

Introduction

A Ride on the Human Rights Bus

Bardo Fassbender and Knut Traisbach

The purpose of this volume is to engage frankly with the question of what 'limits of human rights' are and what these limits can 'mean'. We start out from the assumption that human rights do have certain (albeit very different) limits, and that human rights discourses have their own pathologies and dilemmas. We believe that it is only by acknowledging these limits that we can understand the substance of human rights. We also believe that an open and constructive discourse about these limits will prove more valuable to the protection of human rights than a tactical marginalization or even negation of limits in the name of a self-defined progress. Accordingly, we do not equate limits with weaknesses or gaps that need to be 'cured' or 'closed', respectively.

Publishing a book about the limits of human rights seems to imply a particularly sceptical approach to human rights. However, we have not chosen a specific *Vorverständnis* of human rights (in general or in international affairs) or a particular method of analysis.¹ We neither aim at expounding an alternative theory of human rights or international law. Rather, the authors of the chapters and comments in this volume seek to identify and to conceptualize limits of human rights, using different disciplinary understandings from anthropology, history, international relations theory, law, legal and political theory, philosophy, and (political) sociology, as well as different professional perspectives from advocacy and legal practice. Much to our benefit, we are confronted with different 'versions' of human rights and their limits. To learn from these different perspectives requires a flexible mindset on all sides of disciplinary divides because the vocabulary and the reasoning do differ.²

¹ If the title of this volume bears resemblance to that of Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005), this does not imply a similar approach, form, or content. Our understanding of 'limits' is closer to that of the following authors: Anne Orford, 'A Jurisprudence of the Limit' in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press 2006) 1; Amartya Sen, 'Human Rights and the Limits of Law' (2006) 27 *Cardozo Law Review* 2913; and Wiktor Osiatynski, *Human Rights and their Limits* (Cambridge University Press 2009).

² For a cautionary warning in this regard, see Jan Klabbers, 'Counter-Disciplinarity' (2010) 4 *International Political Sociology* 308.

When considering the role human rights have played over the last seven decades, it is easy to portray these rights as a form of panacea or, conversely, as a pandemic. The continuous expansion and refinement of normative human rights regimes together with domestic, regional, and international protection mechanisms may appear positive and limitless but can also be viewed as doomed and counterproductive. But both views are extremes that distort realities.

Human rights have taken a prominent place in law, politics, philosophy, and other social sciences, but also in everyday life and in professional settings.³ During the second half of the last century they have become a dominant vocabulary meant to foster domestic and supranational change. What has been dubbed the 'humanisation' of international law⁴ describes an expanding, and by tendency all-inclusive, effect of human rights considerations throughout international law, with a special focus on, but by no means limited to, humanitarian, international criminal, and international economic law.⁵ The transforming effect of human rights law has arguably changed our very conceptions of the state, the rule of law, and individual and political responsibilities. The conditionality of state sovereignty, the transformation of the fundamental principle that the will of states is the sole source of international legal validity, the idea of an international community that is based on shared interests and values, the concepts of peremptory norms and obligations *erga omnes*, the idea of a 'responsibility to protect', processes of supranational constitutionalization, and a renewed concern for the unity of the international legal order—all this would not have such a prominent place in recent discourses without the influence of human rights as a recognized central pillar of international law.

At the same time, we need to remember that the conceptualization and defence of human rights in the name of humanity or an international community does not mean that the entire international legal order has moved from bilateralism to community interests, or from co-ordination to co-operation. Although these conceptual shifts can be powerful social forces, we must not forget that sovereignty, the nation state and hard power persist.⁶ What lies behind much of the co-operation

³ See, e.g., Henry Steiner, 'Human Rights: The Deepening Footprint' (2007) 20 *Harvard Human Rights Journal* 7; Mark Goodale, *Surrendering to Utopia: An Anthropology of Human Rights* (Stanford University Press 2009); Jeremy Perelman and Katharine G Young, 'Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice' (2010) 9 *Northwestern Journal of International Human Rights* 27; Kate Nash, *The Political Sociology of Human Rights* (Cambridge University Press 2015).

⁴ See Theodor Meron, *The Humanisation of International Law* (Martinus Nijhoff 2006).

⁵ See, e.g., Saladin Meckled-García and Başak Çalı, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law' in Saladin Meckled-García and Başak Çalı (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge 2006) 10; Knut Traisbach, 'International Law' in Stephen McGlinchey (ed.), *International Relations* (E-International Relations 2017) 57, 65–7; Andrew Clapham, 'Human Rights in Armed Conflict: Metaphors, Maxims, and the Move to Interoperability' (2018) 12 *Human Rights and International Legal Discourse* 9.

⁶ See Bardo Fassbender, 'The State's Unabandoned Claim to be the Center of the Legal Universe' (2018) 16 *International Journal of Constitutional Law* 1207.

of states and the rationale of community interests is not a harmonious solidarity but struggles about influence and contentious processes of supervision, evaluation, demands for change, and substitution. Numerous supranational bodies engage in activities of supervision and evaluation of national performances. In case of non-compliance with international standards they demand change, and some international bodies may, under certain conditions, even substitute national decisions with their own. These processes of evaluation and substitution are processes of socialization and entail difficult struggles about competencies and hierarchies. They raise important questions of legitimization, representation, and autonomy.

It is thus not astonishing that the ubiquitous presence of human rights has also provoked criticism.⁷ Concerns have been voiced, for instance, about the long marginalization of women, about the proliferation of rights through the establishment of special protection regimes, about the role of 'human rightism' and 'humanitarians', the continued presence of a 'civilising mission' of 'the North' and 'the West', and a human rights activism going (occasionally) wrong and being 'a part of the problem'.⁸ Doubts persist about the political relevance of human rights, their effectiveness, the sometimes questionable roles of bureaucracies and technocrats, the self-righteousness of activists, and the false promise of samaritanism. Critics continue to question the trans-civilizational universality of human rights and their use for politicized purposes.⁹ For some observers

⁷ See Chris Brown, 'Universal Human Rights: A Critique' (1997) 1 *The International Journal of Human Rights* 41; Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2012) 3; Malcolm Langford, 'Critiques of Human Rights' (2018) 14 *Annual Review of Law and Social Science* 69.

⁸ See, e.g., Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in Abdullahi Ahmed An-Na'im and Francis M Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings Institution Press 1990) 331; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000); Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002); Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004); Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005); see also the contributions in Jose-Manuel Barreto (ed.), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing 2013) and in Mark Toufayan, Emmanuelle Tourme-Jouannet, and Hélène Ruiz-Fabri (eds), *Droit international et nouvelles approches sur le Tiers Monde: entre répétition et renouveau / International Law and New Approaches to the Third World: Between Repetition and Renewal* (Société de législation comparée 2013).

