

SPECIAL REPORT

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KATHRYN AND SHELBY CULLOM DAVIS INSTITUTE FOR NATIONAL SECURITY AND FOREIGN POLICY

## About the Author

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This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The “First Principles of International Human Rights” essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

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This paper, in its entirety, can be found at <http://report.heritage.org/sr227>

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# How “Collective Human Rights” Undermine Individual Human Rights

*Aaron Rhodes*

**T***he human right to individual liberty rests on a moral and rational foundation that was understood in ancient times, with the realization that the laws of rulers and legislatures must conform to the laws of nature so as not to infringe on the freedoms that are essential to human nature. Human beings possess reason and moral agency—the capacity to make moral choices; this is what forms the core of humanity. True human rights are those that constrain governments from violating our inherent, natural right to liberty—the freedom to live and act in accordance with these central pillars of humanity’s common nature.*

To the degree that the individual right to liberty has been honored and respected, societies have flourished, and their members have had opportunities for human fulfillment. To the degree that they have been betrayed, restrictions on fundamental freedoms have resulted in tragic human suffering: violence, poverty, discrimination, the manipulation of truth and information, and lost opportunities to advance the welfare of individuals and societies.

At the end of World War II, the international human rights system was envisioned as a project to defend individual human rights. Yet, through ideologically driven revisionism, it has evolved to endorse a broadly expanded array of rights, including many that are profoundly inconsistent with the philosophical and moral foundations of the very concept of inherent, natural human rights. Today, internationally protected human rights include rights rooted in political movements, that obligate government not to respect freedoms, but to provide services, and corporate solidarity rights that are not individual rights at all.

One variant of the latter is the notion of “collective human rights.” Collective human rights show the contempt for intellectual integrity that

underlies much of contemporary human rights discourse and practice, and the failure of the international community as custodian of the idea of human rights itself. Since the establishment of the international human rights system over 70 years ago, and particularly in recent decades, more and more attention in the human rights community (including international institutions as well as civil society campaigns) has been devoted to collective and group rights, and international human rights legislation has focused on protecting the rights of specific categories of people with a tendency to collectivize them in a framework of group interests and entitlements.

Scholars and activists have sought to give assurance that such collective rights neither exclude, nor conflict with, individual human rights.<sup>1</sup> But they do. “A collective right is not a human right, but a right established by a state or community regarding a group.”<sup>2</sup> There are no specifically women’s human rights, gay human rights, indigenous peoples’ human rights, or disabled persons’ human rights, beyond those they share with all others. Collective or “group” human rights are an oxymoron because they are not rights of human beings.

This *Special Report* aims to provide a cursory review of the origins of the idea of collective human rights, and how these rights entered into international human rights law and “soft law.”<sup>3</sup> It enumerates the ways that collective human rights are a threat to individual human rights and how they drive human rights proliferation and inflation, how they dilute attention to basic freedoms, clutter and politicize the international human rights agenda, and how they impair—sometimes intentionally—efforts to identify and address violations of individual civil and political rights. Collective rights are fragmenting and divisive, corrosive of the vision of humanity as such—the moral vision that gives human rights their potential as an inclusive, international movement on behalf of all individuals, everywhere.

## Collective Human Rights in Context

Collective human rights are sometimes also called group rights, solidarity rights, or communitarian rights. A clear, consensus definition is not an option; there is hardly a fuzzier issue in international human rights—or one that has been subject to more technocratic casuistry—than the issue of collective human rights. It is perhaps easiest to identify the rights that preceded the assertion of collective human rights and use those examples to illustrate how collective rights are a departure from human rights as traditionally understood.

Civil and political rights, that is, inherent, individual rights to be free from state coercion, are “first-generation” rights. These basic human rights to various freedoms and liberty itself have been recognized in different ways and with varying degrees of clarity since ancient times, and became the basis for liberal democratic governments in the Enlightenment. They are rights that are protected in the U.S. Constitution’s Bill of Rights. The First Amendment prohibits the passage of laws that infringe on religious freedom, freedom of speech, the freedom of peaceful assembly, and the right to petition the government for redress of grievances. Such rights to freedom, or “negative liberties,” are also protected by international human rights legislation, in particular by the United Nations’ International Covenant on Civil and Political Rights (ICCPR). First-generation rights require government restraint, and few if any government expenditures (hence, “negative” liberties). They are rights that are seen as inherent and rooted in a natural, or God-given, order; that is, they are natural rights.

Economic, social, and cultural rights, or “second-generation” rights, differ fundamentally from the first-generation human right to basic freedoms in that they assert rights to positive state services. For example, the U.N.’s International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees citizens a wide range of social services, mandating legislation to provide, *inter alia*, social insurance, paid maternity leave, and the right to an “adequate standard of living.”<sup>4</sup>

Such positive rights from the state cost money to provide, and thus depend on the availability and redistribution of resources. They are not clearly inherent natural rights, but are rights granted by states on the basis of positive law, reflecting political preferences. They are arguably not universal human rights, but rights that derive from specific political traditions. Their presence in the system of international human rights establishes that for the purposes of international politics, human rights need not be natural rights; positive human rights have provided a moral and legal framework for human rights proliferation, and for the loss of human rights as a moral test of the legitimacy of regimes.

Collective human rights, as “third-generation” rights, are a further devolution from inherent human rights. Third-generation rights are both “corporate rights” belonging to individuals by virtue of their membership in groups, and collective rights of groups themselves. The distinction between these two forms of third-generation rights often becomes obscure in practice; here we discuss issues of concern with both, while focusing in particular on the latter—rights that are, strictly speaking, collective rights. Economic and social rights are enjoyed by whole societies,

and by different categories of people in different ways through implementing social policies that seek to protect well-being differentially, that is, through groups. They are often seen as collective rights, but economic and social rights can also be understood as individual human rights to minimum social standards and protections, that is, as an implementation of individual rights.

