

May 2020

The Right to Life in International Law

W. Paul Gormley

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

W. Paul Gormley, The Right to Life in International Law, 16 Denv. J. Int'l L. & Pol'y 191 (1987)(book review).

This Book Review is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

BOOK REVIEW

The Right to Life in International Law

*Reviewed by W. Paul Gormley**

RAMCHARAN, B. G. (editor), Martinus Nijhoff, Dordrecht, (1985); \$57.50 ISBN 90-247-3074-0, xii, 371 pp.

The most grievous violations of the fundamental rights of individuals - indeed of all mankind - become the focus of this excellent volume. The distinguished editor guided a group of contributors during an in-depth evaluation of the right to life as it currently exists in customary international law, and continues to be codified in major multinational conventions.¹ Nonetheless, the focus of this series of essays is placed on the future developments that will assure effective implementation of the right to life. Accordingly, this book reflects the philosophy of the editor, who seeks to enlarge the effective protection of human rights by means of an expanded and open-ended interpretation of existing treaty texts, as opposed to the traditional approach which tended to apply a restrictive interpretation toward human rights provisions that restrict absolute state sovereignty.

One of the book's main contributions is that a dynamic approach has been adopted for the purpose of expanding human rights protection. Admittedly, the question can be asked: "Has the tone of the volume become excessively dynamic or overly far-reaching in terms of current state practice"? Beyond question, the issues raised in this challenging text will be controversial throughout the remainder of this century, as dictatorships of the left and the right continue to arbitrarily deprive their citizens of fundamental rights and even their mere physical existence. "[W]hile maintaining a legal orientation in general, an effort has also been made to be dynamic, to view the right to life from all of its possible areas of appli-

* W. Paul Gormley is a member of the District of Columbia and United States Supreme Court Bars. Formerly Leverhulme and Simon Fellows, University of Manchester. A.B. San Jose State University; M.A. University of Southern California; Ph.D. University of Denver; J.D. (hons), LL.M. George Washington University; M. Int.-Comp. L., D. Jur. Free University of Brussels (VUB); LL.D. Victoria University of Manchester.

1. THE RIGHT TO LIFE IN INTERNATIONAL LAW (B. Ramcharan ed. 1983) [hereinafter cited as RIGHT TO LIFE]. The applicable treaty texts are reproduced in the Annexes, *id.* at 317 ff. See generally, B. Ramcharan, INTERNATIONAL LAW AND FACT FINDING IN THE FIELD OF HUMAN RIGHTS (1982).

cation, to examine the complex problems which this right encounters in practice, and to address existing or future needs."²

The influence, in fact leadership, of the editor is considerable; however, it would be incorrect to assume that the contributors have been unduly influenced. There are, accordingly, points of disagreement that appear among the various essays. In other words, authors "do their own thing." For example, the conservative approach is to classify human rights and fundamental guarantees into three distinct classes: 1) political and civil; 2) economic, social and cultural; plus 3) the newer solidarity rights (or human rights of the third cycle), because of the different standards of implementation and enforcement that have been perfected by regional and international organizations.³ By way of contrast, the goal sought by action-oriented human rights lawyers is to abandon these classifications in order to employ the corpus of existing human guarantees to precise situations. In practice, the right to life (the primary civil and political right) incorporates the "right to living" (which consists primarily of economic guarantees). But as frequently demonstrated in the series of chapters, such philosophical differences do not hamper the emerging standards and implementation of human rights norms. Perhaps all persons of goodwill can avoid being entrapped by such philosophical controversies by devoting a greater portion of their efforts toward the practice, rather than the theory, of human rights law. This position is clarified in Chapter I, *The Concept and Dimensions of the Right to Life*,⁴ which represents the synthesis, and offers the conclusions and recommendations of the project. Dr. Ramcharan brings together a number of diverse positions for the purpose of analysis, and, secondly, provides a workable and unified scheme of human rights protection. Consequently, Dr. Ramcharan assumes a law-making role when he advocates that human rights lawyers "must, therefore, of necessity be in the forefront of the discipline, charting new courses, breaking new ground, and establishing new models and methods."⁵ He illuminates this approach to the future role that should be accepted by human rights lawyers by contending that: "If the international human rights lawyer is doing his job well, he has to be ahead of his colleagues in postulating new theories, in advocating the recognition of new norms and in advancing new forms of action for promotion and protecting human rights."⁶

2. *Id.* at v.