⁹ See Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006); Boaventura de Sousa Santos, 'Toward a Multicultural Conception of Human Rights' in Felipe Gómez Isa and Koen de Feyter (eds), *International Human Rights Law in a Global Context* (University of Deusto Press 2009) 97; Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Brill 2010); Rosa Freedman and Ruth Houghton, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17 *Human Rights Law Review* 753; Yuval Shany, *The Universality of Human Rights: Pragmatism Meets Idealism* (The Jacob Blaustein Institute for the Advancement of Human Rights 2018) <<https://www.jbi-humanrights.org/BlausteinLecture2.Online.24July18.pdf>> accessed 31 January 2019; on the possibility of a non-hegemonic approach to human rights, see Han Sang-Jin, Bai Guimei, and Tang Lei, 'A Universal but "Nonhegemonic" Approach to Human Rights in International Politics: A Cosmopolitan Exploration

the post-Second World War 'success story' of human rights has ended, if it ever existed.¹⁰

This volume, however, is not intended to be a stock-taking exercise trying to answer the question of whether all that criticism is justified, or to determine where the human rights project is standing right now. The book is neither meant to deny the importance of human rights nor to discredit them. None of the authors contributing to this volume believes or argues that human rights do not matter or that they have failed. Of course, 'they' can fail (if a right can fail by itself), but there never is only one single human rights project, or one single history, or one grand failure or success. The starting point of this volume is rather the observation that the existence of human rights in domestic and international law is not self-evident. Instead, human rights result from hard social and political struggles, and human rights violations—horrendous or small—are not a matter of a distant past but a reality of today.

Professor Tony Judt wrote that, at the beginning of the twenty-first century, we (in the Occident) live in an 'age of forgetting' by which he meant 'the difficulty we seem to experience in making sense of the turbulent century that has just ended and in learning from it.' 'With too much confidence and too little reflection,' he continued, 'we put the twentieth century behind us and strode boldly into its successor swaddled in self-serving half-truths: the triumph of the West, the end of History, the unipolar American moment, the ineluctable march of globalization and the free market.'¹¹ The current rise of so-called 'populist' parties and governments is a stark reminder that the recent past is nothing that can be left behind or be put into simple 'lessons' that just need to be 'learned'.

Given the current political landscape and the frequent critique of human rights, it is no surprise that both the history¹² and the

for China' in Michael Kuhn and Yazawa Shujiro (eds), *Theories About and Strategies Against Hegemonic Social Sciences* (ibidem Press 2015) 299.

¹⁰ See, e.g., Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013); Eric Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014).

¹¹ Tony Judt, 'Introduction: The World We Have Lost' in Tony Judt (ed.), *Reappraisals: Reflections on the Forgotten Twentieth Century* (William Heinemann 2008) 1–2 (hereafter Judt, 'The World We Have Lost'). He further wrote: '[W]e should not be surprised to see the revival of pressure groups, political parties, and political programs based upon fear: fear of foreigners; fear of change; fear of open frontiers and open communications; fear of the free exchange of unwelcome opinions,' *ibid.* 20.

¹² One can gather at least two insights from the works mentioned in this and the following footnote: first, at the turn of the century, a profound political, legal, social, and economic disquietude induced a renewed interest in the histories, meanings, and purposes of human rights, and, secondly, both the historiography and the 're-thinking' of human rights still originate predominantly from North America and Europe. On the history of human rights, see, e.g., Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004); Yves Dezalay and Bryant Garth, 'From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights' (2006) 2 *Annual Review of Law and Social Science* 231; Lynn Hunt, *Inventing Human Rights: A History* (WW Norton & Co 2007); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); Aryeh Neier, *The International Human Rights Movement: A History* (Princeton University Press 2013); Christian Reus-Smit, *Individual Rights and the Making of the*

future¹³ of human rights attract considerable attention in contemporary academic writing. And so do the foundations and functions of these rights.¹⁴ Human rights, we are told, need to be rethought, reinvigorated, and defended against populist backlashes and the erosion of the rule of law, and also the shrinking (or already vanished) space of civil society needs to be re-established.¹⁵ Of course, there is no agreement on either the diagnosis or the cure. But what these discussions demonstrate is that ‘cascades of progress’ do not only develop in one direction but can also turn ‘backwards.’ A more uncomfortable proposition would be that the progress has never really materialized to the degree that has been postulated by many writers.

The discussions also demonstrate that the constant use, appropriation, critique, and rethinking of human rights forms an intrinsic part of their history and nature. In this regard, Professor Judt warned us against too much confidence and too little reflection. One can have an ‘ideological tunnel vision’¹⁶ in both directions: by focusing too much on achievements or on failures; by overemphasizing particularities or universalities; by spinning an over-generalized progress narrative through history or by insisting that modern human rights have nothing (or very little) to do with earlier rights claims.

International System (Cambridge University Press 2013); Jan Eckel, *The Ambivalence of Good: Human Rights in International Politics since the 1940s* (Oxford University Press 2019).

¹³ On present and future challenges to human rights see, e.g., Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006); Upendra Baxi, *The Future of Human Rights* (3rd edn, Oxford University Press 2012); Joe Hoover, *Reconstructing Human Rights: A Pragmatist and Pluralist Inquiry into Global Ethics* (Oxford University Press 2016); Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017); Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (eds), *Human Rights Futures* (Cambridge University Press 2017); Alison Brysk, *The Future of Human Rights* (Cambridge University Press 2018); Mireille Delmas-Marty, *Sortir du pot au noir: L’humanisme juridique comme boussole* (Buchet-Chastel 2019); Dapo Akande, Jaakko Kuosmanen, Helen McDermott, and Dominic Roser (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press 2020).

¹⁴ See, e.g., Costas Douzinas, *The End of Human Rights: Critical Thought at the Turn of the Century* (Hart Publishing 2000); Michael Ignatieff, ‘Human Rights as Politics and Idolatry’ in Amy Gutmann (ed.), *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 1; Jack Mahoney, *The Challenge of Human Rights: Origin, Development and Significance* (Blackwell Publishing 2007); James Nickel, *Making Sense of Human Rights* (Blackwell Publishing 2007); James Griffin, *On Human Rights* (Oxford University Press 2008); Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2009); Martha C Nussbaum, ‘Capabilities, Entitlements, Rights: Supplementation and Critique’ (2011) 12 *Journal of Human Development and Capabilities* 23; John Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 1; Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2017); Gráinne de Búrca, ‘Human Rights Experimentalism’ (2017) 111 *American Journal of International Law* 277; see also the contributions in Adam Etinson (ed.), *Human Rights: Moral or Political?* (Oxford University Press 2018).

¹⁵ Susan Marks, ‘Backlash: The Undeclared War against Human Rights’ [2014] *European Human Rights Law Review* 319; Hurst Hannum, ‘Reinvigorating Human Rights for the Twenty-First Century’ (2016) 16 *Human Rights Law Review* 409; Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1.

