

## ‘Not in our name!’: losing humanity in current human rights discourse

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### 1 Introduction

Now that everyone partakes in falconry it is important  
 to have a sharp eye and a sharp pen  
 We should not plough the paper roughly  
 ...  
 Too many going for falconry are darkening the streets[.]<sup>394</sup>

These lines, taken from a poem by the Dutch poet H. H. ter Balkt, and read many years ago, have always stayed with me. By ‘falconry’ the poet referred to the art of poetry, which, through excessive writing ‘drenched in smoke and wine’, was on the brink of collapse. According to the poem, falconry is an art demanding the sharpest vision and lightning-fast precision, not drowsiness and intoxication.

Years later, I involuntarily applied these lines again. This time, on the subject of human rights discourse. Are not too many human rights darkening the streets nowadays, with everyone taking every opportunity, whether appropriate or inappropriate, to claim them for themselves or to use them to protect or condemn others, near and far? Are not human rights susceptible to linguistic inflation, which may mean, according to some critics, that their central position in the legal and political organisation of liberal-democratic societies is being undermined?<sup>395</sup> And would not someone wanting to continue using human rights to correct the inhuman aspects of our global legal systems take Ter Balkt’s message to heart and have ‘a sharp eye’ and ‘a sharp pen’ rather than seeking to ‘plough the paper roughly’?

<sup>394</sup> H. H. ter Balkt, *Ode aan de Grote Kiezelwal en andere gedichten* (Amsterdam: De Bezige Bij, 1992), 68–9 (‘Ballade van Valcoogh de schoonschrijver’) (translation mine).

<sup>395</sup> See C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007), 12.

The idea that effective use of human rights calls for restraint and subtlety implies a critical distance towards the myriad of human rights discourses, tools, practices and organisations currently existing in the world. This critical attitude is based on the tentative assumption that, in the case of human rights, *less is more* and, conversely, *more is less*. By this, I mean that the notion of human rights, as a layered and plural concept, is eroding at different levels, and is consequently losing at least some of its significance in some of these contexts. In the following, I set out to discuss the situation at three different levels at which human rights or discourse on human rights have come under threat.

Human rights can be eroded by:

- (1) an excessive use of ‘human rights’ as a superior moral standard in political statements;
- (2) the use of deadly force, including military action, justified by an appeal to ‘human rights’;
- (3) the tendency to extend the range of ‘human rights’ ad infinitum.

Note that the term ‘human rights’ means something different at each of these three levels. At the first level, that of daily political rhetoric, the concept of human rights is generally underdetermined and loosely used. A politician complains, for example, about the ‘human rights situation’ in a given country and calls it ‘unsatisfactory’. At the second level, using the reference to human rights to justify humanitarian intervention that is not authorised by the UN Security Council is less open-ended. Here, military action is weighed against the current human rights situation and presented as the ‘lesser evil’. That means there must be evidence of such a serious violation of human rights that the use of military force to put an end to this situation is morally justified. Central to the third level is the political struggle for legal recognition of a new human right, being the right to combat social distress or suffering of particular groups.

In this chapter, I first discuss three areas of human rights discourse in which the viability of human rights is at risk, illustrated by some examples. In the second part, I reflect further on the problematic and self-defeating reference to humanity at these levels of discourse. In discussion with Arendt, Scheler, Agamben and Lévinas, I argue that if a right to a community and to organised living is considered to be the most basic human right, we cannot *disregard* the other’s belonging to a (dynamic) concrete, customary world when we consider that other person’s rights. ‘Thought’ may help us to rediscover the fundamental *other*-directedness of human rights and the dangerousness of decisionism (the politics of

‘clean slates’), on the one hand, and biological and social determinism, on the other hand. First of all, I briefly allude to the origins of the Universal Declaration of Human Rights (1948). What do the motives behind this Universal Declaration tell us about how human rights in this century may contribute to a more humane world?

