

## Book Review

Eric A. Posner, *The Twilight of Human Rights Law*  
(Oxford: Oxford University Press, 2014) 185 pages.

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Late in 2014, Egyptian officials appeared before the United Nation's Human Rights Council in Geneva to participate in a Periodic Review. This marked the first instance that Egypt had faced the Council's review mechanism since the captivating events in Tahrir Square had promised political transition towards democratic institutions and human rights protections. In its national report to the Council, Egypt framed this transition as wholly successful.<sup>2</sup> Much of the Council, however, disagreed.<sup>3</sup> During the review exchange, criticism of Egypt's human rights record was led by the American Ambassador who conveyed Washington's deep dismay with increased violations of free speech, the absence of due process and the continued use of excessive force against peaceful protestors.<sup>4</sup> The Egyptian Minister for Transitional Justice issued a defiant defence of his country's record, describing the new Egyptian constitution as "a true victory for human rights and freedoms" and noting that his government remained committed to upholding the international treaties it had signed.<sup>5</sup>

Months earlier, as waves of social unrest gripped the St. Louis suburb of Ferguson, Missouri following the police shooting of Michael Brown, the Egyptian Foreign Ministry issued a condemnation of events in the American Midwest. In response to US attempts to contain the growing protests, Egyptian

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<sup>2</sup> The Egyptian report noted that "Egypt is making serious progress on its democratic journey, completing the transitional phase and achieving economic and social stability while taking accounts of the rights and freedoms of Egyptians of which the most important is to live in safety, universally considered to be the most basic of human rights." See UNHRC, 20th Sess, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Egypt*, UN Doc A/HRC/WG.6/20/EGY/1 (22 July 2014) at para 9.

<sup>3</sup> For example, note the *Compilation* prepared by the UN High Commissioner for Human Rights which provides a comprehensive and lengthy list of necessary human rights reforms as expressed by the various human rights monitoring bodies. See UNHRC, 20th Sess, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Egypt*, UN Doc A/HRC/WG.6/20/EGY/2 (18 August 2014).

<sup>4</sup> Frank Jordans & Sarah El Deeb, "U.S. Slams Egypt's Human Rights Record at UN Meeting", *Associated Press* (5 November 2014).

<sup>5</sup> *Ibid.*

officials called on the Americans to abide by international standards.<sup>6</sup>

Such exchanges are unremarkable. The language of human rights is commonly placed at the forefront of state dialogue, prominently positioned within foreign policies and elevated to a status that demands compliance and espouses commitment. Yet violations continue to occur. The extent that these lofty declarations, however, are coupled with corresponding levels of sincerity to truly promote *rights as trumps* over alternative interests provides cause for reflection.

This apparent schism between human rights rhetoric and state policy caused Joseph Raz to remark that “[t]his is a good time for human rights. Not that they are respected more than in the past.”<sup>7</sup> Eric Posner’s new book, *The Twilight of Human Rights Law*, begins by endorsing this quote before moving to explain why human rights law has failed.<sup>8</sup> Posner, a law professor at the University of Chicago, is a known skeptic of international law whose past works on the subject applies a rationalist-realist orientation to questions of compliance.<sup>9</sup>

*The Twilight of Human Rights Law* follows this approach as Posner focuses in on international human rights law. In so doing, he sets himself two objectives. The first is to provide the reader with a general introduction to the subject of human rights law. The second, and more ambitious, is to develop the claim that human rights law has failed to accomplish its intentions and that human rights treaties do not improve well-being or increase respect for the rights they contain.<sup>10</sup> Given the significance attached to the concept of human rights in the second half of the twentieth century, Posner’s claims carry a heavy burden that is not always met. *The Twilight of Human Rights Law*, however, does succeed in accentuating core challenges facing the discipline. It articulates well the gap between proclamations and practices and tidily identifies the difficulties that emerge from the proliferation of rights. These are central challenges facing human rights that must be addressed if efforts to minimize this gap and strengthen compliance are to be successful.

Posner, however, does not think that they can be.