¹⁶ Judt, ‘The World We Have Lost’ (n. 11) 19.

The contributions to the present volume do not primarily focus on particular 'issues' or 'issue areas' with respect to a perceived limitation of the reach of human rights. They rather discuss limits that are functional, pragmatic, systemic, ideological, or epistemic in nature. The discussions show how our very understanding of human rights depends to a large extent on the meaning(s) of these limits, and how we think and act in light of their existence. The two areas with a stronger focus, namely women's rights and humanitarian law, we have chosen for several reasons. Women's rights have been one of the earliest and most successful critiques that made limits and their effects visible that were so inherent that the dominant 'culture' was (and unfortunately often still is) not even aware of their existence. Women's rights are also connected to wider social movements which address systemic biases in the public and private sphere in order to instigate social change. Naturally, these movements have also established their own new limits and have struggled with critiques from within. The humanitarian field, on the other hand, exhibits more pragmatic limits of human rights. It is an area where different, and at times contrary, functional interests need to be balanced. The interaction that has developed between rules of international humanitarian law, international criminal law, and human rights uncovers deep contestations of the limits of human rights but also manifests the constitutive force of these limits.

All limits are contentious, and their meaning depends in part on the respective personal outlook on (international) society. This situation motivated us to combine each contribution with a comment by another author who often comes from a different discipline. This, we hope, will not only provide a wider spectrum of viewpoints but also be the start of conversations between authors and readers who draw inspiration from the different expositions. However, in one regard we, the editors, did not succeed: The volume is dominated by northern-occidental voices although we did invite scholars and practitioners from other regions of the world to contribute chapters and comments. Some of them kindly confirmed their participation but later, and for various reasons, were unable to complete their work. We hope that others will continue the efforts made in this volume and further expand the range of voices.

I. THE JOURNEY BEGINS

We would like to further introduce the subject of the present volume with a thought experiment inspired by the famous 'A ride on the bus' presented by Joel Feinberg in his analysis of offensive nuisances.¹⁷ The advantage of this kind of experiment is that it grounds abstract reasoning in concrete examples. It obliges us

¹⁷ Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 2 *Offense to Others* (Oxford University Press 1988) 10.

to put ourselves in specific situations and *experience*—at least to some degree—the complexities and ambiguousness of the situation. You, as the reader, are invited to project yourself into these situations as they unfold and determine as best as you can how you would evaluate the situation from a human rights perspective. What do these stories tell you about human rights, the relevant actors, and their limits? Much in the same way as in Feinberg's original version, you are not a captive on the bus. You could leave (or quickly move on to the next story) but doing so would be avoiding the dilemma. You are invited to face (and think through) the situations as they present themselves to you.

Story 1. Imagine yourself entering a small public bus on your way to work. You take a free seat next to a young woman who has a folder on her lap and taps nervously on it. You strike up a conversation with her and eventually she confides in you that she is a PhD researcher and has recently discovered a hitherto unknown correspondence between Thomas Jefferson and a British citizen who signed his letters only with J.B. The correspondence shows that Jefferson considered a radically different formulation for the opening paragraph of the Declaration of Independence:

We solemnly declare and claim these rights as our law, for they are not self-evident truths but need to be accomplished, that all civilised men are created equal, that they are endowed by Constitution with certain Rights, that among these are Life, Liberty, Property and the pursuit of economic Happiness. — That to balance these rights, Governments are instituted among Citizens, deriving their just powers from the consent of the governed right-bearers only. — That at times when a Form of Government becomes destructive of these ends, it can be the Right of a People to alter and abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as the principles of the Law of Nations require.

Story 2. On the other side of the aisle sits a man reading a current global best-seller about a Muslim family and its plight of living under an extremist regime and military occupation in a war-torn country. While reading one particular section, tears run down his face. All of a sudden, repeated message notifications interrupt his reading. Parents in his children's school group complain that a new maths teacher wears a headscarf during classes. Some parents compare it to a veil. The man is appalled. He closes the book and types an answer comparing the situation to a recent case of a judge who wanted to wear her headscarf during court sessions.

Story 3. Much like story 2 except that this time the judge wants to wear a court dress with a cross embroidered on it.

Story 4. This time a Christian teacher is on exchange in a country where it is obligatory for all women to wear a headscarf in public. She wears the headscarf outside her home but does not want to wear it during classes. The regional human

rights court eventually confirms that the obligation to wear the headscarf in all public places, including schools, is necessary in a democratic society to avoid biased religious statements by public officials.

Story 5. Close by on the bus sits a judge of another regional human rights court. She looks tired and mentions that yesterday they reviewed more than sixty cases of individual complaints during a three-hour meeting. 'By the time I had put my papers on the table,' she says, 'we were already discussing the third case.'

Story 6. On the other side of the aisle sits the Secretary-General of an international organization which receives the largest part of its funding from only eight major economies around the world. She explains that she had several meetings yesterday: first came a delegation from the 'Global South' promoting a treaty for the progressive realization of economic and social equality of nations. The draft treaty stipulates that a certain percentage of national expenditure shall go to an international redistribution fund. Then came a delegation of non-governmental organization (NGO) representatives and victim associations who claimed compensation for instances of child trafficking that occurred during a recent international support mission led by the organization. Finally, she met with representatives of the two economically strongest member states who intimated that their governments would cut funding if the proposed treaty on equality received the organization's support, or if the conduct of their soldiers who participated in the mission was investigated.

Story 7. In the next row of the bus sits a young woman who fled from a war-torn country and barely survived the long journey to Europe. In a reception centre, she explains, she was handed an information leaflet that 'specifies' her human right to asylum and describes the necessary criteria and procedural steps until asylum is granted or denied. The first question she had to answer was whether she had already requested asylum in another Schengen country.

Story 8. The woman continues to narrate how a local NGO recently approached her and asked her to participate in a campaign about women's rights in the refugee crisis. The project is part of a major funding campaign in which the NGO secured a special grant from a philanthropic foundation. She explains how members of the NGO worked with her on how to tell her 'story' most effectively. At public campaign meetings and media presentations, she was alternately presented as a victim, a witness, or a survivor.

Story 9. The woman also confides to you that she had been tortured and abused by fundamentalist fighters at home and that she recognized one of these men in the asylum reception centre. Upon her complaint to the police, he was arrested, and investigations revealed that he was only sixteen years old. In one of her meetings with the NGO she overheard a declaration of a global human rights expert demanding that children should not be deprived of their liberty. He apologized to children for what had happened to them. 'Whatever they have done,' he said, 'children should not be detained.'