3. *Contra*, Alston, *The Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 N.I.L.R. 307 (1982) (and the sources cited). While in sympathy with the objectives sought by a number of contributors, the reviewer feels compelled to concede the validity of the conservative approach by classifying political and social rights as a distinct group of legal rights when contrasted with social and economic guarantees, because of the different schemes of implementation and methods of enforcement.

4. RIGHT TO LIFE, *supra* note 1, at 1-32.

5. *Id.* at 1.

6. *Id.*

The position defended by the contributors is that the right to life is an imperative norm, a peremptory right, that is, *jus cogens*.⁷ Precisely, the "right to life" is a norm of customary international law or a general principle of international law which transcends particular positions, as this right is codified in specific international conventions.⁸ As a result of this interpretation of existing customary law, human rights lawyers are "not necessarily limited by the provisions of particular conventions or declarations, but must have recourse to the totality of the evidence and the practice available within the international community."⁹

The further innovation becomes the scope, or the outer limits, of the right to life. A restrictive interpretation of treaty texts, such as article 6 of the *International Covenant on Civil and Political Rights*,¹⁰ article 2 of the *European Convention of Human Rights and Fundamental Freedoms*,¹¹ or article 4 of the *American Convention on Human Rights*,¹² is no longer applicable. Yet, two aspects of this right to life must be considered, as the contributors so aptly demonstrate. The mere physical existence of mankind must be assured as a norm of *jus cogens* from which states may not derogate, even during periods of extreme emergency and open warfare. Simultaneously, the "right to living" mandates that a minimum quality of life be maintained. Governments have a legal duty to provide minimum subsistence levels. Obviously, the problem of setting such levels must, necessarily, be determined in each case; yet the significant consideration is that governments are required "to pursue policies which are designed to ensure access to the means of survival for every individual within its country."¹³

Related subject matter areas, such as the right to peace, the right to survival, and the right to a safe environment are applicable. Environmental hazards must not be minimized, for the reason that the interrelationship between the right to live and the right to a pure and clean environment are inseparable. Not only is a strict duty imposed on states, but a legal obligation - a right *erga omnes* - is imposed on the international community. As a result, measures must be taken by international and re-

7. The contributors assume that the imperative norm of *jus cogens* (and also rights *ergo omnes*) exist in customary international law and is applicable to the right to life. *E.g.*, RIGHT TO LIFE, *supra* note 1, at 14-15, 186-87, & 190. This position is supported by the reviewer; however, it must be conceded that a significant number of distinguished authors attempt to refute the existence of imperative norms. *See, e.g.*, Weil, *Towards Relative Normativity in International Law?*, 47 AM. J. INT'L L. 413 (1983), and Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455 (1965).

8. RIGHT TO LIFE, *supra* note 1, at 3.

9. *Id.*

10. Adopted Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16), 49 U.N. Doc. A/6136 (1966) (*entered into force* March 23, 1976).

11. E.T.S. No. 5 (1950); 213 U.N.T.S. 221.

12. Pact of San Jose, Costa Rica (*opened for signature* 22 Nov. 1969)(*entered into force* July 1978), O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 of 7 Jan. 1970; 9 I.L.M. 673 (1970).

13. RIGHT TO LIFE, *supra* note 1, at 6.

gional organizations to prevent those environmental defaults that endanger the lives of human beings. Here, then, one of the newer human rights becomes an essential phase of the larger safeguard for human life. All too obviously, uncontrolled pollution has the potential not only of destroying flora and fauna, but also mankind: it is man who has become the endangered species.¹⁴

Conversely, the right to life is not absolute: in certain clearly defined and limited circumstances, the state may legally take human life, and these "permissible deprivations" are clearly set forth within the texts of human rights conventions. But Dr. Ramcharan, relying on the text of article 4 of the *American Convention*, maintains that these "categories of exceptions are closed and that no derogation of the right to life is permissible outside of the permitted categories"¹⁵ as a rule of customary international law. This restriction on the imposition of the death penalty is accepted within the orbit of the Organization of American States; however, is it valid to contend that other sovereigns are precluded from enacting legislation to apply the death penalty to additional crimes? As this review is being written, public pressure is mounting in the United States for the imposition of the death penalty for acts of espionage committed during peacetime. Presently, this crime carries the penalty of life imprisonment. At the moment, it is only possible to speculate as to whether Protocol Number 6 to the *European Convention of Human Rights*¹⁶ and the *Draft Second Protocol to the International Covenant on Civil and Political Rights*¹⁷ will be widely adopted by the High Contracting Parties.