Collective human rights are the rights, not of individual human beings, but of groups *as* groups. The doctrine of collective rights holds that a person's rights that are dependent on the group cannot be honored unless the rights of the group as an entity are honored. Some collective rights are seen as universal, when the collectivity in question is the human species; such rights cannot be enjoyed individually unless they can be enjoyed universally. Rights like the "right to a sustainable environment" might make sense as rights to be free from harm from others, within the framework of tort law, for example. But this is not how they are framed in collective rights legislation and soft law, which is generally redistributionist in orientation. Other collective rights are human rights that are restricted to a defined set of people. They are thus rights that cannot be enjoyed by all; they are only available to individuals within a given community.

Proponents of collective rights argue that while the individual may have been the main subject of international human rights law, and individual rights its main object, the enjoyment of those rights requires some to devolve directly upon groups.<sup>5</sup> They hold that individual rights to basic freedoms are insufficient to protect members of groups from discrimination and exploitation on the basis of qualities they derive from such membership. Collective and group rights are considered necessary to individual psycho-social survival when individuals derive their very identity from such groups, for example, members of indigenous tribes. Some group rights are thus meant to preserve the cohesion of groups as such. They are "special measures to maintain and promote separate identities...[and]...allow for a lasting manifestation of difference."<sup>6</sup>

The idea of group rights raises the problem of priorities: Group or collective rights might be considered priorities in the sense that without them, various other human rights cannot be realized. This draws upon, but also contradicts, the U.N. doctrine that no human right is prior or superior to any other, and that all are equal, indivisible, and interdependent. If one believes that collective rights are indeed human rights, then one is bound to the conclusion that the enjoyment of individual freedoms depends on honoring collective and group rights.

## Collective Human Rights in Hard Law and Soft Law

The idea of collective human rights grew into human rights discourse and the modern human rights system from conceptual and legal kernels that predate it, kernels that have been eclipsed subsequently in international human rights “hard”<sup>7</sup> and “soft” law.

The League of Nations recognized various rights of minority collectivities in the context of political adjustments after World War I. Article 22 of the Covenant of the League of Nations referred to “peoples” of former colonies, and “the principle that the well-being and development of such peoples form a sacred trust of civilization.”<sup>8</sup> During the inter-war period and World War II, dangerous, and indeed lethal, interpretations of minority rights and collective rights were deployed. Expansionist ethno-nationalist regimes, mainly that of Nazi Germany, but also other entities, such as the fascist and anti-Semitic Ustasa regime in Croatia, defined collective legal *duties* of minorities in the framework of minority rights, resulting in group deprivation and exclusion, and the near extermination of Jewish minorities in the quest for racial purity. Protecting the rights of German minorities abroad provided a pretext for Nazi conquest and subjugation. Some have claimed that racist Nazi legislation based on an inversion of collective rights was inspired by America’s Jim Crow laws, which enforced racial segregation.<sup>9</sup>

When leaders of the Allied powers envisioned a post-war international system to protect human rights and ensure peace, they bore these negative experiences in mind. Respect for individual rights gained favor as a principle goal of the nascent United Nations Organization, in part due to the failure of the League of Nations to protect members of minorities, and the Nazis’ cruel exploitation of the principle of minority rights.<sup>10</sup> All the same, the U.N. Charter, in Article 1, stated that the “self-determination of peoples” was a primary principle for building peace, signaling a collective right.

The 1948 Universal Declaration of Human Rights, which is the framework of principles underpinning the modern international human rights system, made no explicit references to collective rights, and was faulted by some for prioritizing individual rights over collective rights. During deliberations over the Universal Declaration, for instance, the Soviet Union demanded inclusion of collective rights in the form of minority rights, but ultimately failed in the face of resistance from the United States and other nations.<sup>11</sup>

The Universal Declaration did, however, recognize economic, social, and cultural rights, which, as note, can often apply to specific groups only, can be seen as collective rights, and which included principles that enabled the development of collective rights as the human rights system evolved. The



Universal Declaration recognized the rights of families and the “will of the people” as what legitimates governments (Article 16). The document stated in Article 28 that “everyone is entitled to a social and international order in which the rights set out in the Declaration can be fully realized.” The Universal Declaration thus suggested that humanity has the characteristics of a single entity or collectivity. How is such a right, owed to the human species as such, to be claimed? Who or what is the duty holder?

The Universal Declaration embedded a form of utopianism into human rights discourse and practice, and gave space for the legitimation of collectivistic globalism and ideologies like “one world socialism” that have led to grave violations of individual freedom, and have undermined the U.N.’s own core principle of national sovereignty.

Third-generation rights have typically been promoted by governments and groups from the third world, or what is now more commonly known as the “global South,” beginning in the context of de-colonization and increasingly during a period of profound revisionism in human rights that began in the 1980s. Agitation for such rights continues today, often as a political or ideological weapon against systems defending individual rights, against capitalism and free markets, against the putatively discriminatory character of efforts to defend traditional sexual and family mores, and to shield some religions and religious groups from criticism. Although collective and group rights are increasingly embedded in the international *human rights* system, the intrinsic contradiction between universal human rights and collective rights is finessed in diplomatic and human rights jargon by dropping the word “human,” so the term of art is “collective rights,” not “collective human rights.” Collective rights, as such, can be coherent in the sense of rights that are established by groups for their members, but those something altogether different from *human rights*.

**Collective Rights in U.N. Human Rights Treaties.** Following the devastation of World War II and the Holocaust, the international community sought to address tragic and urgent threats to members of minorities and refugees within the matrix of human rights. The Convention on the Prevention and Punishment of the Crime of Genocide is considered the first piece of international human rights legislation, promulgated in 1948, before the U.N. Third Committee and the Human Rights Commission began to debate how to codify the principles in the Universal Declaration. The Genocide Convention specifically banned violence that targeted a national, ethnic, racial, or religious group for destruction, and thus suggested that “membership of a minority community entails distinct human rights.”<sup>12</sup> It was an inversion of exterminationist Nazi law and practice, seeking to protect groups targeted as groups.