Story 10. Next to her sits a well-dressed lady, clearly not used to commuting to work by bus. She talks on her mobile phone and informs a friend that her car broke down and that she had to take an overcrowded and smelly bus. At work, she explains, she recently found out that a female colleague with comparable experience and responsibilities is paid a considerably higher salary. She does not know what to do without endangering her position and future career in the company. She also doubts whether the law can help her.

Story 11. In a variant of story 10, the higher compensated colleague with comparable experience and responsibilities is male. In this case, she feels more confident about her prospects in a court of law.

Story 12. The phone conversation continues: She complains to her friend about her housekeeper who has asked her for a pay rise from 7 to 8 dollars per hour. Her domestic worker comes from an Asian country and tries to send 80 per cent of her salary home to her children whom she has not seen for the last six years.

Story 13. In the next row sits a man with scars on his face and arms. He fled from a country with a long history of ethnic-based violence between the two major ethnicities living there. Over the last one hundred years, there have been multiple instances of large-scale killing campaigns, civil wars, and violent clashes between the ethnic groups. After the end of one particularly horrendous genocide, the international community established an international criminal tribunal. This particular genocide is now engrained in the international public memory and has become a watershed moment in the development of international criminal justice. Today, one ethnicity is generally regarded as the perpetrators and the other as victims or survivors.

Story 14. Incidentally, the president of the aforementioned country sits also on the bus. He belongs to the minority ethnicity of the 'survivors' and has ruled the country for the last eighteen years. He was elected three times with more than 90 per cent of the votes and a voter turnout of over 95 per cent. The international community is largely content with the reforms undertaken by the president, and with the fact that no major clashes have occurred between the two ethnic groups since he took office. However, recently, his military is allegedly involved in systematic killings of members of the majority ethnicity living in one of the neighbouring countries. Amused, he tells you about the growing international concern about these activities and rumours that the UN Security Council might refer the situation to the International Criminal Court. The president adds: 'Can you imagine that the Council will give another case from my continent to the court? And what do they think will happen again in my country and the region if I was indicted or even sentenced?'

Story 15. Next to the president sits a military lawyer. She is a specialist in international humanitarian law and advises special operation units before and during their employment. 'This morning was tough,' she says. 'I can't give you details but

one of our units caught enemy fire. Air support wanted to drop a RBL or CBU—sorry, I mean a cluster bomb. We considered alternatives in order to achieve the same effect: sending in more troops would have taken too long and was too dangerous; we would have needed ten times more conventional non-cluster weapons to achieve the same effect, and it would also have taken too much time. Dropping one of our RBLs takes only thirty seconds. We estimated that 94 per cent of enemy targets would be wounded or killed. We estimated that there was a 12 per cent chance that a close-by school building would receive some shrapnel and of course there is always a 1 to 5 per cent possibility that some bomblets fail—on average.’ After a short pause she mumbles: ‘What we do must be proportionate.’

Story 16. In the first row of the bus sits an accomplished human rights scholar. Confidently, he has taken a seat in the front row and has asked the bus driver for a microphone to comment on the journey for the passengers. He enjoys telling success stories about human rights and indeed there are many. The assertions that human rights are only idealist talk, or that their post-Cold War rise has ended (and with it his own) upset him. In his long speech to the passengers, he underlines that in the absence of an ‘alternative language’ human rights are the best possible foundation of international peace and security, and that there is no need for a further proliferation of rights because new rights are already ‘present’ in already existing provisions. He ends by stating once more that human rights, when ‘properly’ defined, reflect a global consensus in all regions of the world regarding their core content.

II. AFTER THE JOURNEY

The stories above highlight some of the complexities that we often overlook or choose to marginalize. Some of the stories may make us wonder how easy it is for rights holders to disregard or infringe the rights of others. Other stories point to the importance of context, to systemic biases in our actions, and to the ‘darker sides’ and unintended consequences of well-meant human rights work. A number of stories address the particular roles of the state, supranational institutions, NGOs, and other actors in the definition and ‘realization’ of human rights. More stories could be added of course, and we hope the readers will do exactly that—add their own stories.

Already a cursory reading of the stories above shows that human rights mean very different things to different people. In fact, when you discuss some of the stories you may come to the conclusion that a human rights-based argument alone cannot provide a satisfying answer or ‘solution’ to the dilemma, especially if you consider different understandings of human rights. This is perhaps one of the most fundamental limits of human rights as we understand them: they do not provide answers; they can only provide reasons.

In this volume, Professor Henry Steiner opens the floor with a fine illustration of how limits function in human rights law. In law—and elsewhere—human rights have never been limitless. As he explains, international human rights law stands in a complex relationship with general international law. It may seem that human rights law is only supposed to limit state prerogatives, but in many ways these rights depend on and remain intrinsically connected to the state. As Professor Steiner explains, any reformatory aspirations that are expressed through human rights always encounter numerous obstacles that are rooted in local particularities but also in the ‘indelible language’ of human rights itself (compare stories 2–4).

Some of these limits of human rights lie already in the foundational claim to self-evidence while actually the political and legal relevance of human rights is not self-evident at all. Professors Lynn Hunt and Bardo Fassbender discuss the historical origins and the political realities of this claim in the founding period of the United States and in revolutionary France (cf story 1). Professor Hunt tries to answer the question how human rights could resonate with a broader public across social status. Beyond the rights declarations of the eighteenth century, she looks at more subtle changes in society, such as new ways of conducting one’s life, the wide success of novels, or the attentive care for one’s own body. She also admits that empathy and a common humanity felt from a distance in the warmth of an armchair and in the security of a privileged life remain a shaky ground for global human rights (cf story 2). Bardo Fassbender investigates further the origins of the formulation of self-evident truths in the Declaration of Independence. He also emphasizes that the universal aspiration of rights declarations was inherently limited because these acts of liberation were also exclusionary and required further acts of emancipation and actualization.

The following six contributions explore in different ways the complex relation of human rights with the state and the need for a political housing in the sense of institutionalization.¹⁸ Professors Kate Nash and Mark Goodale highlight the tensions that exist between the universal category of being human and the political category of citizenship (cf story 7). The state structure and the ‘general will’ remain both a constitutive precondition and a limit for the enjoyment of human rights. As Professor Goodale points out, from the very beginning in the eighteenth century citizen rights were both anti-individualist and anti-universalist. These tensions make human rights ‘necessarily political’, as Professor Nash explains—a position that resonates with the political philosophy of Hannah Arendt. This politicization, Professor Goodale remarks, also means that human rights norms ‘must be vernacularized in terms that are immediately recognisable and woven into relevant histories’ (cf stories 13 and 16).

¹⁸ On the importance of institutional housing, see Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 6.

