as having a distinct and internal moral purpose of its own, while being capable of generating beneficial consequences for human rights as moral rights indirectly, e.g. by promoting the rule of law. These views, though significantly different, see international law as a friend of moral rights.

As far as the 'foe' position is concerned, some perceive international law as an obstacle to the implementation of moral rights, primarily due to its statist foundations and doctrines. What is needed is not more human rights in international law, but an overall reform of the international legal system to bring the law closer to the requirements of morality. Yet, others have a different concern: they are worried about extremely broad interpretations of international human rights law as compared to the requirements of moral human rights, holding that the so-called legal human rights inflation undermines and dilutes the moral significance of human rights.

Each of these views has important and distinct implications for understanding the relationship between human rights and international law and for the interpretation of international human rights law. Whilst the first and the second views perceive international law prevailingly as a friend of human rights as moral rights, their interpretive outlook for international human rights law is

significantly different. As far as the first view is concerned, the interpretations of human rights law must be adjusted, as much as possible, to the moral view of human rights and the specification of human rights must be protected from non-moral considerations, such as the margin of appreciation doctrine or consensus-based reasoning. According to the second view, as international human rights law does not merely seek to give effect to moral rights, the interpretation and specification of human rights law may accommodate non-moral concerns, with due regard for the acceptability of human rights interpretations by state officials, as, in the long run, international human rights law will be more beneficial to promoting human rights as moral rights.

The third view, however, offers a more radical critique of the state-based international legal order and it perceives international law as a foe rather than a friend of human rights as moral entitlements. According to this view, references to the moral origins of human rights in legal texts or judicial interpretations are not only unable to play a meaningful role in the legal enunciations of human rights, but international law also has a debasing effect on human rights as moral entitlements. Law fails regarding moral human rights. Therefore, what is needed is not a progressive interpretation of human rights within the existing statist structures, but a more radical reworking of structural doctrines of international law, such as reservations to treaties, third state responsibility in international law, duties of non-state actors or the concept of jurisdiction in international human rights law. The fourth view offers an entirely different formula and calls for interpretive minimalism and the avoidance of trivialisation of human rights by lawyers.

The conceptualisation of the relationship between international law and human rights as moral entitlements have and will continue to play a significant role in the interpretations of human rights law, seventy years after the Universal Declaration of Human Rights. The text of the Universal Declaration of Human Rights potentially lends support to each of these perspectives. We may be well placed to examine, in our current *Zeitgeist*, whether the focus of the debate about international law and human rights is shifting from those who oppose the 'friend' status of international law to those who dispute the 'foe' status of international law, i.e. from those who advocate human rights minimalism to those who advocate a structural reform. The paper will conclude in a discussion as to whether this shift is taking place in the light of the contemporary practice of international human rights and its possible consequences for the future of human rights in international law.

HUMAN RIGHTS AND THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

Miodrag Jovanović, Ivana Krstić

University of Belgrade, Faculty of Law, Belgrade, Serbia

The paper discusses the current status of human rights through the lens of the constitutionalisation of international law. What do we mean by 'constitutionalisation'? The word designates the developing constitutionalist functions of the international legal order. In this respect, two fairly distinguishable aspects of the possible constitutionalisation of international law may be observed. First, we may discuss constitutionalist functions with respect to the governmental power. The function of constitutionalisation is to a) organise and b) limit the governmental power. Secondly, we may discuss constitutionalist functions with respect to law. In this sense, constitutionalisation has to do with the a) hierarchisation and b) systematisation of the legal order.

The Universal Declaration of Human Rights was a stepping stone in the process of constitutionalising the international legal order in terms of limiting the global governance (insofar as there is no such a thing as 'global government') and hierarchising international law. This process was further supported by the adoption of the core United Nations (UN) and regional human rights instruments. Human rights have become universally applicable yardsticks for the constitutionalist function of constraining and checking the global exercise of power (labelled by Peters as 'constitutionalism 2.0'). For example, with respect to the World Trade Organisation (WTO), constitutionalisation implies focusing on the need for the WTO regime to integrate non-trade concerns, including the protection of human rights. Even more paradigmatically, the European Commission's Court of First Instance concluded in the famous Kadi case that it had jurisdiction to review indirectly the lawfulness of the resolutions of the UN Security Council on targeted sanctions on individuals suspected of terrorism in the light of *jus cogens* norms, "in particular the mandatory prescriptions concerning the universal protection of the rights of the human person". Accordingly, some human rights are largely identified as hierarchically higher norms of international law from which no derogation is permitted.