The 1951 Convention on the Status of Refugees is another early human rights treaty targeting specific groups: asylum seekers and refugees—those who have a “well founded” basis to fear persecution based on their race, religion, nationality, membership of a particular social group, or political opinion. The right to asylum, however, is clearly an individual right: Article 14(1) of the Universal Declaration states, “Everyone has the right to seek and enjoy in other countries asylum from persecution.” In order to be declared a refugee under the terms of the Convention on the Status of Refugees, an individual must show personal persecution, not persecution of a group.

The main international human rights treaties, namely, the ICCPR and the ICESCR, share a common Article 1 on the “right of *peoples* to self-determination.” (Emphasis added.) Self-determination was thus seen as a collective right, a right of peoples or nations; if the article had referred to people, singular, or persons, it would have affirmed the right of individuals to choose their form of government, to make their own laws, indeed, to liberty and the pursuit of happiness. Instead, it suggests the collective will of a putatively homogeneous community, and all the dangers of majoritarian rule that go with it.

Article 27 of the ICCPR states, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This statement does *not* assert a collective right of any group, but individual rights of members of groups. It is the same with the non-binding 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.<sup>13</sup>

The African Charter on Human and Peoples’ Rights,<sup>14</sup> which came into effect in 1986 under the auspices of the Organization of African Unity (later the African Union), recognizes collective rights more than any other human rights treaty. The document states that “peoples” have the rights to equality (Article 19), self-determination (Article 20), their natural resources (Article 21), development (Article 22), peace and security (Article 23), and a “generally satisfactory environment” (Article 24). In fact, Chapter I concerns “Human and People’s Rights,” suggesting that the two are not the same.

Of the nine major international human rights treaties (other than the genocide and refugee conventions), four address specific groups: women, children, migrant workers, and the disabled. These treaties conceive of human rights along identity lines; both “corporatist” and “collectivist” impulses may be found in each. The treaties tend heavily toward mandating state group entitlements deemed necessary to the enjoyment of human rights, and some have established new human rights altogether.

The Convention on the Rights of the Child has 196 state parties—more than any other U.N. human rights treaty. The treaty deals with numerous serious threats to children, yet puts the state in the role of making decisions about the moral education of children. Dealing with children as a group, it has spawned assertions of additional collective rights of various classes of children, especially indigenous children,<sup>15</sup> and suggestions of special human rights of indigenous children with disabilities.<sup>16</sup>

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which the U.N. General Assembly adopted in 1990, defines a migrant worker as “a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>17</sup> Migrant workers are often abused by employers, sometimes with complicity by state actors, such as with workers from Pakistan and elsewhere in the United Arab Emirates and other Persian Gulf states. The numerous articles affirm that migrant workers cannot be denied their human rights under other existing U.N. and International Labor Organization treaties. However, the treaty neither creates new rights, nor suggests that migrant workers are a collectivity with human rights.

The U.S. government supported the creation of the Convention on the Rights of Persons with Disabilities (CRPD) “not to create new rights but to ensure that *existing* human rights were made *equally* effective for persons with disabilities.”<sup>18</sup> But legal scholar Andrea Broderick of Maastricht University in the Netherlands has argued that “the enactment of accessibility obligations for States Parties, falling indirectly on the private sector, results in some form of *sui generis* ‘entitlement’ for persons with disabilities, which can arguably be viewed as amounting to a corresponding new human right—the right to accessibility.” She states that

there is no sound legal basis for a separate human right to access and that, even if there were, the accessibility obligations in the CRPD go far beyond any potential “right to access” that could be read into existing international human rights law, both in terms of their scope and content. Article 9 CRPD not only imposes widespread positive obligations on States Parties, but it also requires the private sector to take into account accessibility considerations.<sup>19</sup>

The Charter of the United Nations enshrined nondiscrimination as a legal principle. The International Convention to End Racial Discrimination (ICERD) defines racial discrimination as any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin.<sup>20</sup> The treaty endorses discriminatory quotas that favor one group

over another with the aim of rectifying past inequality and discrimination,<sup>21</sup> but does not explicitly focus on collective rights of any particular racial group.

The Convention to Eliminate Discrimination Against Women (CEDAW), which came into force in 1981, deals exclusively with discrimination against women and does not oppose discrimination against men when promoting more opportunities for women. Like ICERD, it legitimates discriminatory quotas, such as one enshrined in German law in 2015, that imposes a minimum of 30 percent female membership on the boards of large corporations. The campaign to ensure that women can enjoy basic human rights is an ongoing challenge, and legal and societal discrimination against women, especially in Islamic theocracies, is the most widespread form of discrimination in the world. But do women constitute a “group” with rights of its own? Mainstream human rights scholar Jack Donnelly argues that there is no “collective agency for a diverse group that constitutes half of humanity.”<sup>22</sup>

Yet, especially following the 1993 World Conference on Human Rights in Vienna, feminist activists and officials have disregarded the principle that women have human rights as individuals, and have sought to collectivize women’s rights. Feminism thus put its stamp on human rights, and proponents went further, reflecting an effort to change the very idea and practice of human rights, international law, and society itself. The aim, for the most ambitious members of the movement, was to renegotiate the universal human rights framework in light of women’s experiences in particular cultures and class backgrounds.

Women’s rights activists claimed that “all human rights instruments in fact assume men to be the bearers of basic rights.”<sup>23</sup> The assertion gave license to abandon the principle of gender neutrality altogether. The idea of universality was deemed a fraud, even a conspiracy, to favor generally white men and the patriarchal social order, and was now obsolete. Instead, human rights treaties should focus on a specific group, not individuals. The Vienna conference rightly focused on members of a number of groups who were vulnerable, including members of “national or ethnic, religious and linguistic minorities,” indigenous peoples, migrant workers, children, and the disabled, in addition to women. However, it promoted the notion that abused and vulnerable individuals should be protected *as members of groups*—that groups themselves would be the focus of human rights.

Thus, over the course of decades, the very notion of equal, individual human rights was upended. Human rights advocates now see major treaties defining human rights as flawed because they were not drafted from the point of view of victims, but supposedly from the perspective of privileged

classes of people. The idea of protecting individual rights came to be associated with discrimination, individualism, and reactionary resistance to expanding respect for the rights of women and minorities. New treaties were needed to rectify historical injustices and challenge the transcendent vision of universal human rights, in favor of a divisive emphasis on group rights and identity politics.