The intrinsic connection between human rights and the state is further explored by Professors David Dyzenhaus and Conor Gearty. Professor Dyzenhaus reconfigures the limits of human rights that traditionally were thought to become visible during a state of emergency when considerations about the safety or welfare of the people prevail. He relocates this question to the context of the constitutional state and the rule of law. In this context, he argues, human rights and the welfare of the people are not juridical opposites, not even during emergencies. Rather, even in such exceptional times human rights shall shape how states may respond to this situation by establishing a requirement of justification in terms of these rights. Professor Dyzenhaus is of course aware of the fact that human rights were used, and continue to be used, as a justification for various purposes, and not always the most virtuous ones. There is no legal or political language that is immune to 'abuse' even within institutional frameworks of the rule of law and the constitutional tradition. Ultimately, it is a risk that we must accept, he writes, but one that is countervailed by the opportunities and benefits of rule of law institutions. Professor Gearty is more wary about this, especially in the current 'climate of post-rational politics' in which actors try to change these constitutional set-ups and institutional safeguards. He emphasizes that rational justification can differ profoundly when feelings of patriotism and national anxieties dominate, even if the language of emergency is not employed. Thus also the vernacularization of reason and justification reflects the deeper political preferences of a community, and not only do these preferences change but, as Professor Gearty writes, they are not immune to momentous passions (cf stories 2–4 and 7–8).

How interest and power constitute limits of human rights, and how on the other hand these rights constitute limits of power, is further investigated by Professors Christian Reus-Smit and Başak Çalı. Professor Reus-Smit questions the orthodox realist view of power and agency in international relations that is so connected to a particular conception of the nation state and international society. He stresses instead the complex institutional settings and the dynamics of how actors use rights claims 'in the cracks and contradictions of [these] complex institutional environments' (cf stories 6, 8, and 14). It is this form of flexible power that he identifies as 'protean power'. If human rights are conceived in light of that power, that is, as tools of innovation under conditions of uncertainty, this does not only permit a reassessment of the limits of human rights but also facilitates a better understanding of the potential role of human rights in sustaining or subverting the legitimacy of political orders. Professor Çalı establishes an important link between the vernacular and the protean power of human rights by placing them in the context of the 'public authority' of multiple supranational human rights institutions, including regional and local courts, supervisory bodies, and civil society. These actors can contribute to 'a multi-authored concept of international human rights practice' and to a more effective implementation of these rights. She highlights that protean claims, too, need to be translated into more binding public power. At the same time, she and

Professor Gearty point to the danger of backlashes against human rights that she regards as a reassertion of a normative democratic identity rather than an endorsement of realist power. But these backlashes can also employ protean power to promote their agendas. To stay within the same metaphor, a further aspect needs consideration: Proteus was not only known for his extraordinary capabilities (he could foretell the future and change his shape), but used his versatile and mutable form to escape and to avoid having to give a concrete answer (he foretold the future only if compelled to do so). Thus it is worth remembering that flexibility and elusiveness never stand far apart.

This also holds true for human rights institutions. Professors Jan Klabbers and Rosa Freedman together with Dr Ruth Houghton discuss the limits (and promises) of institutionalization. Professor Klabbers shows that as soon as an activity becomes institutionalized there is a risk of tension between the substantive interests behind a given activity and the interests of the institution. Ideally these interests coincide but they can also diverge, and then the question arises which interest shall take precedence (cf stories 5–6, 8–9, and 14–15). As he observes, when an institution enters the equation the situational ethics can also change. Jan Klabbers dissects the structural bias of institutional functionalism (and functional aspirations) and provides several examples of how institutional interest can prevail over better practices. In the opinion of Professor Freedman and Dr Houghton, these examples are somewhat too crude. They call for a finer distinction that acknowledges the multiple interests and actors within an institution and also takes into consideration different types of institutions. The authors emphasize in particular the role played by individuals working for (or acting in the name of) an institution (cf stories 8–9 and 15–16), and also describe how the functional interests of alliances between actors can determine opportunities. Professor Klabbers probably agrees with the need for further differentiation, but the question remains who ultimately determines the institutional interest and the limits of engagement in a particular situation. In addition, it remains important to investigate the ‘institutional field’ in order to understand how functional limits of different institutions interact. We also need to remember that these functional opportunities and limits do not arise in a space void of politics (cf story 14).

Activist organizations are institutions with a very specific functional agenda. They seek to shape the interests and behaviour of other institutions and actors. Aryeh Neier’s essay about human rights activism exemplifies how certain limits get established, and how they are sustained from within a movement. He sees a clear division between activism for civil and political rights on the one hand, and for economic and social benefits on the other hand (he refrains from calling the latter ‘rights’ in his chapter). Many human rights lawyers and activists (passionately) disagree with many of his arguments: that economic benefits or goals are matters of public policy rather than of human rights and litigation; that civil and political rights do not involve conflicts that require balancing; or that advocacy

for the two categories of rights takes place in different venues, by different means, and according to different criteria. Professor Jeremy Perelman raises many of these objections in his response. More importantly, he takes us beyond the well-known debates by accentuating other profound arguments about the potential and the pitfalls of the human rights discourse in achieving social justice by challenging structural features of globalization, in much the same way as Professor Henry Steiner does (cf stories 6 and 12). Professor Perelman also hints at a more pragmatic way forward that combines established practices and critiques with new strategies—an approach that resonates with the discussion in the last two chapters of this volume.

Professors Hilary Charlesworth and Christine Chinkin then lead us into the discussion of women's rights as one of the most profound critiques of rights discourses. By charting the complex geography of actors, sites, and mechanisms, the authors discuss several structural limits of human rights (cf stories 6 and 10–12). Going beyond the often mentioned limits of commitment and compliance, they shine a critical light on limits of location and scope when they describe how international treaties dealing with specific issues of women's rights at the margin allowed the mainstream to proceed undisturbedly. Limits of terminology and compromise come into focus when Professors Charlesworth and Chinkin recount how conflicting interests and agendas resulted in broad definitions of a general prohibition of sex discrimination that favoured compromise over more specific issues. Institutional limits become visible when they describe how the existence of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) may have initially reduced the willingness of other United Nations (UN) bodies to deal with sex-based discrimination. Also limits of inclusion and exclusion persist in this context, as their discussion of violence against men and boys and the relational aspect of gender shows. Limits established through particular definitions, structural assumptions of vulnerability, or specific choices of references (e.g. male lives or the family) thus play a crucial role. Moreover, the authors expose how many different actors, fora, and mechanisms were needed, and how they eventually interacted with each other and contributed over time to the 'to and fro' of women's rights. Professor Bai Guimei adds valuable insight from the People's Republic of China and describes the difficulty in using transnational legal frameworks to overcome strong locally ingrained stereotypes which persist in society. She emphasizes, for example, that the choice of terminology ('women's rights' instead of 'human rights') has tactical advantages in China. Context matters, Professor Bai seems to say, including cultural and social particularities beyond a global consensus (cf stories 2–4 and 16). She also stresses that it is important to look beyond the legal and political framework for other forms of regulation and influence, including education and the media.