This paper seeks to elucidate the effects of the observed processes of constitutionalisation on the body of human rights law, by addressing the following questions: Does the *jus cogens* doctrine introduce a distinction between some human rights, thereby challenging one of the principles of international human rights law – that all rights in the Universal Declaration are regarded as

equally important? In other words, are some human rights now regarded more fundamental than the others? Is (should) this status (be) reserved for the class of 'non-derogable', i.e. 'absolute' human rights? If so, what specific rights are considered as 'absolute'? Another important question is whether the mechanism that allows for human rights control by international organisations, apart from States, leads to the meaningful constitutionalisation of international law? If this is the case, is it possible to reconcile universal and regional regimes of human rights protection, the respective practices of which may lead in different directions? Ultimately, can the implementation of a constitutionalist perspective be detrimental for strengthening and further development of international human rights law?

HUMAN RIGHTS POLITICISED: WELCOME AND UNWELCOME DEVELOPMENTS

Daniel Smilov

University of Sofia; Centre for Liberal Strategies, Sofia, Bulgaria

The paper briefly traces the evolution of fundamental rights from their liberal origins – as constraints on power – to their modern uses, covering socio-economic and cultural issues, as well as problems of privacy and identity. While much of this expansion has been extremely beneficial and necessary for the functioning of democracy, the progressive legalisation of an increasing number of the areas of political contention has somewhat diluted the borderline between the legal and the political spheres. The resulting politicisation of jurisprudence and the juridification of the political process have had certain negative side effects, which need to be taken into account. In European context, this process of simultaneous politicisation and juridification through the institutions of the Council of Europe and the European Union is particularly visible and it raises additional concerns about a possible clash between national and supra-national interpretations of basic rights. In such a context, human rights are often portrayed as part of an ideology purporting to dilute national sovereignty.

The paper seeks to offer a taxonomy of areas in which such tensions are particularly visible and argues that they could ultimately be managed through a set of moderate reforms concerning both the legal sphere and the political process.

NON-CITIZENS AND HUMAN RIGHTS: CEASING TO BE STRANGERS IN A GLOBAL WORLD?

Jeremy McBride

Monckton Chambers,
London, United Kingdom

International and regional guarantees of human rights make frequent use of the formulation 'Everyone' when referring to those who should enjoy them and there is only infrequent reference to the notion of citizenship in the latter connection. Nonetheless, it is well-established in the case law of human rights tribunals that the admission of non-citizens to individual States is a matter that generally remains within their sovereignty. The exercise of the State's discretion to refuse to admit them to its territory can inevitably have an adverse impact on the ability of non-citizens to enjoy particular rights and freedoms there. However, where their immigration status is not itself in question, the issue of not being a citizen still has potential relevance for the enjoyment of human rights by them and others. This paper explores four sets of situations in which this may occur.

Firstly, it reviews those instances in which States are expressly authorised to impose restrictions on the exercise of certain specified rights where those who might otherwise seek to do this are not its citizens. In particular, it considers the extent to which such an authorisation is capable of allowing for much greater restrictions to be imposed than might otherwise be considered necessary in a democratic society in the case of citizens and whether this is appropriate in the case of non-citizens. In addition, it examines the scope for limiting the application of the authorisation through an interpretation that would broaden the scope of the citizenship concept to embrace persons from States that are in close political and economic associations with the State seeking to impose the restrictions.

Secondly, outside of those situations in which differential treatment is specifically authorised, the paper examines the potential for non-citizens to rely upon guarantees against discrimination where they have been subjected to such treatment on account of the fact that they are not citizens, as well as the circumstances in which this status can justifiably be invoked for treating them differently. It also considers the extent to which there may be an obligation to take action against the use of hate speech as a way of countering the capacity for such use to alienate non-citizens and lead to their withdrawal from the communities in which they are present.

Thirdly, it reviews various treaty provisions that have been adopted internationally and regionally with the aim of guaranteeing particular rights for non-citizens either generally or on account of their having a particular status, such as being a refugee or a stateless person. In particular, it will consider whether the requirement that the enjoyment of such rights be no less favourable than that enjoyed by other aliens is consistent with the general guarantees of human rights. It also considers the extent to which treaty provisions concerned with ensuring the participation of non-citizens in public life not only limit the scope for applying restrictions on their exercise of rights to assembly, association and expression that are authorised in other treaties but are also providing a model to be followed in securing rights for non-citizens in other contexts.

Fourthly, the paper considers the emerging problem posed for the enjoyment of certain human rights by citizens on account of objection being taken to their association with non-citizens, whether through their efforts to secure the rights of those non-citizens or as a result of them being in receipt of funds or other forms of support from non-citizens for the activities which they undertake. It examines the extent to which the increasing tendency to adopt measures that entail the imposition of such restrictions on rights of citizens for such reasons is admissible.