In setting out his account, Posner dedicates the first three chapters of the book to an overview of international human rights law. In chapter one, he offers a history, beginning with pre-War intellectual rights-based foundations before moving into post-War accounts of the UN system, Cold War influences

<sup>6</sup> “Ferguson unrest: Egypt urges US to show restraint”, *BBC News* (19 August 2014), online: <[www.bbc.com/news/world-us-canada-28855811](http://www.bbc.com/news/world-us-canada-28855811)>.

<sup>7</sup> Joseph Raz, “Human Rights without Foundations” in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321 at 321.

<sup>8</sup> Eric A Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014) at 1.

<sup>9</sup> See e.g. Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

<sup>10</sup> Posner, *supra* note 8 at 7–8.

and subsequent treaty proliferation. The second chapter engages with formal human rights structures, providing descriptions of the prominent treaty regimes, the various UN mechanisms and bodies and the European regional system. Having sketched the formal human rights system, Posner turns in chapter three to the question of why states enter into human rights treaties. He groups the world into liberal-democratic, authoritarian and transitional states. The reasons for entry, he concludes, differ amongst the groupings but are each largely interest-driven and spurred by the belief that the prominent treaty regimes are too weak to influence the acceding state's behaviour.<sup>11</sup>

As an introductory account of international human rights law, these chapters highlight several formative events and raise important questions that are indeed foundational considerations for any recent arrivals to the discipline. Out of necessity, perhaps, Posner's account of these historical developments, contemporary structures and necessary questions receive only rudimentary treatment. This strains Posner's claim that his introductory objectives stand-alone regardless of whether or not one accepts his substantive critiques.<sup>12</sup> Further, the book's substantive arguments clearly influence his selection of introductory content. This is most evident through the omission of alternative rights-based discourses that could provide contradictory, and perhaps less skeptical, accounts of why states enter such regimes that would surely illuminate any introductory reader's engagement with the topic.<sup>13</sup>

Posner, however, is perfectly clear about what the primary objective of his book is and the aforementioned chapters begin developing this critique. And most who read *The Twilight of Human Rights Law* will do so to engage with his assessments of the "efficacy and value of human rights law."<sup>14</sup> Throughout, as these are presented, Posner makes his most significant contributions: emphasizing the varied interests held by states and how readily these appear in conflict with their formal rights commitments; and, the extent to which rights proliferation has raised clear compliance challenges. The degree to which these, largely realist, observations succeed in substantiating Posner's overarching claim that "human rights law has failed to accomplish its objectives" is less certain.<sup>15</sup>

Posner builds this claim on the proposition that the failure of human rights is multifaceted but largely based on *rule naiveté*: "the view that the good in every country can be reduced to a set of rules that can then be impartially

<sup>11</sup> *Ibid* at 63.

<sup>12</sup> *Ibid* at 8.

<sup>13</sup> See e.g. Philip Alston & Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013) at 157–330; Frédéric Mégret, "Nature of Obligations" in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, eds, *International Human Rights Law*, 2nd ed (Oxford: Oxford University Press, 2014) 96; Harold Hongju Koh, "How is International Human Rights Law Enforced?" (1999) 74 *Ind LJ* 1397.

<sup>14</sup> Posner, *supra* note 8 at 8.

<sup>15</sup> *Ibid* at 7.

enforced.”<sup>16</sup> The resulting failure of human rights is thus substantiated by what can be classed as three broad themes – violations despite ratification; treaty ambiguity and vagueness; and the overexpansion of rights and conflicting values.

The first of these themes draws attention to well-known and prevalent human rights violations that continue to occur despite high-levels of treaty ratification. Of course, Posner is correct that such violations are widespread and may occur with alarming frequency amongst states that have ratified many or all of the principal international rights treaties. In demonstrating the pervasiveness of such violations, he appeals to statistical data. This is intended to validate the position that, empirically, treaties have failed to improve human rights protections.<sup>17</sup>

The empirical approach that Posner espouses should be welcomed, as national considerations, policy decisions, legal advocacy and reform, implementation efforts and the general study of human rights law would undoubtedly profit from an increased fact-based grounding. Ultimately though, Posner’s engagement with these methods feels selective and would benefit from further development and consideration. For example, a positive correlation between ratification of the *International Covenant on Civil and Political Rights*<sup>18</sup> and Freedom House’s political rights score is questioned. Posner suggests that the influence of alternative factors such as rising global wealth and increased trade has likely contributed to the observed improvements.<sup>19</sup> It is, of course, probable that several factors beyond ICCPR ratification itself would contribute to such an observed improvement just as economic growth following a bilateral trade agreement is based on various dynamics including a healthy manufacturing sector and sufficient infrastructure, and not the trade agreement alone. Posner allows such factors to go unaddressed and hastily dismisses the positive results.