This leads us to the role of social movements which campaign not only for normative change but also for a deeper social change and internalization of these norms. Professors Martha C Nussbaum and Fareda Banda discuss the relationship

between law and a wider social movement in the context of women's rights. For Professor Nussbaum, an important aspect of treaties like CEDAW and other legal documents dealing with women's rights is that they establish a common language and thus make a transnational communication possible which promotes the formation of political and social movements and interest groups. This, she argues, is a crucial effect of international law beyond actual compliance with legal norms which may remain weak and vague, especially when the norms have to reach into socially engrained limits in society (cf stories 10–12). Professor Banda agrees with much of her colleague's argument but assesses the relevance of CEDAW more positively. She provides many examples of how institutionalized normative mechanisms have contributed to expanding established limits of meaning and scope of women's rights. In particular, she underlines that CEDAW is a common language not only of social movements but also of numerous other bodies and actors *within* the UN system, and of regional human rights institutions.

Professor Frédéric Mégret leads us into the area of armed conflict. In his critical study of the humanitarian tradition, he identifies a number of contingent (characteristic but not defining) and inherent (deeper rooted) limits of the laws of war. He links these limits to the underlying normative choices, priorities, and dominant mindsets that construct the (changing) meanings and functions of these limits within the field. Besides the more practice-dependent limits (such as the changing nature of armed conflict and of belligerents, the complexity of compliance and enforcement, or the dependence on state preferences), he also discusses conceptual and systemic limits of legalism, of proportional assessments and humanitarian policies (cf stories 13 and 15). Professor Mégret questions the potential of normative regulations and also asks which other approaches to mitigate the effects of war might be possible, including approaches originating outside 'the Occident'. A deeper concern of his is the constitutive effects of laws of war: laws do not only prohibit certain actions and protect individuals but also constitute a 'legalized' way of conducting war, thus ultimately legitimizing particular forms of warfare. Knut Traisbach adds in his comment a critical view on the alleged oscillation between limits and opposing interests. He argues that these interests usually function as absolutes which distort our vision for the space 'in-between'. It is in this space, he argues, where a politically more relevant conception of humanitarian law exists. This conception does not focus on an understanding of limits as demarcating the width of an oscillation between opposing interests. Rather, the discourses about these limits create a space which makes it possible to acknowledge the need to take sides and which enables us to act (cf stories 13 and 14).

Professors Andrew Clapham and Yuval Shany discuss more specific limits of international humanitarian law and international human rights law. They reflect on how and why the limits between humanitarian and human rights law have been established, defended, moved, or functionally changed due to the complex interactions between these two legal regimes. Professor Clapham distinguishes

situations of armed conflict from other situations of armed violence. He describes how human rights considerations have influenced targeting decisions and situations of detention, and questions their applicability to extraterritorial situations and to armed groups. He carefully identifies the multiple actors and their differing interests in shaping these discussions. It becomes evident how the limits of applicability and scope do not only relate to the strategic interests of actors but are structurally engrained in the specific 'rationales' of the legal regimes themselves and in the functional aspirations of the institutions, as Professor Klabbers also explains. Professor Shany speaks in this regard of the 'normative assumptions', 'functional limits', and also policy concerns that shape the conceptualization of these limits. In particular, he highlights how 'new realities' of conflict can influence established functional limits and enable new normative constructions (of jurisdiction, for example) which in turn provoke reactions in defence of hitherto established meanings.

The last four contributions to this volume discuss possible outlooks for human rights in light of their limits. Professor Mireille Delmas-Marty contrasts the 'reason of state' (*raison d'État*) with the humanist and universalist ideal of human rights, and adds to this 'type' of reason two novel ones: 'reason of planet' (or planetary reason) and 'reason of technology and science' (or techno-scientific reason). Arguments about human rights and their limits change categorically depending on which type of 'reason' takes precedence (cf stories 2–3, 7, 10–11, and 13–16). Similar to Professor Dyzenhaus, Professor Delmas-Marty regards human rights as a means to conceive the 'reason of state' not as standing in opposition to those rights but in a symbiosis in accordance with the rule of law. But this is 'not enough', she seems to say, when it comes to environmental considerations and the protection of future generations in light of the ambivalence of scientific and technological progress. It is here that her elaboration of, and hopes for, a 'truly common law' become most evident. In her comment, Professor Marie-Bénédicte Dembour places Professor Delmas-Marty's argument within her own model of four human rights schools. She proposes an understanding of her colleague's conception of human rights as 'limiting' particular 'reasons' in the light of the natural school of her quadripartite model. For Professor Dembour, this means that Professor Delmas-Marty leaves the orthodox conception of human rights intact which regards human rights mainly as limits of prerogatives. She shows how our understanding of human rights and their limits depends on latent assumptions. The discussion provokes deeper questions about the importance of constituency—whose rights and whose limits are we talking about? And who is human?¹⁹

¹⁹ On the latter question, see, e.g., Joel Feinberg, 'The Rights of Animals and Unborn Generations' in William T Blackstone (ed.), *Philosophy and Environmental Crisis* (The University of Georgia Press 1974) 43; Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011).

Douglas A Johnson and Professor Kathryn Sikkink propose a more strategic and outcome oriented approach to human rights that employs new tactics beyond law and beyond the established strategies of human rights bodies, such as 'naming and shaming'. They propose strategic thinking as a new mindset which questions what works and looks for new tactics to achieve specific objectives. The authors urge increased innovation instead of sticking to an excessive legal focus of human rights that can result in a counterproductive inflexibility and inertia. In order to be able to innovate, activists need better criteria for assessing success and failure and a better understanding of targets, tactics, and timing (cf stories 6, 8, and 14). The authors explain how specific tools and capabilities can help in these strategic processes, such as mapping the terrain of relevant actors and their relationships (as adversaries or allies, but also between the strategic actors themselves), the creation of new opportunities for participation and learning, a better understanding of complex processes of change, and the employment of multi-faceted and flexible tools. In her comment, Professor Micheline Ishay adds a number of critical points to this kind of 'effectiveness politics'. One of her biggest concerns is a sensibility for particularities and a need for greater differentiation regarding the social and economic contexts. This requires a more flexible heuristic which acknowledges the need for adaptation of tactics, and also for compromise, in order to secure long-term results. The cost-benefit assessment varies and needs to be adapted, Professor Ishay emphasizes, depending on contexts, preferences, and unexpected developments. She lays emphasis not only on the challenge of deciding which objectives to pursue and which tactics to employ but also on the difficulty of how to measure success (cf stories 5, 9, 14, and 16).²⁰ The discussion points to a more pragmatic approach that starts in the midst of things and acknowledges that we often must choose between non-ideal alternatives and without knowing what will happen in order to be able to 'go on'.²¹ Similar to renewed warnings not to construct history in light of 'results' that we know only today, one of the biggest challenges for tactical thinking is then how to assess options and strategies without being influenced by our preferences.