The paper concludes with an assessment as to whether the current approach to the enjoyment of human rights by non-citizens is both coherent and compatible with the vision of the Universal Declaration of Human Rights. It also considers the extent to which it is realistic to expect any change in this approach despite other trends towards globalisation.

INTERNATIONAL HUMAN RIGHTS LAW IN EAST ASIA

SHIN Hae Bong
Aoyama Gakuin University,
Tokyo, Japan

Asia, in itself a vast geographical area, is one of the few regions devoid of region-wide system of human rights. In the wake of the 1993 World Conference on Human Rights, the member States of ASEAN (the Association of South-East Asian Nations) made a commitment to create an ASEAN human rights body, and the ASEAN Intergovernmental Commission on Human Rights (AICHR), composed of representatives from ten member States (Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) was inaugurated in 2009. The ASEAN Human Rights Declaration was adopted in 2012. Although it is a consultative body with largely promotional functions, the Commission has actively conducted research on various human rights issues and capacity-building activities, such as training and workshops, often in cooperation with the United Nations and the European Union, involving stakeholders such as civil society organisations, business enterprises and academics. There are countries that have not ratified the International Covenants (Myanmar for the International Covenant on Civil and Political Rights and Malaysia for both), and even among States parties to UN human rights conventions the acceptance rate of individual communication mechanism is quite low. On the other hand, Malaysia has a national human rights institution accredited as 'A' status in terms of compliance with the UN Paris Principles. What about East Asia? This part of Asia is characterised by the absence of an international organisation or intergovernmental platform engaged in questions of human rights, and this is aggravated by political situations such as the division of two Koreas (the Democratic People's Republic of Korea – DPRK, and the **Republic of Korea – ROK**) by a ceasefire line symbolising a legacy of the Cold War. The acceptance of universal human rights norms is still timid; conspicuously, China remains a non-State party to the ICCPR and, in spite of the fact that it has ratified the Refugee Convention, its treatment of defectors from the DPRK seeking refuge in China leaves much to be desired. While the ROK, Nepal and Mongolia have accepted individual communication mechanisms of some UN human rights instruments, countries such as **Japan** persistently resist joining such a system, shying from the situation in which cases of human rights violations are brought to international attention before treaty bodies. On the other hand, as democratisation has progressed, we have witnessed important developments

on numerous fronts. In the ROK, the National Human Rights Commission, accredited as 'A' status, actively utilises international human rights norms, including the general comments of treaty bodies, within its broad mandates. **Taiwan** has emerged as one of Asia's most vibrant democracies, and although it cannot be a party to UN human rights instruments, it has enacted a law for domestic implementation and has conducted a 'virtual' examination of State reports by experts. Judicial practice is also developing in favour of integrating international norms, albeit slowly, even in Japan. The paper highlights some of these developments, with special focus on the ROK, Taiwan and Japan.

STATUS AND RIGHTS OF LANGUAGES IN CULTURALLY COMPLEX SOCIETIES

Valery Tishkov

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Based on Russian materials, the paper revises two postulates about the role of ethnic diversity and the fate of languages in the world. The author makes the following conclusions: (a) the ethnic fragmentation of the population and language diversity in various countries in the world do not correlate directly with their levels of democracy, presence of conflicts, and economic success; and (b) widely publicised predictions about the quick extinction of most languages in the world have turned out to be a myth and international campaigns and declarations in support of endangered languages have been excessively politicised. There is an ongoing process of the revitalisation of languages; languages, including the minority languages of the peoples of Dagestan, the North, and Siberia, are acquiring a higher status, acknowledgment, and support on the territory of the former Soviet Union. The state policy of providing an official status for regional languages and the ethnic component of the federative system as ethnocultural autonomy for individual regions and ethnic communities play a key role. A list of endangered languages is provided; instruments to support minority (ethnic) languages and to secure their status are suggested. Categories and social practices based on them, such as *mother tongue* and *national language* are revised in favour of multiple and mutually nonexclusive approaches.

INTERNATIONAL PROTECTION OF RELIGIOUS MINORITIES, WITH AN EMPHASIS ON THE USE OF RELIGIOUS SYMBOLS – RISE OR DECLINE

Ivana Jelić

Judge of the European Court of Human Rights, elected in respect of Montenegro; University of Montenegro, Law Faculty, Podgorica, Montenegro

The level of democracy in a multicultural society could be measured by the level of the protection of the rights of persons belonging to national, ethnic and cultural minorities, as stipulated by international law. A special place notably belongs to religious minorities because a collective approach is a precondition for their full protection.