**Soft Law on Collective Human Rights.** Collective human rights thus occupy a significant, if duplicative and often-ambiguous, position in legally binding international human rights law. But the growing influence of these so-called rights also flows through soft law, in the form of quasi-legal U.N. resolutions and declarations and the assertions of U.N. human rights mandate holders, ad hoc groupings of state representatives, and academic experts that have identified, expanded, and promoted collective human rights.

Soft law is easier to create than hard law because it is not legally binding. Yet there is a distinct tendency for soft law to morph into hard law. Given the wide and differentiated range of sources and topics, there is no comprehensive list of collective and group rights that have been proclaimed in soft law. However, it is unquestionably a growth industry. As noted by U.S. Secretary of State Michael Pompeo,<sup>24</sup> claims of "rights" have exploded; indeed, human rights proliferation is watering down and diluting focus on protecting basic liberties. The scope of this expansion is staggering. The Freedom Rights Project, a research initiative co-founded by this author,

counted a full 64 human-rights-related agreements under the auspices of the United Nations and the Council of Europe. A member state of both of these organizations that has ratified all these agreements would have to comply with 1,377 human rights provisions (although some of these may be technical rather than substantive).<sup>25</sup>

Cursory accounts follow of several prominent examples of collective rights that originated as soft law and have gained legal currency:

*The Right to Development* is among the most influential elements of soft law asserting collective rights. Established by a U.N. General Assembly Resolution in 1986,<sup>26</sup> on which the United States cast the only dissenting vote, the Right to Development is a hybrid, involving both "the human person," as well as states and peoples, as subjects. Yet the main thrust of this highly influential concept has always been to strengthen the sense of obligation on the part of wealthy states to assist poor, third-world countries financially, and, thereby, provide the economic conditions under which they

could honor civil and political human rights. The Right to Development is perhaps best seen as a cynical play justifying a redistributive political and economic agenda in terms of human rights. It has also been a powerful platform for proclaiming the “indivisibility” of human rights, as seen for example in the 2017 Chinese-government-inspired “Beijing Declaration” of the South–South Human Rights Forum, which declared that “[h]uman rights are the unity of individual rights and collective rights.”<sup>27</sup> From this perspective, individual freedom cannot exist, and cannot be honored by governments, if collective economic and social entitlements are not sufficient—which amounts to a form of international blackmail playing upon the West’s attachment to individual rights and freedoms. Third-world states have essentially held respect for human and civil rights hostage with the notion that without more financial assistance to provide for economic and social rights, those rights cannot be enjoyed.<sup>28</sup>

*Environmental Rights* are collective rights that “affect everyone everywhere”—in other words, they are of the form of collective human rights for which the subject of rights is the human race as a whole. It has an important foundation in the 1972 Declaration of the United Nations Conference on the Human Environment,<sup>29</sup> also known as the Stockholm Declaration, which is considered a part of international environmental law recognizing the right to a healthy environment. In Principle 1 of the declaration, the signatories established that everyone “has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” Principle 7 asserts, “States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.”

Environmental rights typically obligate governments to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment, prevent third parties, such as corporations, from interfering in any way with the enjoyment of the right to a healthy environment, and adopt the necessary measures to achieve the full realization of the right to a healthy environment. Similar language also has been applied to the right to health and other all-encompassing collective rights.

Recently, the Office of the U.N. High Commissioner for Human Rights has focused on climate change as a human rights issue. At the opening of the Human Rights Council session in September 2019, High Commissioner for Human Rights Michelle Bachelet stated, “The world has never seen a threat to human rights of this scope.”<sup>30</sup> A “human rights based” approach to combating climate change suggests that U.N. human rights officials need



to set and control a wide range of national economic policies in order to ensure that legal human rights obligations are met. Some have charged that promotion of environmental rights in the face of climate change<sup>31</sup> can be a justification and smoke screen for campaigns to end capitalism and to promote revolutionary economic ideologies that threaten property rights and individual freedom.

*Indigenous Peoples' Rights* are based on the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A large proportion of the rights set out in the declaration are collective rights. It begins by asserting: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." The declaration also includes, in Articles 3, 5, 8, 10, and 11, the rights of indigenous peoples to self-determination to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions," to protect their culture from destruction, not to be forcibly removed from their lands and territories, and to practice and revitalize their cultural traditions and customs. "In UN parlance, the Declaration is a 'human rights instrument' and commentators commonly conceive the rights it enunciates as human rights."<sup>32</sup>

*"Defamation of Religion" Rights.* Persistent efforts by the Organization for Islamic Cooperation (OIC) to ban the "defamation of religion" amount to claiming a collective human right based on religion—that a religion, not an individual, can be slandered or defamed. The U.N. Human Rights Council adopted 16 resolutions with the support of Islamic states that essentially demanded protection of Islam from criticism, which proponents call "Islamophobic." A U.S. ambassador to the Human Rights Council, Eileen Donahue, said the concept of "defamation of religion" was "used to justify censorship, criminalization, and in some cases violent assaults and deaths of political, racial, and religious minorities around the world."<sup>33</sup>

*Sexual Orientation and Gender Identity (SOGI) Rights.* A current top preoccupation of numerous U.N. and other officials and activists is the establishment of collective human rights based on membership in sexual identity groups. The movement is guided by the Yogyakarta Principles, which are ostensibly a "set of new principles on international human rights law relating to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC)—released...by a group of 33 international human rights experts—[that] charts a way forward for both the United Nations, governments, and other stakeholders to re-affirm their commitment to universal human rights."<sup>34</sup> SOGI is not included in any international

human rights treaty. But U.N. member state delegations and the U.N. High Commissioner for Human Rights—in its compilation of “United Nations information on the State under review” and “summary of information submitted by other stakeholders”<sup>35</sup>—regularly call for SOGI group rights during Universal Periodic Review exercises.<sup>36</sup>

Numerous other U.N. initiatives and resolutions declare collective human rights.<sup>37</sup> In 2012, the U.N. Human Rights Council began a process to establish a “right to peace.”<sup>38</sup> The motion passed with the support of such states as China, Cuba, Libya, the Russian Federation, and Saudi Arabia, states for whom “peace” meant acceptance of state authorities, by their own citizens and by other states. The United States was the only country voting against the motion, while European countries abstained. In 2014, the independent expert on Human Rights and International Solidarity, a mandate created in 2005, presented a draft U.N. resolution claiming, “The right to international solidarity is a fundamental human right enjoyed by everyone on the basis of equality and nondiscrimination.”<sup>39</sup> The main thrust of the draft resolution is the obligation of wealthy states to provide financial assistance to poorer countries in order to help them honor economic and social rights. Such assistance has always been a key component of the “right to development.”