These discussions show that when we consider the limits of human rights we need to understand that these limits are actor- and context-dependent and historically contingent, and that they are not normatively universal and neutral. We

²⁰ See Thomas B Jabine and Richard P Claude (eds), *Human Rights and Statistics: Getting the Record Straight* (University of Pennsylvania Press 1992); Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2009); Malcolm Langford and Sakiko Fukuda-Parr (eds), 'Special Issue: Quantifying Human Rights' (2012) 30 *Nordic Journal of Human Rights* 222; Francisco López-Bermúdez, 'Creating and Applying Human Rights Indicators' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 873.

²¹ Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press 2014) 284–91.

should always consider how these limits are defined, by whom, for what purposes, and with which effects. These effects are particularly important because limits are always both restricting and enabling, displacing and constituting, excluding and conflating, as well as separating and connecting.

We mentioned at the beginning that there is not one single human rights project, or one single history of human rights, or one grand failure or success of those rights. Neither has there ever been a single human rights movement, a sole historical source of human rights, or a unique meaning of these rights. Of course, there are dominant histories, meanings, and practices but human rights have never been universal panacea or universal pandemic. We are drawn too easily towards binary oppositions such as perpetrator–victim, compliance–violation, morality–politics, centre–periphery, particular–universal, or (nation) state–humanity. Too easily are we presented with the shallow diagnosis that human rights are justifications of particular projects, and that they can mean anything to anyone. We believe too easily the promise of emancipation and liberation without noticing exclusions. Too easily we condemn or praise. We therefore hope that the reflections on the limits of human rights presented in this volume will at least yield a more differentiated sensibility and also a certain modesty that eschews conventional or fashionable arguments.

An essential limit of human rights is that they do not proclaim an objective and universal truth of ‘the good’ or ‘the right’. To invoke human rights always means to make a claim, and this claim in its legal, political, or moral realization is (and must be) contested, defended, and reformulated. Human rights always entail both an objective record of experience and a subjective view. A meaningful conception of human rights also needs to embrace the necessity for political materialization which encompasses the reality of both claiming and contestation, because the ‘balancing’ of rights ultimately always means taking sides, with all the subjectivities and possible injustices this involves.

III. BEFORE THE NEXT JOURNEY BEGINS

Before we continue our journey, we would like to sincerely thank every contributor to this volume for her or his dedication and patience. It is the authors who have made this work possible. We very much appreciate that they devoted a substantial part of their limited time to this volume, and we hope that they too find that the volume as a whole is more than a sum of its individual parts. At Oxford University Press, Ms Merel Alstein, Ms Nicole Leyland, Ms Emma Endean-Mills, Ms Natasha Flemming, Mr James Baird, and in the final stage of the project, especially Mr Jack McNichol provided their invaluable assistance. Also the excellent team of copy editors has our gratitude and appreciation.

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Writing and editing are processes that require dedication and patience not only of the authors but also of those closest to them—families and friends. This volume would not have been possible without their support. Clara Marsan Raventós made so much possible, and little Ona and Kai Traisbach Marsan showed more patience than one could have reasonably expected from them. Both will hopefully continue to challenge limits and also establish new ones of their own.

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Contents

<i>Notes on Contributors</i>	xiii
Introduction: A Ride on the Human Rights Bus	1
<i>Bardo Fassbender and Knut Traisbach</i>	
I. The Journey Begins	6
II. After the Journey	10
III. Before the Next Journey Begins	18
Prologue: Limits and their Varieties	23
<i>Henry J. Steiner</i>	
I. Introduction	23
II. Limits Distinguishing Human Rights from other Fields of International Law	24
III. Legislatures and Courts: Economic and Social Rights and Political Democracy	29
IV. Conclusion: Majestic Ideals, Limited Means	35
PART I. LIMITS OF IDEAS, LIMITS OF COMMUNITIES: PARADIGMS AND BIASES	
1. Humanity and the Claim to Self-Evidence	39
<i>Lynn Hunt</i>	
I. 1776 and 1789	39
II. The Cultural Learning Implied by Self-Evident Universal Human Rights	43
III. Limitations	48
2. The Self-Evidence of Human Rights: Origins and Limits of an Idea	55
<i>Bardo Fassbender</i>	
I. The Origins of Self-Evidence	56
II. 'All Men'? The Limits of Self-Evidence	63
III. The Shattered Belief in the Self-Evidence of Human Rights	65

3. Human Rights, Global Justice, and the Limits of Law	69
<i>Kate Nash</i>	
I. Human Rights are Globalizing ...	69
II. ... through States	71
III. Two Sovereignties	74
IV. The Citizen/Human Paradox	75
V. Human Rights are Political	79
4. Human Rights beyond the Double Bind of Sovereignty: A Response to Kate Nash	81
<i>Mark Goodale</i>	
5. Emergencies and Human Rights: A Hobbesian Analysis	89
<i>David Dyzenhaus</i>	
I. Legitimacy, Justification, and Human Rights	93
II. Hobbes and the Basic Legitimation Demand	96
III. Constitutionalism versus Reason of State	101
6. Reason, Faith, and Feelings: A Response to David Dyzenhaus	109
<i>Conor Gearty</i>	
I. The Flight from Reason	109
II. Land	112
III. Community	114
IV. Justification by Faith	116

PART II. LIMITS OF FUNCTIONS, LIMITS OF USES: ACTORS AND PRACTICES

7. Being a Realist about Human Rights	121
<i>Christian Reus-Smit</i>	
I. Realist Scepticism	122
II. Power and Agency Reconceived	124
III. Orders, Rights, and Uncertainty	126
IV. The New Scepticism	128
V. To Cut a Long Story Short	130
VI. Conclusion	133
8. Political Limits of International Human Rights: A Response (or a Rejoinder) to Christian Reus-Smit	137
<i>Başak Çalı</i>	
I. Realism about International Human Rights: A Simple Story Line	139
II. Modern versus Contemporary International Human Rights: An Even More Complex Story on Political Limits	141