In an age marked by the challenges of multiculturalism, with an evident increase of expressive religious identities, one of the most sensitive issues is the legal protection of the right to use and disclose religious symbols. Religion, as a crucial element of many personal and group identities, is one of the phenomena that require affirmative action directed to both groups of religious minorities and to individuals belonging to them. In this regard, the legal protection of collective minority rights, though rarely implemented as such, is an additional parameter of modern democratic society.

Under international law, religious minorities enjoy individual and a certain level of collective protection. Yet, there is an evident gap between legal provisions and practice, even in the states legally bound by the relevant international law. On the other hand, not all international bodies rule the same or similar in the same or similar situations. The best example is the difference between the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECHR) in respect to wearing religious symbols, notably Islamic veils, scarves, niqabs and burkas. The recent jurisprudence of the bodies concerned confirms different approaches of the prominent international bodies regarding the right of the persons belonging to religious minorities to wear religious symbols in public and at the workplace. The latter is actually affected by the fragmentation of international justice, especially by the recent case of the UN HRC concerning wearing an Islamic veil by an educator in a private kindergarten, in which the responsibility of France, as the state which violated the right to religion, is emphasised. This ruling is different from the rulings of international courts in Europe.

It is evident that the implementation of international obligations deriving from legal instruments on the protection of national, ethnic and cultural minorities is a very sensitive and complex issue, far from offering uniform solutions. It is

actually highly diversified, keeping in mind that the states have failed to adopt the minimum common standards in important aspects of the legal protection of religious minority rights.

Analytically observed through the historical lens of international law, the protection of the rights of religious minorities has had its ups and downs. As far as the level of international norms regarding minority rights protection and their legally binding nature are concerned, an evident progress has been made. The same applies to the promotion of diversity and integration, as well as the prohibition of assimilation, which has actually become a legally binding provision only with the Council of Europe Framework Convention for the Protection of National Minorities.

On the other hand, international provisions on minority rights protection are not *jus cogens* in character. Still, some states use the right, where possible, to put reservations to international treaties in respect of minority rights protection, e.g. France regarding Article 27 of the International Covenant on Civil and Political Rights. This has introduced different standard in the implementation and respect of international law and this is an obviously negative trend. There is no universal legal approach, i.e. no minimum common standard on religious minority rights protection. The application of the margin of appreciation doctrine does not help; actually it is critical in this regard. In addition, the fragmentation of international law in the area of religious minority rights protection additionally burdens an already vulnerable issue. The question in the focus is: what is the future of international protection of religious minorities in the age of many challenges, i.e. is the protection of religious minority rights fully feasible?

The paper seeks to critically access and examine different aspects of the rise and decline of the international legal protection of religious minorities, particularly through the analysis of respective differences in international jurisprudence concerning the right to use religious symbols in public, at workplace, at school and university, at security checks, on identity photos in official documents and in the courtroom.

THE EUROPEAN COURT OF HUMAN RIGHTS, ETHNIC AND RELIGIOUS MINORITIES AND THE TWO DIMENSIONS OF THE RIGHT TO EQUAL TREATMENT: JURISPRUDENCE AT DIFFERENT SPEEDS?

Kristin Henrard

Erasmus University Rotterdam, Faculty of Law, Department of International and EU Law, Rotterdam, The Netherlands

This paper argues that it is no longer tenable to qualify the Court's non-discrimination jurisprudence overall as 'poor'. Indeed, a different speed of development is noted for the "prohibition of invidious discrimination" track and the "duties of differential treatment" track. In cases concerning invidious discrimination, the Court tends to engage explicitly with the complaint in terms of the prohibition of discrimination, while adopting high levels of scrutiny in regard to differentiations on the basis of ethnicity and religion. Admittedly, there are ongoing flaws in the jurisprudence on the allocation of the burden of proof, and particularly the identification of a *prima facie* case of direct discrimination. Nevertheless, the Court seems to be willing to test the boundaries.

A markedly different picture emerges concerning duties of differential treatment. The analysis of the selected case law confirms that the Court avoids as much as possible non-discrimination analysis in cases on claims to official recognition of separate identities and ways of life of ethnic and religious minorities. The Court prefers to conduct its analysis of the related complaints about a lack of accommodation in terms of articles 8 and 9 of the European Court of Human Rights respectively. Arguably, demands for reasonable accommodation of different ethnic and religious identities are on the rise in the current era of globalisation.