Gross violations of human rights - such as torture, lack of a fair trial, disappearances of defendants, and executions during periods of emergency - have increased in severity during the past year. It appears that even graver deprivations of human freedom will occur in the final decade of this century. Accordingly, the lesson is clear: there is a desperate need for international cooperation and concerted action by the international community, within the framework of the United Nations. To achieve this objective, Dr. Ramcharan presents a thirty-seven point agenda for action, for example the reinforcement of *jus cogens*, the enactment of the right

14. *Accord generally*, Gormley, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION (1976).

15. RIGHT TO LIFE, *supra* note 1, at 21.

16. Protocol No. 6 to the *European Convention For the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*; reproduced *id.* at 343 - 45. Article 1 provides: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." And Article 3 stipulates: "No derogation from the provisions of the Protocol shall be made under Article 15 of the Convention." See also, *Explanatory Report on Protocol No. 6 to the Convention For the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*; reproduced in RIGHT TO LIFE, *supra* note 1, at 345-47.

17. *Draft Second Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc. A/C.3/35/L.75, at 35; reproduced in RIGHT TO LIFE, *supra* note 1, at 348 - 50.

to life in national constitutions, the imposition of international criminal liability for gross violations, the duty to negotiate disarmament issues, etc.

Dr. F. Menghistu reexamines the basic definition of this concept in order to come to grips with the main elements comprising the right to living, i.e. its economic base.¹⁸ Not by accident, the Ethiopian author approaches this problem as one of survival; consequently, he speaks of a human right to survival, namely the right to live. But this right involves more than a negative approach that will restrict arbitrary governmental acts; instead, a duty is placed on the state (and its organs) to provide the sustenance of life, primarily adequate nutrition and medical treatment. This economic side of the right to live brings together a number of other individual rights to deal with the mere survival of mankind, since 800,000,000 of the world's population face starvation. In addition, the newer rubric of human rights jurisprudence will also encompass some of the solidarity rights in that the international community has a duty to lend support. Indeed, one of the themes to emerge in most of the essays is the duty of the global community - as represented in the United Nations, its specialized agencies, plus regional institutions - to implement the right to living.

Yet the difficulty of implementing such a global guarantee will become all too obvious, owing to the package of rights and economic guarantees that will become relevant. Nonetheless, human beings will be protected when governments deal effectively with such matters as underdevelopment, socio-economic stagnation, and political instability.

It follows that the newer right to development assumes a special importance within the third world. Hence, Professor de Waart, in a thoughtful chapter,¹⁹ deals with the very foundation of any "right to survival." Perhaps this right to development will go further in supporting the right to living than dealing exclusively with survival, for in his view, "a right to development may emerge as a right to protection by law against unintentional non-arbitrary creeping or passive deprivation of life resulting from natural or man-made disasters which endanger the fulfillment of basic needs."²⁰ Thus, international society will assume an accelerating role in dealing with natural or man-made disasters that cannot be adequately dealt with by states.

Professor C.K. Boyle deals directly with one of the book's underlying themes, *The Concept of Arbitrary Deprivation of Life*.²¹ In fact, the con-

18. Ch. III, *The Satisfaction of Survival Requirements*, RIGHT TO LIFE, *supra* note 1, at 63-83.

19. Ch. IV, *The Inter-Relationship Between the Right to Life and the Right to Development*, *id.* at 84-96. See also, THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL (R. Dupuy ed., 1979); Van Boven, *The Right to Development and Human Rights*, 28 REV. INT'L COMM'N JURISTS 49 (1982).