The U.N. General Assembly proclaimed a “human right to clean drinking water and sanitation,” and called upon states and international organizations

to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.<sup>40</sup>

American officials objected, stating that no such right existed under international human rights law. A review of the relevant legal instruments, they said, “demonstrates that there is no internationally agreed ‘right to water.’ Neither the Universal Declaration of Human Rights (UDHR) nor the International Covenant on Economic, Social, and Cultural Rights (ICESCR) mentions water at all.”<sup>41</sup> Other collective human rights that are generally redistributionist routinely mushroom up from within international bodies, for example, the “right to sanitation”<sup>42</sup> and the “right to the city.”<sup>43</sup>

**New Collective Human Rights Treaties in the U.N. Pipeline.** With the assertion of a broad array of collective rights in “soft law,” international officials and human rights activists are hard at work pressing for additional legally binding human rights instruments. For instance, United Nations



human rights officials, lawyers' groups including the American Bar Association (ABA), nongovernmental organizations, and influential governments have been promoting a "U.N. Convention on the Rights of Older Persons." Argentina, Chile, and other Latin American and African countries spearheaded the proposal.

The proposed convention would institutionalize services to the elderly not as government policies, but as rights guaranteed by international law. According to its proponents, the rights of older persons are "invisible under international law" because they are not "recognized explicitly." Proponents say that universal human rights protections afforded by the main U.N. conventions on civil, political, social, economic, and cultural rights have not protected the aging from discrimination, exploitation, and deprivation. At a strategy meeting to promote advocacy for a convention, sponsored by the ABA, a top Argentine diplomat argued that the main rights treaties came into force at a time (in the 1970s) when people only "thought about white males."<sup>44</sup> Universal human rights protected all "in theory," but additional treaties were needed to protect children, women, racial minorities, indigenous people, migrants, those with disabilities, and now, the aging. U.N. human rights officials took the position that the lack of a dedicated human rights protection system for the elderly was an affront to the rule of law; older persons are victims, and international law is the most effective way to make changes in societies. The "progressive development of international law" is thus a worthwhile investment as "states turn to the U.N. to solve problems more cheaply."<sup>45</sup>

Nongovernmental activists argue that "mainstreaming" the rights of older people through a new treaty and applying a "rights-based" approach to social services will raise the profile of the issue and force states to assign resources and create institutions to comply with legal obligations. The project of advocacy for a treaty has become a guidebook for civil society groups that want a U.N. treaty dealing with their own area of work. It is also a strategy to generate funding streams and lock them in with binding legal obligations.

The U.N. General Assembly gave a major boost to the creation of a new treaty by establishing the Open-Ended Working Group on Ageing to "consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures."<sup>46</sup> The working group, open to input from civil society, institutionalizes the treaty-making process, making it virtually inevitable. A communication from the working group states: "Existing instruments and

mechanisms do not appear to provide sufficient specificity about quality and accessibility of health and long-term care for older persons.”<sup>47</sup>

Addressing the U.N. Social Forum in 2014, the High Commissioner for Human Rights gave unqualified support for a new treaty, saying, “We have found that articulation of dedicated instruments laying [out] the specific rights of certain groups can be of invaluable assistance in focusing world attention—and action—on key groups at risk.”<sup>48</sup> The rights of older persons have been included in the agenda of the Human Rights Council, which has appointed an “Independent Expert on the enjoyment of all human rights by older persons” to report regularly on the issue.<sup>49</sup>

Some resistance to this initiative has reportedly come from the United States, the European Union, China, and other powerful states who argue that existing international law already protects the rights of older people.<sup>50</sup> But democratic states fear conflict with “like-minded” allies and political backlash from their large aging populations. European human rights officials wanted to oppose the treaty, but did not know how without placing themselves in political jeopardy. A confidential memorandum from the EU’s Human Rights Working Group (COHOM) in July 2013 referred to a growing lobby, especially in Latin America, for a convention on the rights of the elderly:

The EU and many others are opposed to a new convention, as they say that all rights are already covered in existing treaties and are wary of the creation of a new treaty architecture, reporting, treaty body etc. However, the OHCHR [Office of the High Commissioner for Human Rights] has also come out clearly in favour of a new convention. The EU is still looking at other options...but ultimately the lobby for a new convention might be too strong.<sup>51</sup>

Without guidance from clear principles, there is apparently no way to resist the proliferation of collective human rights treaties.

In another example, nongovernmental organizations are pressing governments to consider a global treaty protecting the human rights of peasants. The campaign is led by La Via Campesina, an alliance of more than 140 peasant organizations from 69 countries claiming to represent more than 200 million peasants. Other nongovernmental organizations have also joined the effort. The campaign for a human rights convention on peasants’ rights is seen as emblematic of “new rights advocacy,” that is, the expansion of human rights claims since the 1993 World Conference. La Via Campesina represents a movement to “challenge the hegemonic ideology of neoliberalism in global economics,” according to a sympathetic observer.<sup>52</sup>

The Human Rights Council and the General Assembly both invited La Via Campesina to give its views on how the 2008 food crisis could be remedied. In September 2012, the Human Rights Council adopted a resolution on the “Promotion of the human rights of peasants and other people working in rural areas.”<sup>53</sup> Sponsored by Bolivia, Cuba, and South Africa, the council adopted the resolution with 23 votes in favor, 15 abstentions, and nine votes against, including European states and the United States.<sup>54</sup> The resolution led to the creation of yet another open-ended intergovernmental working group with the mandate of negotiating a draft U.N. Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>55</sup> Negotiations started in July 2013.