While the Court is not supposed to impose uniform standards, it remains important that it provides guidance about the benchmarks that contracting states need to take into account when developing policies, legislation, and practices, in order to live up to their commitment to respect fundamental rights. Consequently, the Court is urged to engage more explicitly and properly in non-discrimination analysis, also in relation to complaints about a lack of differential treatment (accommodation), while identifying and weighing the respective interests.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AS AN INSTRUMENT FOR IMPLEMENTING THE UNIVERSAL HUMAN RIGHTS OF PERSONS WITH DISABILITIES

Damjan Tatić

United Nations Committee on the Rights of Persons with Disabilities
Belgrade, Serbia

Human rights are universal and indivisible. They belong to each human being, including, naturally, persons with disabilities. According to a study conducted by the World Bank and the World Health Organisation, persons with disabilities constitute fifteen percent of the total world population. However, those individuals remain excluded, discriminated, segregated in many societies, facing various barriers in the enjoyment of their basic human rights and fundamental freedoms, set forth by the Universal Declaration of Human Rights. Therefore, it was necessary to adopt a legally binding instrument of international public law under the auspices of the United Nations – a treaty that would provide for measures to ensure the full and equal enjoyment of rights stipulated for persons with disabilities by the Universal Declaration. In December 2006, the UN General Assembly unanimously adopted the Convention on the Rights of the Persons with Disabilities and the Optional Protocol to it. Both treaties entered in force in May 2008.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and foster respect for their inherent dignity. The Convention on the Rights of the Persons with Disabilities reaffirms their right to life, protection in various situations of risk, equal recognition before the law (including full legal capacity), access to justice, liberty, freedom from torture and other degrading and inhumane treatment and punishment, protection from violence, abuse and exploitation, personal integrity, liberty of movement, nationality, freedom of expression and opinion, privacy, marriage and family life, education, employment, healthcare, social protection and an adequate standard of living, participation in political life and conduct of public affairs, participation in culture, sports and leisure activities. It provides for the measures which state parties have to take in order to enable persons with disabilities to enjoy the above-mentioned rights effectively and to be fully included in their respective societies. The Convention guarantees effective protection from any form of discrimination, including denial of reasonable accommodation, against all persons with disabilities. Furthermore, it explicitly addresses the position of women and children with disabilities, as well as specific issues of accessibility,

personal mobility, support services and habilitation and rehabilitation.
Ten years after its entry in force, with 177 State parties and the active Committee on the Rights of Persons with Disabilities as a monitoring body consisting of independent UN experts supervising the implementation of this instrument of international public law, the Convention on the Rights of the Persons with Disabilities is vital for the full and equal enjoyment of all human rights and fundamental freedoms set forth by the Universal Declaration of Human Rights by all persons with disabilities.

ARE 'MINORITY' RIGHTS HUMAN RIGHTS?

Goran Bašić
Institute of Social Sciences,
Belgrade, Serbia

The debate whether 'minority' rights are human rights has been present in recent literature on several levels – the first one concerning tensions between individualism in liberal ideology and the universal character of human rights, the second stemming from the cultural and collective character of minority rights and the third concerning the consequences of recognising 'special' rights of minorities in order to protect their distinctive ethnic and cultural identity.
Despite the theoretical development of the concept of liberal multiculturalism, which was expected to relieve these tensions, the question remains whether collective rights, including national minority rights, can be justified as human rights or whether they constitute civil rights, which stem from the status of citizenship and the institutional and legal framework? According to some liberals, minority (collective) rights can be classified as human rights if they protect the basic interests of people (individuals). To meet the ethical requirements of liberalism, it is necessary to ensure that collective rights allow equal access to cultural assets to all individuals. While a vivid debate unfolded in political theory and philosophy (Kymlicka, Taylor, Parekh, Tamir, Apaya, Habermas, Barry...) several political leaders declared "the death of multiculturalism", with one of the most striking statements rejecting 'passive tolerance' in favour of 'muscular liberalism'. Does this actually mean that minority rights have been reduced (or will be reduced) as a consequence of the liberal state's inability to respond to the challenges to which it has contributed and that the reduction of other rights may be expected with the emergence of more substantial challenges?

CORPORATE DNA, HUMAN RIGHTS AND THE EMERGING INSTITUTIONS OF THE COMMONS

Ugo Mattei

University of Torino,
Torino, Italy

Corporations display a legal personality granted by law and charter (Corporate DNA) that has progressively transformed them into machines of capital accumulation, the agents of the great modern transformation of commons to capital, of a use value into an exchange value. The current condition of human organisation is dubbed Anthropocene to emphasise the threats posed to human civilisation by our extractive economic model in which a capitalist corporation is a major and senior pars. The paper discusses the possibilities for and the limitations of changing corporations from agents developing a corporate personality of a sociopath (serial violator of human rights and environmental sustainability) to those developing a personality of a good citizen of the world seeking to pass it down to future generations. The emerging institutions of the commons might prove to be part of the solution to this tragedy.

The paper is based on the forthcoming book Ugo Mattei & Alessandra Quarta, *The Turning Point in Private Law*, Edward Elgar 2018.