## 2 Past and present

On 10 December 2008, the Universal Declaration of Human Rights (UDHR) was sixty years old, a venerable age for a document that, in times of ups and downs, has never ceased to fascinate and inspire. The interesting thing about the UDHR is that it was not created as a legally binding document, but instead based its universal value directly on its moral content, without any specific foundation in natural law.<sup>396</sup> The message of the UDHR is twofold, according to the following words from the famous preamble:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

On the one hand, human rights are designed to safeguard the individual from ‘barbarous acts’ and from ‘tyranny’ and ‘oppression’. Here, human rights act as protectors against the greatest injustice, a feature usually associated with traditional civil liberties and political rights. On the other hand, human rights proclaim the coming of a world not yet achieved. In that world we will not only enjoy freedom of speech and belief, but also freedom from fear and want, in a direct reference to Franklin D. Roosevelt’s famous ‘Four Freedoms’ in his State of the Union address on 6 January 1941. In this context, human rights act as incentives, as promising signposts to a better world. In the endless pursuit of a world order in which fear and want no longer exist, it is particularly socio-economic rights, also known as second-generation human rights, that

<sup>396</sup> See M. Agi, ‘L’action personnelle de René Cassin’, in *La Déclaration universelle des droits de l’homme 1948–1998. Avenir d’un idéal commun* (Paris: La Documentation Française, 1999), 166.

have been developed. These rights, for which developing countries in particular have been urging, call on governments and private parties to create conditions for a world where everyone has the opportunity to be free and happy.<sup>397</sup>

It is already clear from the passage quoted from the preamble that the UDHR is primarily rooted in the experience of the greatest injustices in the previous two world wars. Among these, for different reasons, the horrors of the Holocaust have a unique place. The philosophers Avishai Margalit and Gabriel Motzkin even described the Holocaust as the ‘negative myth of origin’ of the (Western) world after the Second World War.<sup>398</sup> By this, they mean that the Holocaust has undermined Western liberal confidence in the progress and stability of their civilisations:

A negative myth of origin such as the Holocaust infuses the entire culture with a degree of nihilism, for it contains an intuition as to how fragile and tentative our culture is . . . The Nazis have posed before all of us the possibility that the idea of a universal humanity is not an unquestioned and fundamental given. *Remembering the Holocaust thus confronts us with the tension between our obligation to affirm our common humanity and our un-sureness about it.*<sup>399</sup>

Human rights may be understood as an attempt to provide the fragile legal order after Auschwitz – both nationally and internationally – with a moral foundation. The legalisation of morality inherent in human rights has been conceived as a means to prevent genocide and other crimes against ‘humanity’ in the future. And it is probably no coincidence that as the commemoration of the Holocaust in Europe and the United States increased in importance, with a peak in the 1990s, so, too, did the self-confidence of the human rights discourse.<sup>400</sup> The entrance of human rights discourse into the arena of international politics is particularly striking in the years since 1989, after the end of the Cold War, the fall of

<sup>397</sup> The inalienable right ‘to the pursuit of Happiness’ is codified in the US Declaration of Independence (1776).

<sup>398</sup> See A. Margalit and G. Motzkin, ‘The Uniqueness of the Holocaust’, *Philosophy and Public Affairs* 25 (1996): 80.

<sup>399</sup> *Ibid.*, 81 (emphasis mine).

<sup>400</sup> See D. Diner, ‘Memory and Restitution: World War II as a Foundational Event in a Uniting Europe’, in D. Diner and G. Wunberg (eds.), *Restitution and Memory: Material Restoration in Europe* (New York: Berghahn Books, 2007), 7–23; P. Novick, *The Holocaust in American Life* (Boston, Mass.: Houghton Mifflin, 2000); T. Maissen, *Verweigerte Erinnerung. Nachrichtenlose Vermögen und Schweizer Weltkriegsdebatte 1989–2004* (Zurich: Verlag Neue Zürcher Zeitung, 2005), 87 ff.