III. Political Limits of Contemporary International Human Rights	142
IV. Conclusion	144
9. Human Rights Bodies and the Structure of Institutional Obligation	147
<i>Jan Klabbers</i>	
I. Introduction	147
II. Human Rights Institutions	150
III. Institutionalization	153
IV. Three Illustrations	157
V. To Conclude	162
10. Dissecting the Institution: A Response to Jan Klabbers	167
<i>Rosa Freedman and Ruth Houghton</i>	
I. Individuals and the Institution	169
II. Institutionalism: The Structure and Function of an Institution	171
11. Differentiating Fundamental Rights and Economic Goals	175
<i>Aryeh Neier</i>	
I. Economic Goals	176
II. Upholding the Rights of the Unpopular	178
III. Conflicts between Economic Goals	179
12. Advocating for Social and Economic Rights—Critical Perspectives: A Response to Aryeh Neier	185
<i>Jeremy Perelman</i>	
I. Conceptual and Pragmatic Considerations: SER as Rights and as Political Strategies	186
A. SER as Rights	186
B. SER as Political Strategies	188
II. SER as Rights and Political Strategies: Responses from the Fields	190
A. The Positivist Answer: SER as International Law	190
B. Theoretical Rejoinders	191
C. Doctrinal Rejoinders: The Structure of Rights and the Respect, Protect, and Fulfil Trilogy	193
III. Revisiting and Transcending Critique: The Limits of the Human Rights Framework and Beyond	195
IV. Conclusion	198

PART III. LIMITS OF SCOPE, LIMITS
OF RECOGNITION: THE CASE
OF WOMEN'S RIGHTS

13. Between the Margins and the Mainstream: The Case of Women's Rights	205
<i>Hilary Charlesworth and Christine Chinkin</i>	
I. Introduction	205
II. The Human Rights Field	205
III. Women, Peace, and Security	213
IV. Conclusion	219
14. Women's Rights are Human Rights: A Response to Hilary Charlesworth and Christine Chinkin from a Chinese Perspective	223
<i>Bai Guimei</i>	
I. Introduction	223
II. The Margin and Mainstream Discourse	224
III. The Specialist and Generalist Approaches	225
IV. The Family Values Debate	225
V. Women in Armed Conflicts: The Security Council Resolution 1325	227
VI. Article 5 of CEDAW and its Implementation	228
VII. Concluding Remarks	229
15. Women's Progress and Women's Human Rights	231
<i>Martha C. Nussbaum</i>	
I. Women's Progress: What Does International Law Have to Do with It?	232
II. Does Law Deter Crimes against Women?	236
III. 'Already a Form of Improvement in Itself'	238
IV. CEDAW as a Victory and Midpoint	241
V. CEDAW, the CEDAW Committee, the Protocol, the Recommendations	244
VI. The Limits of International Human Rights Law for Women's Human Rights	246
VII. CEDAW's Modest Contributions	251
16. The Limits of Law: A Response to Martha C. Nussbaum	267
<i>Fareeda Banda</i>	
I. On Seeing the Unseen: CEDAW and Intersectionality	268
II. Reproductive Rights	270
III. Beyond CEDAW	274
IV. On the Challenge of Measuring Progress	276
V. Conclusion	278

PART IV. LIMITS OF PRAGMATISM, LIMITS
OF COMPROMISE: THE CASE
OF ARMED CONFLICT

17. The Limits of the Laws of War	283
<i>Frédéric Mégret</i>	
I. Contingent Limits	284
A. Lag behind the Reality of War	284
B. Lack of Enforcement	285
C. The Interstate Character of the Regulation of War	286
II. Inherent Limits	288
A. The Limits of Legalism	288
B. The Limits of Compromise	290
C. The Limits of Pragmatism	292
III. Conclusion	294
18. The Banality of Humanity (as an Absolute): A Response to Frédéric Mégret	297
<i>Knut Traisbach</i>	
I. The Limits of Law	298
II. Inherent Limits	299
III. Conclusions	303
19. The Limits of Human Rights in Times of Armed Conflict and Other Situations of Armed Violence	305
<i>Andrew Clapham</i>	
I. Introduction	305
II. Human Rights in Armed Conflict	305
A. A Limited Role for Human Rights in Targeting Decisions?	305
B. A Limited Role for Human Rights in Challenging Internship and Detention?	310
III. Human Rights in Other Situations of Armed Violence	312
A. Human Rights Law for Those Subjected to Targeted Killings by Drones	312
B. Human Rights for Those under the Control of Armed Groups	314
20. The End of the War/Peace Limit on the Application of International Human Rights Law: A Response to Andrew Clapham	319
<i>Yuval Shany</i>	
I. Substantive Expansion	320
II. Institutional Concerns	324
III. Fear of Backlash	326

PART V. LIMITS OF PROSPECTS, LIMITS OF MEANS: AN OUTLOOK

21. The Limits of Human Rights in a Moving World—Elements of a Dynamic Approach <i>Mireille Delmas-Marty</i>	331
I. Introduction: Limits, Crossing Limits, and Refusing any Limit	331
II. The Limits of 'Reason of State' in Light of the Humanist and Universalist Ideal of Human Rights	334
A. Human Rights <i>or</i> Raison d'État	334
B. Human Rights <i>and</i> Raison d'État: Towards a Common Standard	336
III. The 'Reason of Planet' and Risk Anticipation as Overcoming the Limits of Time	338
A. 'Reason of Planet' as a Limit of Human Rights: The Precautionary Principle	338
B. From Zero Risk to Acceptable Risk: Limiting Limits	340
IV. Does 'Techno-Scientific Reason' Lead to the Refusal of any Limit?	341
A. The Ambivalence of New Technologies	341
B. The Contours of the 'Irreducible Human Core'	342
V. Conclusion	343
22. Where are the Limits of Human Rights? Four Schools, Four Complementary Visions: A Response to Mireille Delmas-Marty <i>Marie-Bénédicte Dembour</i>	345
I. The Four-School Human Rights Model	347
II. The Limits of Human Rights According to the Four Schools: Inherent Defects, Limited Results, Specific Domain, Unfortunate 'Mishaps'	350
III. The History of Human Rights as Viewed by the Different Schools	352
IV. Conclusion	354
23. Strategizing for Human Rights: From Ideals to Practice <i>Douglas A. Johnson and Kathryn Sikkink</i>	357
I. Context and Background	359
II. What Does It Mean to Strategize?	360
III. Is There a Downside to a More Strategic and Outcome Oriented Human Rights Practice?	360

IV. How to Strategize for a More Effective and Outcome Oriented Human Rights Practice	362
A. Using Tools and Exercises for Strategic Training	365
B. Using Historical and Social Science Research for Training	369
V. Conclusions	372
24. Historical Strategies for Human Rights: A Response to Douglas A. Johnson and Kathryn Sikkink	375
<i>Micheline Ishay</i>	
I. Mapping the Terrain of Human Rights	376
II. Sustaining the Capacity for Change	376
III. Mass Dispersal versus Mass Concentration	377
IV. The Importance of a 'Spectrum of Allies'	377
V. Human Rights Ideology and Strategic Thinking	378
VI. Are Non-Violence Tactics more Likely to Lead to Successful Strategies?	378
VII. When Can We Declare 'Success'?	380
VIII. Conclusion	381
<i>Index</i>	383