HOME STATE REGULATION OF TRANSNATIONAL CORPORATIONS TO PROTECT HUMAN RIGHTS

Markus Krajewski

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Transnational corporations are not formally bound by international human rights obligations. While attention is currently focused on an internationally binding legal instrument which might change this, the respective duties of states should not be overlooked. Based on the trichotomy of state obligations in human rights law, states have a duty to protect individuals against human rights abuses by third parties, including corporations. While it is indisputable that this obligation extends to all individuals living on the territory of the respective state, the extraterritorial scope of the duty to protect remains contested. Generally, it is accepted that extraterritorial human rights can apply extraterritorially if the state has jurisdiction, as clearly stated in the jurisprudence of international human rights treaty bodies and regional human rights courts.

Nevertheless, the case of human rights violations through transnational business activities is different because home states do not exercise jurisdiction over the activities of transnational corporations. Two scenarios can be distinguished: in the 'Transnational corporate relationship' scenario, a locally incorporated subsidiary of a multinational enterprise contributes to environmental pollution with negative effects on the right to health and the right to adequate living conditions, because the mother company lacks due diligence. In the 'Global supply chain' scenario, a locally incorporated supplier of a global buyer provides unsafe working conditions with negative effects on the right to life and rights at work, because the global buyer requires fast and cheap production. In both cases, the host state has a duty to protect human rights by adopting and implementing labour and environmental laws. However, it is less clear if and to what extent the state where the mother company or the global buyer are basically located – the 'home state' – also has a human rights duty to regulate transnational business activity.

There are a number of policy reasons which support the case for a state duty to regulate transnational business activities. However, this paper argues that this duty can also be based on the existing human rights doctrine and standards of general international law, such as the no harm-rule (*sic utere tuo ut alienum non laedas*) and the due diligence principle. The paper argues that states have a duty to regulate transnational business activities of corporations over

which they exercise jurisdiction if adverse human rights of such activities are predictable and preventable. The paper will also assess whether the principle of non-intervention serves as a limitation to exercising an extraterritorial obligation to protect. Finally, the paper will analyze various approaches in state practice, such as tortious or corporate liability, transparency and disclosure obligations and corporate due diligence requirements.

FUNDAMENTAL RIGHTS OF EMPLOYEES, THROUGH THE LENS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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The European Convention on Human Rights guarantees rights of individuals *vis-à-vis* States. Nevertheless, it can also be relevant in relations between private individuals. Apart from the possible 'horizontal application' (*Drittwirkung*) of the Convention, it imposes a positive obligation on the States to protect human rights even in relations between private individuals. This positive obligation may include an obligation to adopt a normative framework and to provide for an effective judicial protection mechanism.

The paper focuses on the States' obligation to protect the rights of employees *vis-à-vis* their employers. The case law of the European Court of Human Rights provides numerous examples of States being required to take action in this area. They relate to rights such as the right to life (protection of safety and health), the prohibition of slavery and forced labour (fair labour conditions), the right to respect for private life (e.g. to what extent can employees be monitored? – see the Grand Chamber's judgment of 5 September 2017, *Bärbulescu v. Romania*), freedom of religion (regulation of the wearing of religious symbols), freedom of expression (criticism of the employer), freedom of association (union activities).

The paper seeks to answer the question to what extent the Convention can contribute to an effective protection of employees' rights.

CAN A NEW TREATY TAME TRANSNATIONAL CORPORATIONS?

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The paper analyzes the current debate concerning a new legally binding instrument before the UN Human Rights Council. It examines the current proposal of the Government of Ecuador to develop a new legally binding instrument focusing on the obligations of transnational corporations with respect to human rights. The paper will examine the history of previous attempts to regulate the conduct of TNCs via binding treaties – which led to the creation of the United Nations Guiding Principles on Business and Human Rights in 2011.

The paper examines the national and regional regulatory developments since the Human Rights Council's adoption of the UN Guiding Principles, such as the UK Modern Slavery Act and the French Loi de Vigilance. The paper also explores the continuing governance gaps in terms of corporate respect for human rights and the lack of access to effective remedy by victims of business-related human rights abuses. These include the developments in the US aimed at narrowing the scope of litigation under the US Alien Tort Statute, and other cases foreclosing suits against parent companies by victims in cross border litigation, as well as the failure of various criminal prosecutions against corporate actors. Finally, the paper evaluates the current treaty proposal, and alternatives to the treaty process in the light of some of the key challenges that the treaty proponents face. Such alternatives might include regional instruments or treaties which focus on a more limited scope, such as human rights due diligence.

PIGEONHOLING HUMAN RIGHTS IN INTERNATIONAL INVESTMENT ARBITRATION: A CLAIM OR DEFENCE?