the Berlin Wall and the end of apartheid in South Africa. Since then, human rights have been everywhere. And they can be everywhere, because they not only have a narrow, legal meaning, but also fulfil an important rhetorical function as ‘universal’ moral–legal values outside the domain of law in a strict sense. Human rights supply moral claims with ‘something extra’. By presenting a moral claim in the form of a human right, it appeals – rightly or wrongly – to universal validity. This makes the moral claim, too, legally relevant. As John Stuart Mill said, ‘[t]o have a right . . . is . . . to have something which society ought to defend me in the possession of’.<sup>401</sup> In other words, those able to translate their moral claim into a universal human right score a double victory: first, they can invoke it *anywhere* (1), and secondly they can invoke it *as a right* that each society is theoretically supposed to protect, at least to a certain extent (2). Human rights are even capable of legitimising illegal acts.

### 3 Human rights and the Bird’s Nest

Rarely has there been so much talk of human rights as during the preparations for the Beijing Olympics in the summer of 2008. In the months preceding the Olympic Games, leaders from virtually the entire Western world criticised the Chinese government for the human rights situation in the country. Their criticisms were often complacent and non-specific. In their appeal to ‘human rights’ they not only meant China’s crackdown in Tibet or its oppressive politics towards the Uighurs, but also the position of China’s minorities in general, the treatment of political dissidents, the lack of democracy and violations of the freedom of religion, freedom of speech, freedom of information, free Internet access and so on. The comprehensiveness of the criticism gave the impression that China was primarily being criticised for not being ‘Western’ enough. In other words, that the incorporation of ideas of democracy, individual freedoms and the rule of law was wrongly failing to keep pace with China’s rapid economic growth. The Chinese leaders remained stoical in the cacophony of allegations and protests. Although the human rights situation in China was reported to have worsened in the run-up to the Olympics, not a single word was uttered on the topic of human rights during the spectacular opening of the Games at the equally impressive Bird’s Nest.

<sup>401</sup> J. S. Mill, ‘Utilitarianism’ [1863], in J. S. Mill and J. Bentham, *Utilitarianism and Other Essays* (Harmondsworth: Penguin Books, 1987), 327.

The perfect show put on by the Chinese in the Bird's Nest, under the watchful eye of almost all Western political leaders, each of whom had good reasons *not* to boycott the opening ceremony, can be seen as a symbol of a shifting world order on which the Western countries are gradually losing their political and moral grip. That image is confirmed by a report released by the European Council on Foreign Relations (ECFR), a European think tank, in 2008. The report maps the voting on human rights issues within the General Assembly of the United Nations. The result?

In the 1990s, the EU enjoyed up to 72% support on human rights issues in the UN General Assembly. In the last two Assembly sessions, the comparable percentages have been 48 and 55%. This decline is overshadowed by a leap in support for Chinese positions in the same votes from under 50% in the later 1990s to 74% in 2007–8. Russia has enjoyed a comparable leap in support. The trend away from the Europeans is markedly worse on the new Human Rights Council (HRC) where EU positions have been defeated in over half the votes.<sup>402</sup>

The report concludes that Europe's political influence in the field of human rights has diminished significantly in the past decade. In a time when 'overall support for its [human rights] positions is eroding, even among previously firm friends', this suggests that there is a growing need for a different, less-patronising and more moderate tone, beginning with an interest in the viewpoint of the other, in empathy. The ECFR report states that the EU will have to find a new balance between the willingness to engage in dialogue with others about human rights and seeking to remain persistent with regard to its 'core principles' which it must continue to defend, if necessary via the UN Security Council.<sup>403</sup>

The increase in accusatory, comprehensive human rights rhetoric on the eve of the Olympics shows that the Western countries, including EU member states, have not yet adjusted to their new position in the world.<sup>404</sup> Ironically, the Swiss architectural firm Herzog & de Meuron,

<sup>402</sup> R. Gowan and F. K. Brantner, *A Global Force for Human Rights? An Audit of European Power at the UN* (London: European Council on Foreign Relations, 2008), 2 (votes on the Israeli–Palestinian conflict were left out of the calculation). The general conclusion has been confirmed in later reports, and so far also holds for the post-Bush/Obama era.