20. RIGHT TO LIFE, *supra* note 1, at 89.

21. Ch. X, *id.* at 221-83.

cept of "arbitrary" - to be contrasted with the legal taking of human life by a state - requires constant interpretation and reevaluation, because the term "arbitrary" is contained within international conventions. For instance, article 6 of the *Civil and Political Covenant* speaks of "arbitrary deprivation of life." As such, the issue becomes: "Have governmental authorities acted in an arbitrary fashion?" The issue of the arbitrary taking of life by state agencies, even if permitted by municipal law, must be reexamined in terms of regional and international criteria, guaranteeing the right to life. This is to say, considerable disagreement arose at the time these human rights conventions were negotiated, and compromises were required, which had the effect of weakening the original goals of the treaty drafters. Still, considerable insight is provided by the *travaux preatoires* of the treaty articles at issue, for the reason that these provisions have become general principles of international law and are also included within customary international law. The primary consideration is that the right to life is the foremost human right, upon which all other human rights (and social guarantees) depend. The point at issue becomes: "Which exceptions to this sacrosanct right are recognized under international rights law?" The death penalty, consequently, must be reexamined in terms of the subsequent evolution of international criteria.

Thus, the specialized topic, which continues to become ever more controversial, is that of capital punishment. Dr. Sapienza examines the *International Legal Standards on Capital Punishment*,²² particularly from the perspective of future treaty commitments. Those international norms that ban or restrict the imposition of capital punishment become the main legal force restricting the right of governments to extinguish human life. The primary examples are to be found in treaty articles, e.g. article 6 of the *Civil and Political Covenant*, which does not outlaw, but restricts the imposition of the death penalty and provides post-sentencing relief, such as a pardon or commutation. However, the compromises that were reached during the drafting stage have weakened the commitment undertaken by states parties. It follows that protocols, when ratified, will abolish capital punishment, namely the *Sixth Optional Protocol to the European Convention of Human Rights* and the *Draft Second Optional Protocol to the Civil and Political Covenant*. Here, then, is the main thrust (along with possible changes in domestic legislation) to preserve human life at the global level, specifically a binding treaty commitment. The next stage is to provide, first, the machinery for international monitoring and, second, a means of enforcement, especially during periods of emergency or throughout a state of war, at which time governments are more inclined to disregard their international obligations.

The recommendation offered, which could also be utilized as the primary conclusion emerging from the series of studies, is that constant attempts to improve standard-setting, accompanied by supervisory struc-

22. Ch. XII, *id.* at 284-96.

tures, be intensified, in spite of the hesitancy on the part of states to restrict their freedom of action against their own nationals.

In looking toward the future, particularly the final decade of this century, the right to life, deemed to be *jus cogens*, peremptory, and a right *erga omnes*, must become the focus of United Nations efforts, and indeed the focal point of the U.N. Commission for Human Rights, as so eloquently espoused by Professor van Boven, who contends, and quite properly, that "The protection of human life and the prevention of killings could become one priority theme of the Commission in its future programme and in taking up concrete situations involving gross and consistent violations of human rights."²³ Therefore, Professor van Boven offers a number of precise recommendations, such as the designation of a special rapporteur to examine instances of deliberate taking of life. These far-reaching proposals should be evaluated in future studies that build upon the foundation laid in this outstanding book.

23. *Id.*, Annex VII, 335, at 340. The right to life becomes a recognized rubric of human rights law, with the result that the literature continues to expand. See Desch, *The Concept and Dimensions of the Right to Life (as defined in International Standards and in International and Comparative Jurisprudence)*, 36 ÖSTERR. Z. ÖFFENTL. RECHT UND VÖLKERRECHT 77 (1985) for a reexamination of the expanding concept. See Dr. Desch's discussion of the *Universal Declaration of Human Rights* 1981 (proclaimed by the Islamic Council to mark the anniversary of the 15th century of the Islamic era, Paris, 19 Sept. 1981), *id.* at 79 & n. 8 at 81-83.

See also van Aggelan, *LE RÔLE DES ORGANISATIONS INTERNATIONALES DANS LA PROTECTION DU DROIT À LA VIE* (1986).

The evolution of these rights, enunciated in the *Universal Declaration of Human Rights* (U.N. GAOR 3rd Sess. (I), U.N. Doc. A/810, 1984), including the right to life, is discussed in Gormley, *The Emerging Dimensions of Human Rights: Protection at the International and Regional Levels - The Common Standard of Mankind*, 17 BANARES (INDIA) L.J. 1 (1981). Cf. Okere, *The Protection of Human Rights In Africa and the African Charter on Human Rights, European and American Systems*, 6 HUMAN RTS. Q. 141 (1984).