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Human rights and investment laws do not seem to stand at odds with each other, as it was previously thought. The recent developments show that human rights considerations in international investment arbitration could be invoked either as a state defence or an investor's rights. Arbitral tribunals might invoke human rights *sua sponte* in their decisions. Accordingly, in *Urbaser v. Argentina* (2016), Argentina, subjected to arbitration due to its emergency measures in the financial crisis, alleged that the concessionaire that supplied water failed to provide the necessary level of investment and thus violated the right to water. In *Grandriver Enterprise v. the U.S.* (2011), the investors belonging to indigenous people claimed that the term investment, as well as the fair and equitable treatment clause, had to be interpreted by taking into account indigenous peoples' rights. In *Micula v. Romania* (2008), the tribunal noted that it would be 'mindful' of Article 15 of the Universal Declaration of Human Rights when deciding on the legality of the deprivation of nationality.

While the readiness of tribunals to use human rights as authority for their decisions has not aroused major controversies (and has remained largely untheorised), there is an ongoing heated debate regarding the issues of whether investors' rights included in investment treaties are human rights and whether a host state can use human rights as its defence to justify regulatory measures affecting the investment. The paper offers an assessment of the pigeonholing of human rights considerations in international investment arbitration from the perspective of human rights law with the aim of demonstrating that while human rights can justify the host state's legitimate right to adopt regulatory measures to protect human rights, the investor's rights are not human rights, although some rights granted to the investors in the investment treaties tend to echo human rights.

ENVIRONMENTAL RIGHTS AS A NEW WAVE OF HUMAN RIGHTS

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After the waves of political rights, economic rights, social rights, cultural rights, new areas of human rights arise. One of these areas is the corpus of environmental rights that emerged as a new wave of human rights in the closing decades of the 20th and the opening decades of the 21st century.

The past several decades have witnessed a growing awareness of the links between human rights and the environment. The number and scope of international and national laws, judicial decisions, and academic studies dealing with the relationship between human rights and the environment have grown rapidly.

A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.

Many states now incorporate a right to a healthy environment in their constitutions. However, many issues regarding the relationship of human rights and the environment remain unresolved and require further examination.

Special attention in the paper is paid to two international documents: the UN Resolution adopted by the Human Rights Council on 23 March 2016, 31/8. Human rights and the environment; and The Aarhus Convention: UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

BIOETHICS AS A TOOL FOR EXTENDING THE HUMAN RIGHTS DISCOURSE

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Whenever a new biological or biomedical discipline emerges, promising to provide new answers to old problems, such as the role of biological factors in influencing identity, reproduction, health and behaviour, scientists, policy-makers, and the society as a whole engage in a new legal policy debate. The paper focuses on human rights as the catalyst and synthesising force in these debates. Human rights may now be seen as providing rights to humans with open boundaries, such as human tissues, human DNA, brains of dead persons, and *in vitro* embryos. By focusing on human rights as the closest ally to bioethics in providing an alternative to biological explanations, one can see better the implications of human rights when a policy failure reinforces biological fallacies. Seeking to scrutinise these trends, the paper focuses on human rights in this new and wider scope.

The paper addresses these questions through human rights case analysis. For instance, what happens when one interprets discrimination based on genetic characteristics (on molecular level) or develops the notion of privacy based on genetics or on neuroscience? What are the advantages and what are the limitations of using a human rights framework on this biological level?

BIOETHICAL AND LEGAL CHALLENGES OF HARARI'S FUTURE *HOMO DEUS*: NEED TO PREPARE

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In his book *Homo Deus*, Yuval Noah Harari has identified three processes that he deems important for the future and for the existence of *homo deus*: science is converging on an all-encompassing dogma, according to which these organisms are algorithms and life is data processing; intelligence is decoupling from consciousness and non-conscious but highly intelligent algorithms may soon know us better than we know ourselves. He has also identified three agendas of humanity: war against death that includes but is not limited to the development of genetic engineering, regenerative medicine and nanotechnology; the right to happiness anything which makes us dissatisfied is a violation of our basic human right therefore biochemical manipulations that strengthen political stability, social order and economic growth are allowed and even encouraged (e.g., those that calm hyperactive kids in school, or drive anxious soldiers forward into battle); and the third agenda, as Harari underlined, consists in seeking bliss and immortality. Humans are in fact trying to upgrade themselves into gods, and this process may follow any of three paths: biological engineering, cyborg engineering and the engineering of non-organic beings.
It may be concluded that regardless of which path humanity takes, bioethics and legal boundaries will have very important saying. What will be preserved of our humanity and which part of us will be upgraded or enhanced and/or lost? These questions always deserve constant analysis and a very thoughtfully created legal framework.