<sup>403</sup> *Ibid.*, 58–9 (quotation at p. 58).

<sup>404</sup> The inflammatory Western human rights rhetoric surrounding the award of the Nobel Peace Prize in 2010 to the Chinese human rights activist Liu Xiaobo (imprisoned in China in 2009) echoed the wave of criticism from summer 2008. This time, however, the Chinese authorities reacted strongly.

which designed the Olympic Stadium in Beijing, seems to have known exactly how to conduct a dialogue with the Chinese.<sup>405</sup> The creation of the design of what came to be known as the Bird's Nest was accompanied by an intensive intercultural dialogue, which later enabled the Chinese people to relate to this building from their own culture, language and history and to develop a bond with it. But why should what has been possible for the Bird's Nest<sup>406</sup> not be possible for the construction<sup>407</sup> of human rights?<sup>408</sup>

#### 4 Human rights and military force

The ECFR report suggests that the EU needs to become more modest, but simultaneously advocates the use of military force to protect human rights: 'the EU must stand ready to intervene directly in major humanitarian crises where the UN will not act; a last resort, but an option that it would be immoral to reject'. The authors specifically consider cases of genocide, war crimes, ethnic cleansing and crimes against humanity, but this list is not exhaustive.<sup>409</sup> It evokes memories of a criterion formulated by Michael Walzer in his classic *Just and Unjust Wars*, which first appeared in 1977. Walzer considered a humanitarian intervention justified as a response – with a reasonable chance of success – to practices that 'shock the conscience of mankind'.<sup>410</sup> Walzer seems to derive this moral criterion directly from the passage in the preamble of the UDHR quoted above. Interestingly, the reference in the UDHR to the conscience of mankind is meant to serve the (peaceful) universal foundation of human rights. Further on, the preamble states that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the

<sup>405</sup> See *Birds Nest. Herzog & de Meuron in China*, a film by Christoph Schaub and Michael Schindhelm, Switzerland 2008, [www.herzogdemeuron-film.com](http://www.herzogdemeuron-film.com).

<sup>406</sup> The arrest, in April 2011, of the Chinese artist and activist Ai Wei Wei, who collaborated with Herzog & de Meuron during the creation of the Bird's Nest, does not change this argument.

<sup>407</sup> For the UDHR as the frontispiece of a temple, see M. Agi, *René Cassin, Père de la Déclaration universelle des droits de l'homme* (Paris: Perrin, 1998), 232.

<sup>408</sup> See Gowan and Brantner, *A Global Force for Human Rights?*, 59: 'The EU should shape a political narrative that reinforces its identity as a progressive force and *emphasizes its openness to others*' (emphasis mine).

<sup>409</sup> *Ibid.*, 68.

<sup>410</sup> M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2000), 107.

rule of law'.<sup>411</sup> Walzer, however, seems to reverse this basic idea: he presents the 'shocked conscience of mankind' as a benchmark for a 'humanitarian war', without a prior Security Council mandate serving morally to justify illegal international acts.