In December 2018, the General Assembly approved the Declaration on the Rights of Peasants and Other People Working in Rural Areas, with 121 voting in favor, eight opposed, and 54 abstentions.<sup>56</sup> A campaign for another collective human right initiated by a highly partisan civil society formation thus resulted in a U.N. resolution that will likely lead to a legally binding international human rights treaty.

**U.N. Human Rights Council Mandates on Collective and Group Rights.** The U.N. Human Rights Council has 56 mandates, or special procedures, through which the body monitors human rights concerns. Only 12 of these focus on examining human rights abuses committed by specific countries.<sup>57</sup> In recent years, the council has approved more and more “thematic mandates.” Currently, there are 44 thematic mandates<sup>58</sup>—nearly four times the number of country mandates—that consume the bulk of council time and resources dedicated to its special procedures.<sup>59</sup> In general, newer mandates focus on either a collective rights issue or issues that are political in nature rather than directly with human rights and freedoms. Examples of mandates dealing with specific groups include people of African descent, persons with albinism, migrants, people with leprosy, and older persons. Others deal with rights to housing, development, and the right to a “safe, clean, healthy and sustainable environment.”<sup>60</sup> Research has shown that support by U.N. members for collective rights and overtly political mandates has come from unfree states, while free, democratic states have generally resisted politicized and collective rights mandates.

## The Threat to Authentic Human Rights Posed by Collective Human Rights

The notion of a group as the *subject* of human rights is inconsistent with principles that have informed our civilization’s most central scientific and humanistic traditions. In his *Nichomachean Ethics*, Aristotle showed that

to understand what is good for man and for communities, one needs first to understand the individual person and what is good for that individual. He stressed the ability of individuals to think and act independently; that their character is not determined by any group, not even the most basic primary group in society, the family.

Individuals are objectively the basic unit of human life everywhere, so one needs to begin with the individual in seeking answers to ethical and political questions about freedom, authority, moral responsibility, and the obligations and limits of governments, in other words, questions about human rights. Individuals are a universal and irreducible human reality; there is nothing less than an individual. Social formations are not universal; some would say they are artificial, and all would agree they are transitory. Families are defined in various ways in different societies and cultures; so are racial, ethnic, tribal, national, religious, and other communities. Members of specific age cohorts do not have the same rights everywhere. Sex or “gender” is more and more the source of category disputes, with individuals and movements challenging science-based categories as well as social traditions. Categorical identities become more fluid and irrelevant to dignity and rights. What is more, while human rights are a moral principle that remains valid through the vicissitudes of history, the relevance of groups changes over time.

Because group identity is arbitrary, culturally specific, and time-bound, the priority of *individual* human rights makes rational sense. And while collective or group rights may be coherent if understood as rights established by groups themselves that apply to members, all groups are in fact heterogeneous. Ambitious individuals typically seek to leverage the political and economic power of others on the basis of their putative group membership. Groups themselves need scrutiny: Are they voluntary? Are they democratic, or coercive? Do members actually share the beliefs and principles as claimed by those who act on their behalf?

The scholarly human rights literature has lucidly established that collective human rights are not authentic human rights, but what needs more emphasis is how the idea and implementation of collective rights threatens respect for individual human rights. The concept and proliferation of collective human rights have been widely criticized by a number of respected human rights scholars, such as Jack Donnelly, James Griffin, James Nickel, and Wiktor Osiatyński, all of whom have clarified that human rights are only the rights of individuals.<sup>61</sup> They have expressed deep skepticism about how groups supposedly holding human rights should be identified, what kind of rights they should have, and who should exercise collective rights.

Collective human rights threaten the idea, and enjoyment, of human rights insofar as they empower assertions that the rights of a group, or the state itself, can be of higher value than the rights of the individual. In fact, the recent tendency to claim that nonhuman entities enjoy human rights, such as animals and inanimate entities (the Earth and rivers, for instance) may be yet a further devolution of the notion that started with the claim that human rights need not be the rights of individual humans.

The concept of universal, individual human rights, based in nature, is a unifying idea with deep roots in world religions and philosophical traditions. In the Judeo-Christian tradition, it stems from ethical monotheism: If all are members of the same family of mankind, sharing common ancestors, and all beholden to one, all-encompassing deity, all are morally equal, and owe to one another, the respect due to an equal. The Bible teaches to love the stranger and to see others not as members of tribes, clans, or nations, or other families, but as fellow human beings.<sup>62</sup> The idea of humanity, of a common human nature, is not a given in human history, but is rather a revolutionary and emancipative idea, and a continuing moral challenge to societies and institutions. Despite all of its problems and failures, the international human rights system, insofar as it concerns individual human rights and freedoms, has helped to mobilize support for people in oppressive societies and societies that have embraced the concept of collective, as opposed to individual, rights. As an institutional manifestation of universal individual rights, it has offered a bridge between people from diverse societies.

The idea of collective human rights is a step backwards, toward social life rife with ascriptive divisions, that is, differences that are based not on achievement or virtue, but on race, sex, and class. It undermines the vision of universality and the dignity of the morally responsible individual as the subject of human rights. The late Sir Roger Scruton observed that while individual rights compel states, and other people, to respect individuals as having sovereignty over their lives,

the new ideas of human rights, allow rights to one group that they deny to another: you have rights...which you can claim only as a member of that group. To think in this way is to resurrect the abuses to which John Locke and others were in search of a remedy—the abuses which led to people being arbitrarily discriminated against, on account of their class, race or occupation.<sup>63</sup>

Collective human rights provide moral legitimacy and a quasi-legal foundation for the identity politics that are dividing Western societies,

promoting a culture of irresponsibility and victimization. Indeed, with the emphasis on collective human rights, international human rights practice, both in civil society and in U.N. and other multinational bodies, has increasingly embraced “intersectionality,” or the need to “acknowledge the ways in which multiple identity strands interact to produce a specific experience at the intersection of numerous heads of discrimination.”<sup>64</sup>