Moving to engage with specific, individual rights-based data, Posner guides his reader towards evidence illustrating increased uses of torture by states that have ratified the UN’s *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>20</sup> Posner asserts that such evidence “should give pause to people who have assumed that the spread

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 72–78.

<sup>18</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

<sup>19</sup> Posner, *supra* note 8 at 73. Freedom House is an American-based non-governmental organization that, since 1972, has published comprehensive annual reports quantifying the levels of political and civil rights in virtually all states. For an overview of the methodology used by Freedom House in calculating their political rights scores, see Freedom House, “Freedom in the World 2015 – Methodology”, online: Freedom House <[www.freedomhouse.org/report/freedom-world-2015/methodology](http://www.freedomhouse.org/report/freedom-world-2015/methodology)>.

<sup>20</sup> Posner, *supra* note 8 at 74–75. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [CAT].

of human rights law has improved people's well-being by leading to real protection of their rights."<sup>21</sup> Without much explanatory justification, Posner glosses over supportive studies, attributing positive results to covariances or unidentifiable factors while claiming that the majority of data presents an overall picture that human rights treaties do not systematically improve rights-based outcomes.<sup>22</sup> Yet the implications of many of these studies that are referenced to support Posner's contention regarding the futility of human rights treaties, such as Oona Hathaway's, are far denser and more nuanced than Posner's conclusions suggest.<sup>23</sup> Treatment of contrasting studies that do suggest a positive influence of treaty regimes, like those of Beth Simmons and Yonatan Lupu, are quickly dismissed after only receiving minimal consideration.<sup>24</sup> In response Posner claims that such works, which quantitatively identify the positive influence of treaties, should not be understood as indicative of improved well-being "because it is unknown whether governments complied with treaty obligations by taking resources away from other projects that served the public interest or shifted resources from more visible to less visible means of repression."<sup>25</sup>

The notion of state resource allocation is closely linked to the final two themes that emerge in *The Twilight of Human Rights Law* – treaty ambiguity and vagueness, and the overexpansion of rights and conflicting values. Chapter two provides an example of how Posner presents the negative influence of the inherent ambiguity and vagueness found amongst many of the primary treaty provisions. Here, he focuses predominantly on positive rights contained

<sup>21</sup> Posner, *supra* note 8 at 76.

<sup>22</sup> *Ibid* at 76–77.

<sup>23</sup> Posner bases his view that human rights treaties do not improve human rights outcomes on what he suggests is the overall picture provided by the empirical work undertaken by various scholars. Among these, Oona Hathaway's 2002 study of human rights treaty compliance is the most significant. In this, Hathaway applies quantitative analysis to explore the influence of human rights treaties on state behaviour. She finds mixed results noting improved practices by states that have ratified but also widespread non-compliance. These divergent results are explained through an analysis of the dual instrumental and expressive nature of treaties. See Oona A Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) 111:8 Yale LJ 1935. For a critique of Hathaway's methodological approach, see Ryan Goodman & Derek Jinks, "Measuring the Effects of Human Rights Treaties" (2003) 14:1 Eur J Int Law 171.

<sup>24</sup> See Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009). Simmons' 2009 work engages various social science methods to provide a descriptive account of how human rights treaties influence state behaviour. By exploring various state motives and classifications, she found that most states do ratify treaties because they both believe in the content of the rights and in their ability or willingness to enforce these rights through domestic measures (*ibid* at 65).

See Yonatan Lupu, "The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects" (2013) 57:4 Am J Pol Sc 912. Lupu's work provides an intricate method-based approach to state compliance that highlights the importance of how states "self-select into treaties" (*ibid* at 912). His work shows that entry into the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) has significantly improved the rights contained within, yet ratification of CAT and ICCPR has failed to produce similar results.