MORAL DUTIES OF POSTHUMANS

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Recent biotechnological developments can cause transformative changes in humans. They include the levels of enhancement (genetic, cognitive) that can bring about a new species: posthumans. The paper discusses the projected moral duties of posthumans, specifically the most essential moral duty of the posthuman species. Current humans suffer from the comprehension-motivation gap: they know right and wrong on a cognitive level, but they do not act always in line with this knowledge. This gap is possibly the greatest predicament of human moral existence. A posthuman morality would be reflected in the comprehension-motivation gap being superseded: posthumans would always act in line with what they consider to be morally right. Moreover, posthumans would have an essential moral duty to help bring into being increasingly morally advanced beings even at the detriment of their own interests or even survival. The moral duty of posthumans is therefore permanent transformative change in the domain of the enhancement of morality.

PROTECTION OF BIODIVERSITY FROM THE PERSPECTIVE OF HUMAN RIGHTS AND HUMAN SECURITY

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Biodiversity, as the totality of genes, species, ecosystems and habitats on Earth, is significant not only for their numerousness and diversity but also for the interaction which makes the survival of all the systems possible. The preservation of biodiversity and natural resources has an impact not only on how human rights are exercised, but also on the preservation and protection of human security, strongly oriented to human beings as individuals and human population as a whole. Global environmental changes and subsequent changes in biodiversity pose real risks and threat to human rights and human security as they limit the access to basic needs and the ability to respect other species on the planet. Each of the five to fifty million animal and plant species and microorganisms that live side by side on Earth has its value and role in the great and complex network of interrelated species.

Goods and services of ecosystems, maintained by biodiversity, have an important role in supporting a whole range of economic, social and cultural rights, including the right to food, health, water and an adequate standard of living, as well as the freedom to engage in traditional cultural practices. The loss or erosion of biodiversity deteriorates the conditions necessary to exercise human rights, i.e. such conditions undermine the ability of human beings to exercise their rights. All living beings can be said to have a right to exist / a right to life and the very existence of plants and animals means that future generations have a right to expect adequate resources in a clean environment. The preservation of species diversity can be justified on account of its direct economic importance for people. If people preserve biological diversity of the planet Earth, they consequently conserve potential food varieties for the future since plants and animals fulfil the basic human need for food. On the other hand, the conservation of biological resources maintains the balance of ecosystems. All of this requires a clean environment, including water, air and soil and is a precondition for acceptable health conditions. The preservation and protection of biological sources enables people not only to exercise their rights to better nutrition, health, etc., but also to secure the continuation of life by providing oxygen, fresh water and other resources necessary for the long-term survival of the human race or the human species. The conservation and sustainable use of biodiversity are therefore essential to the preservation of the human species and future development. The 1994 Human Development Re-

port broadly defined human security as freedom from fear and freedom from want and presented its four essential characteristics (universality, people-centred nature, interdependence and early prevention) and seven key dimensions (economic security, food security, health security, environmental security, personal security, community security and political security). The examples presented in the UN Secretary General's Report (2014(A/68/685)) also indicate that human security has a central role as a universal framework for responding to a range of challenges and possibilities in the 21st century.

In the light of the above-mentioned facts, the aim of this paper is to present biodiversity and its key characteristics/features, as well as possible forms of its interaction with human rights and human security and the way it is reflected through the dimensions relating to political security, human needs security, the security of life and the communication of human population with other species and systems. In order to affirm the significance of interrelatedness of these concepts, all of which essentially defend life on Earth and the planet Earth itself, we will present key binding conventions, resolutions and reports that highlight the importance of sustainable solutions to be accepted by all. It is also important to point out long-term strategic plans and directions for the preservation of biodiversity that are closely related to the 2030 agenda for sustainable development and Aichi Biodiversity Targets and contribute to the 2050 vision of a world without the loss of biodiversity and the degradation of ecosystems, which can influence directly protection of human rights and human security.

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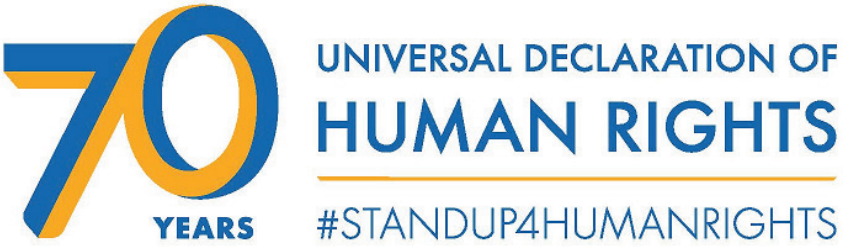

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