Identity politics is also destructive of democratic processes. According to Peter Berkowitz,

Identity politics represents the latest assault to emanate from our colleges and universities on the principles and practices of liberal democracy. It directs students to think of themselves as members of a race, class, or gender first and primarily, and then to define their virtue in terms of the degree of oppression that they believe the group with which they identify has suffered. It demotes the individual rights shared equally by all that undergird American constitutional government, while distributing group rights based on its self-proclaimed hierarchy of grievances.<sup>65</sup>

Another analyst, Addison Del Mastro, attributed the rise of identity politics and decaying respect for individual rights and democracy specifically to the proliferation of collective human rights:

[T]he all-encompassing human-rights discourse, if truly implemented and practiced as all the UN documents and treaties say it should be, obliterates the frame of politics itself. It replaces open discussion, disagreement, and compromise with a rights-based frame in which all disagreement and compromise is an unacceptable denial of rights. In essence, a rights-based discourse turns all politics into identity politics.<sup>66</sup>

Indeed, we see in the proliferation of collective human rights a form of human rights neocorporatism, a structured system of interest-group politics that even suggests the collective rights politics of the Soviet Union. Leading U.N. officials openly claim that the goal of the international human rights system is “substantive equality.”<sup>67</sup>

According to legal philosopher Roger Pilon, the modern human rights system, in emphasizing positive state actions as opposed to freedom from state coercion, is “socialist to its core.” Given that the Soviet Union sought to establish collective rights in the Universal Declaration of Human Rights, the proliferation of collective rights represents a postmortem victory for Soviet ideology. Indeed, the proliferation of collective rights is not merely



an academic problem, it is a problem for the future of freedom. The proliferation of collective human rights reflects rational-actor behavior on the part of interest groups and identity-politics campaigners, who see in the contemporary elastic concept of human rights opportunities to endow their causes with the moral prestige and legally coercive power of human rights and create opportunities for influence and funding.

As observed by Clifford Bob, a proponent of more human rights, "If aggrieved groups can portray their causes as human rights issues, they may be able to tap organizations, personnel, funding, and other strategic resources now available at the international level."<sup>68</sup> Both international officials and human rights lawyers support this agenda because they see it as addressing human rights problems and offering expanded human rights structures and more professional opportunities in expanded international human rights. Civil society has been a primary driver of the process. The human rights movement has often set aside principles and "adopted" new collective rights for "strategic" reasons, whether to broaden constituencies and funding bases, pander to groups insisting that their grievances are human rights violations, expand coalitions, or other reasons. A progressive *realpolitik* holds that human rights are a tool for achieving political objectives, based on a "realistic appraisal of rights claims and rights law as politics."<sup>69</sup>

Undemocratic states also support the proliferation of collective rights to further weaken the leverage that international law and political pressure pose to their own oppressive policies against individual freedom. Promoting collective human rights inflation is a tactic to violate human rights with impunity. In 2018, the European Parliament's Directorate-General for External Policies examined how the "expansion of the concept of human rights impacts on human rights promotion and protection." The consultation resulted in the conclusion that "attempts to develop new rights or to change the nature of human rights has [sic] caused the system to be diluted and is undermining the protection of fundamental rights."<sup>70</sup> Some actors, the study found, have sought to use human rights mechanisms to address issues that go beyond the scope of human rights.

The EU Parliament study found that, in particular, collective rights, such as the "right to development," are tools promoted and used by undemocratic states "seeking to undermine human rights through expansion [with] several goals: UN agenda cluttering, resource absorption, weakening of human rights scrutiny or accountability mechanisms, diversion of attention from existing human rights or from their own abuse."<sup>71</sup> The conclusion is consistent with the development of increasing numbers of U.N. Human Rights

Council mandates dealing with collective human rights, as noted above. With more and more mandates approved for more groups, more human needs, and more ideological and political conflicts, the relative amount of attention to freedom from torture, freedom of association, freedom of religion, and freedom of expression—freedoms that allow citizens to address all of their social problems—is restricted.

Indeed, there is a strong overlap between the main abusers of freedom of religion and other fundamental individual rights, and states that promote collective rights. Oppressive states fear the idea of human rights as individual rights; they seek to undermine the concept of individual rights and crowd it out of the international human rights system through human rights inflation and dilution. Promoting collective human rights is a divide and conquer strategy, domestically and internationally, and corrodes what is the most powerful intellectual and spiritual principle for protecting individual rights: the ideal of universal human brotherhood founded on our common human right, as individuals, to liberty.

## **Saving Human Rights from the Collective Rights Agenda**

Liberal democracies, the United States foremost among them, need to oppose the idea and proliferation of collective human rights if they are to renew understanding of the principle of individual freedom and to promote authentic human rights abroad. The nefarious political agenda behind the proliferation of collective rights is symptomatic of a broad malaise affecting the field of international human rights. Both collective rights and ideologically driven economic and social rights have come to dominate international human rights discourse to the detriment of focus and discourse on individual liberty and fundamental freedoms. More and more problems are labeled human rights problems, and there are more and more human rights standards, treaties, “high-level” international human rights officials, international mechanisms, and courts, all of which are good business for academics, lawyers, and the mainline human rights community, that is, generally well-intentioned people seeking solutions to important problems.

However, in the face of ongoing, politicized, and largely technocratic expansion of international human rights ideas, legislation, and institutions, respect for individual freedom is declining dangerously around the world. Over decades of human rights revisionism, authoritarian states that fear individual rights have developed a seductive human rights ideology, human rights without freedom that conflate human rights with



redistributive social policy, justify repression, and push the struggle to protect basic freedoms off the international agenda. Governments increasingly encroach upon religious freedom and freedom of speech, the freedoms arguably most vital to future human fulfillment. Liberal democracies have done little to counter, in philosophical and moral terms, anti-democratic discourse that denies the principle of inherent individual rights based in nature and hijacks the agendas of international institutions with politicized collective rights issues.