<sup>25</sup> Posner, *supra* note 8 at 78.

within the *International Covenant on Economic, Social and Cultural Rights*.<sup>26</sup> Posner explores the right to work as codified in Articles 6 and 7 of the *ICESCR*.<sup>27</sup> Within these Articles, he identifies the terms “fair wage”, “decent living” and “reasonable limitation of working hours” as interpretative difficulties that render it near impossible for states to meet their prescribed requirements.<sup>28</sup> Many states, according to Posner, face economic realities that render these imprecise provisions un-actionable. High unemployment, he suggests, is an unavoidable consequence of social welfare programs.<sup>29</sup> Yet Articles 9 and 11 of the *ICESCR* require the provision of such programs and thus indirectly compromise the state’s ability to ensure the right to work as dictated under Article 6 of the *ICESCR*. Accordingly, Posner believes, it is difficult to ascertain whether a state has satisfied its inherently vague and ambiguous treaty provisions.<sup>30</sup> The result, it follows, is that treaties fail to create meaningful obligations.<sup>31</sup>

This becomes further exposed, according to Posner, by what he identifies as the overexpansion of rights and conflicting state values. He correctly identifies that formal human rights commitments have expanded greatly since the *ICCPR* and *ICESCR* opened for ratification and notes that today more than three hundred separate human rights exist.<sup>32</sup> Posner terms this phenomenon

<sup>26</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

<sup>27</sup> *Ibid.* Article 6 of the *ICESCR* reads:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 reads:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

- (a) remuneration which provides all workers, as a minimum, with:
  - (i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) safe and healthy working conditions;
- (c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

<sup>28</sup> Posner, *supra* note 8 at 34.

<sup>29</sup> *Ibid* at 34–35.

<sup>30</sup> *Ibid* at 33–35.

<sup>31</sup> *Ibid* at 86.

<sup>32</sup> Posner explains that the majority of these rights derive from the major international rights instruments and details these in the appendix. While there is some duplication of rights amongst the various international treaties (the *ICCPR* and *ICESCR* contain many of the rights formulated within the *Universal Declaration of*

the “hypertrophy of human rights”.<sup>33</sup> This creates a largely resource and value-driven reality in which states, overwhelmed and underequipped, must make tradeoffs as they cannot hope to satisfy the totality of the formal rights to which they are committed. This process inevitably becomes complicated, according to Posner, by fundamental disagreements about public good.<sup>34</sup> When pursuing efforts, for example, to reduce occurrences of torture, a state, limited in its resources and displaying varying priorities and interests, is often unable to dedicate the necessary resources to safeguard alternative rights like religious freedom or the right to education. Posner explains that satisfying a right like the prohibition of torture requires more than simply refraining from the prohibited activity. Adherence to negative rights also requires resources to provide training, monitoring and other means to ensure the rights are protected. Since states cannot satisfy all the obligations that have resulted from the overexpansion of rights they must make value-based judgments as to which rights they wish to prioritize.<sup>35</sup>

The resulting *rule naiveté* that accompanies this overexpansion does not capture the ways by which states render value and resource-based decisions, effectively undermining the efficacy of the entire human rights project. Posner accents this purported fallacy with reference to China and the “right to development.”<sup>36</sup> He suggests that the “right to development”, as presented by China, is effectively “a right *not* to comply with human rights norms that interfere with the ability of poor countries to grow economically and eliminate poverty.”<sup>37</sup> The inherently flawed human rights framework allows China to argue that political turmoil, and possibly civil war, would result from ICCPR adherence and such compliance would serve to advance poverty and stunt development efforts. Posner suggests that this argument is not without merit as evidenced by China’s impressive record of economic growth over the past three decades.<sup>38</sup>

*The Twilight of Human Rights Law* neatly captures many of the challenges facing the discipline. While the proliferation of rights has been welcomed by many, Posner succeeds in detailing the resource and ideologically-based challenges that often stem from this. Similarly, his focus on the inherently

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*Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71. These are often replicated in the various thematic instruments like the CAT), the proliferation of rights is clearly an observed phenomenon. See Posner, *supra* note 8 at 92, Appendix. For further discussion, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed (Ithaca: Cornell University Press, 2003) at 57–65, 127–55. See also Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Boulder, CO: Westview Press, 1999).

<sup>33</sup> Posner, *supra* note 8 at 91.

<sup>34</sup> *Ibid* at 92–93.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at 91.

<sup>37</sup> *Ibid* [emphasis in original].

<sup>38</sup> *Ibid*.

vague and ambiguous nature of many human rights provisions demonstrates well the means by which states often avail of interpretative techniques to skirt their formal commitments.

Though significant, these contributions would benefit from engagement with a broader framework. Treaty prescriptions are presented as the sole source of guidance towards state obligations. The plethora of soft law and authoritative sources that serve to develop and provide interpretative direction receive scant consideration.<sup>39</sup> Similarly, Posner's arguments about resource allocation serve to denote a very real challenge, but his bold claim that directing resources to ensure a right like the prohibition of torture directly results in the negation of other rights, or more seriously, facilitates violations like extrajudicial killings, desperately requires deeper substantiation or the focused empirical support he endorses elsewhere.<sup>40</sup>

Ultimately, *The Twilight of Human Rights Law* provides a necessary account of several of the inherent and external challenges that continue to obfuscate the progress of legally-focused rights-based efforts at both the national and international levels. Posner's depictions of the gap that remains between rhetoric and practice and the challenges that result from the proliferation of rights are notable. These are well-linked to his discussions concerning the vague and ambiguous nature of treaty provisions and the competing interests and values that so often drive state actions. These considerations cannot be ignored. However, the overall conclusion that Posner draws from these, that human rights law has failed to accomplish its objectives, appears hastily reached. The empirical support offered falls short of other such studies that appear to carry most of the evidentiary burden and heavy-lifting upon which Posner relies. The normative arguments, regarding treaty adherence and human rights violations, naturally situates amongst the wide range of literature concerning international law compliance. These assertions, however, lack the equivalent depth demonstrated by much of the critically-focused compliance pieces with which they share a common orientation and neglects engagement with the more theoretically supportive strands of this literature.<sup>41</sup>

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<sup>39</sup> One such possible source may include the General Comments of the UNHRC. These provide interpretative guidance for virtually all of the prominent rights contained within the ICCPR. See Henry J Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" in Philip Alston & James Crawford, eds, *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 15. The various UN treaty bodies also provide General Comments for interpretative purposes. See Helen Keller & Geir Ulfstein, eds, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012). Interpretative guidance also comes from, *inter alia*, the various decisions of international and regional courts and adjudicatory bodies, authoritative academic writings, and the observation of state practice.

<sup>40</sup> Posner, *supra* note 8 at 71–72, 89–90.

<sup>41</sup> For examples of both, see Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995); Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed (New York: Columbia University Press, 1979); Harold Hongju Koh, "Why Do Nations Obey International Law?" (1997) 106:8 Yale LJ 2599; Andrew T Guzman, "A Compliance-Based Theory of International Law"



*The Twilight of Human Rights Law*, however, does not present as a work of international legal theory. Instead, it is a critical commentary on the practice of human rights law and the limits Posner believes inherent to this. Accordingly, it is of greater interest to the practitioner who should engage with Posner's view that human rights law has failed in its objectives and that treaties do not improve well-being or increase respect for the rights they contain. This view, however, largely presupposes that treaties themselves are the culmination of the human rights project. Yet, much like how the interstate dialogue between Egyptian and American officials can be viewed as either the height of hypocrisy or a sign of progress within a much larger process, so too can the overarching objectives of human rights law and the role that treaties play within this. Jack Goldsmith's endorsement on the back of the book cover notes that Posner's work will infuriate the human rights community. It might, though it should not. Those within the human rights community are amongst the most aware of the hypocrisy, of the gaps between rhetoric and compliance, and of the continued violations. The real question raised by *The Twilight of Human Rights Law* is whether their efforts are, as Posner suggests, a flawed and incomplete conclusion of the human rights project or merely a stage within it.

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(2002) 90:6 Cal L Rev 1823; Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998); Kenneth N Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979); Kenneth W Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 Yale J Intl L 335 at 343-44; Robert O Keohane, "The Demand for International Regimes" (1982) 36:2 International Organization 325 at 335-36; Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 Eur J Intl L 503.