Multilateral human rights institutions have proven incapable of addressing this downward trend and are, tragically, contributing to it. In the past few years, the U.N. Human Rights Council, the world's premier human rights institution, has proven vulnerable to dictatorships who successfully seek membership in the body to damage both the idea and practice of human rights. The Universal Periodic Review process now reflects the broad disrespect, hypocrisy, and insouciance toward individual rights among even liberal democracies. For example, when China's human rights record was last examined under the Universal Periodic Review, few U.N. members objected to China's assertion of "human rights with Chinese characteristics," nor to its defense of the incarceration of more than one million Muslims as a means of vocational education. At the conclusion of the review in November 2018, a majority of states applauded China, a key take-away for Chinese diplomacy that will undoubtedly be used in domestic propaganda to show international support for practices that violate human rights. Likewise, when North Korea's record was reviewed, most states praised its respect for human rights, many noting the totalitarian state's programs in support of disability rights, a collective rights issue.

Both the Human Rights Council and the Universal Periodic Review emerged from the 2006 reform of U.N. human rights institutions. In campaigning for those "reforms," former U.N. Secretary-General Kofi Annan described the problem afflicting the Human Rights Commission (the Council's predecessor) as one of "declining credibility," noting: "States have sought membership of the Commission not to strengthen human rights, but to protect themselves against criticism or to criticize others."<sup>72</sup>

In recent years, with China, Cuba, Mauritania, Russia, Saudi Arabia, Venezuela, and other repressive regimes winning election to the Human Rights Council, it is clear that the same syndrome afflicts the Council. The problem is not rogue states and dictatorships; those will always exist. The problem is the illusion that inclusive multilateral human rights institutions are effective in promoting and protecting human rights, while in reality

they are most often a trap where efforts to defend those struggling for their inherent and universal freedoms are willfully thwarted or paralyzed by bureaucratic processes.

While liberal democracies have done little to defend the idea of human rights against the idea of collective rights and other debased notions, they have also generally failed to recognize that human rights institutions of the “liberal” world order have not resulted in liberalization. They have failed to articulate, promote, and deploy a coherent and consistent approach to promoting human rights that could take place outside established multilateral organizations, free from the collectivist approach toward defending human rights. To more effectively counter the trend toward collective rights and support individual rights, liberal democracies must reinforce their own principles, and build a human rights policy based on principled unilateralism and on the use of limited, ad hoc alliances with states that share a commitment to protecting individual rights.

The U.S. Department of State has taken steps in this direction through a 2019 initiative of Secretary of State Pompeo—the Commission on Unalienable Rights—that is charged with examining the question of how human rights are currently understood with reference to the principles of natural law and natural rights. Given America’s classical liberal foundations and tradition of constitutional protection of a closely defined, narrow range of basic individual freedoms, discomfort with the international community’s loss of focus in human rights, and consequent human rights inflation, comes as no surprise.

Yet anxiety about this major problem appears to be shared only by a few. The human rights community, including civil society and international organizations, is overwhelmingly complacent, and indeed defensive on the topic of reforming human rights. The idea of collective human rights is a domestic, as well as an international challenge. Widespread criticism of the very idea of an initiative to reflect on the proper scope of human rights has emerged largely by advocates of collective rights who view reinforcement of the principle of individual liberty as a threat to group identity and rights. The reactions have revealed shocking deficits in knowledge and understanding of the foundations of human rights, as well as of how they have been neglected by the methodological positivism of human rights education.

There is a long way to go before a renewed, broad-based consensus on the meaning and importance of freedom and human rights can emerge. The United States can best promote individual human rights and freedoms by projecting its ideals abroad; but broken ideals, and those ideals not enjoying broad-based respect by citizens, are damaged goods that do not travel well.

The impulse that gave rise to the Commission on Unalienable Rights thus needs to inform and drive a range of initiatives in civil society aimed at renewing appreciation for America’s individual rights tradition.

Saving human rights from collective rights requires not only challenging the idea of collective rights, but also marginalizing it through initiatives reinforcing the salience of the most important individual freedoms. Another Department of State initiative—Ministerial Meetings to Advance Religious Freedom—suggests future directions for promoting basic freedoms on the international level. The two Ministerials to Advance Religious Freedom in 2018 and 2019, have built on a U.S. effort to emphasize and promote religious freedom that began in the 1990s. A Heritage Foundation analyst<sup>73</sup> recommends that these international coordination meetings be codified into law, and form part of a process to identify states that should be sanctioned for abusing religious freedom.

What is remarkable about the Potomac Plan of Action, a document endorsed at the Ministerial in July 2018, is how it almost completely bypasses international human rights institutions while emphasizing national responsibility to uphold international religious freedom standards. The plan introduces a new “framework for national and multinational activity.”<sup>74</sup> In essence, this is an ad hoc international human rights process formed as a voluntary alliance, ready to act together to promote religious freedom, unimpeded by procedural and constrictive obstacles such as characterize inclusive U.N. multilateral processes. It should signify a new beginning for international religious freedom and human rights more broadly, but it also reveals how decaying and dysfunctional U.N. institutions can, should, and will be bypassed by freedom-respecting governments, and will—to borrow language from Friedrich Engels—wither away.

Finally, to effectively and broadly counter the trend toward collective human rights and other tendencies that have diminished respect for individual human rights, the U.S. should take steps that would merge the impulses behind both the Commission on Unalienable Rights and the Ministerial to Advance Religious Freedom—that is, the conceptual and institutional dimensions of human rights reform. America’s Founders inspired freedom movements around the world, not by military interventions or other foreign entanglements, but by their ideas, beliefs, and sympathies.

The United States has an opportunity to fill the moral vacuum of international human rights with both renewed ideas and renewed methods for improving respect for individual freedoms and rights. The principle of individual rights and freedoms is the key to people living peacefully with their differences, and re-establishing human rights as a North Star

for people around the world seeking freedom and democracy, indeed, to strengthening the global struggle for liberty. To challenge the idea of collective human rights; to insist that the universality of individual human rights has a transcendental foundation; and to rally allied partners in efforts to defend individual freedom and civil society, should be the central pillar of American foreign policy. In the long term, it will help secure a more peaceful and prosperous future for all.

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