However understandable the widely felt moral imperative to use military force to intervene, in particular to stop or perhaps even help prevent genocide (thinking particularly of the genocide in Rwanda in 1994, when Western intervention failed to occur, partly because of a lack of interest),<sup>412</sup> the appeal to serious human rights violations (or the Holocaust)<sup>413</sup> to justify military violence is problematic. Not only because of the vagueness of criteria such as 'the shocked conscience of mankind' or 'a major humanitarian crisis', or lists such as 'genocide, war crimes, ethnic cleansing' that offer no sufficient clarity on whether and when intervention is justified. Nor because of the ample opportunities available to anyone wishing to conduct a war to abuse these criteria.<sup>414</sup> More fundamentally, the problem seems to be that in the past few decades, war rhetoric has been unable to do *without* its reference to human rights. By extension, it then becomes impossible to distinguish 'reconstruction missions' from 'fighting missions' when they flow directly over into each other, such as in Iraq and Afghanistan. In the confusion, human rights may turn into their opposite and produce inhumanity. Waging *war* in the name of humanity may imply fighting against monsters, enemies of humanity, 'terrorists' who are out there, disposed to be violent and to 'shock the conscience of mankind' whenever they have a chance.<sup>415</sup> If human rights are no longer able to float freely above warring parties, but, in a battle of good against evil, are appropriated and used by parties in the conflict to dehumanise their opponents, it is time to return to the preamble of the UDHR, which states that it is 'essential . . . that human rights should be protected by

<sup>411</sup> Ibid.

<sup>412</sup> See S. Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 329 ff.

<sup>413</sup> The reference to the Holocaust played an important role in the process of legitimising NATO's intervention in Kosovo in 1999. See A. E. Steinweis, 'The Auschwitz Analogy: Holocaust Memory and American Debates over Intervention in Bosnia and Kosovo in the 1990s', *Holocaust and Genocide Studies* 19 (2005): 276–89.

<sup>414</sup> See D. Fisher, *Morality and War: Can War Be Just in the Twenty-first Century?* (Oxford University Press, 2012), 231–3.

<sup>415</sup> See, in a similar vein, H. Lindahl, 'A-Legality: Postnationalism and the Question of Legal Boundaries', *Modern Law Review* 73.1 (2010): 53.



the rule of law' (and not by war).<sup>416</sup> The argument here is not directed against military operations or making war generally; it is about the justification of war. It is directed against the appeal to humanity of warring parties, in their attempts to claim a superior moral position vis-à-vis the 'immoral' enemy.

The indefinite 'war' against terrorism, framed as a war on behalf of all mankind, not only has Guantánamo Bay, Bagram and Abu Ghraib as its dark side. The discussion about the lack of rights of prisoners at Guantánamo Bay,<sup>417</sup> albeit relevant in this context, conceals the rights of which many millions of victims of war and violence in Iraq, Afghanistan and elsewhere have been deprived. War by definition disrupts, dispels and destroys. In this regard, I agree with Hannah Arendt, who in 1950 described 'the deprivation of a place in the world' (from which one can meaningfully act and form opinions) as 'the fundamental deprivation of human rights'.<sup>418</sup> Arendt argued for a 'right to have rights', a right to a community and to organised living (in which one is judged on one's actions and views), and found simultaneously that millions of displaced people around the globe were deprived of that most basic right, a situation which still holds today.<sup>419</sup> If wars, because of their disruptive nature, are (apart from natural disasters) the greatest threat to people and their rights, it may be prudent *not* to seek to justify the use of military force by referring to 'humanity' or 'human rights' in the absence of a UN mandate or in cases of ill-defined wars with an indefinite character. Note that this approach does not contain a *categorical* exclusion of any appeal to humanity or human rights in the context of a military operation. It still leaves room for the legitimacy of a well-defined, limited military intervention for the sake of 'humanity' in exceptional circumstances.<sup>420</sup>

<sup>416</sup> 'Whether or not we continue to enforce a universal conception of human rights at moments of outrage and incomprehension, precisely when we think that others have taken themselves out of the human community as we know it, is a test of our very humanity', as J. Butler writes in 'Indefinite Detention' (in J. Butler, *Precarious Life: The Powers of Mourning and Violence* (London: Verso, 2004), 89–90).

<sup>417</sup> See T. H. Bingham, *The Rule of Law* (London: Penguin Books, 2010), 133–59.

<sup>418</sup> H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace & Company, 1979), 296–7.

<sup>419</sup> *Ibid.*

<sup>420</sup> I therefore agree with David Fisher, who argues that '[i]f the international community is to recover its confidence in humanitarian intervention, it is . . . essential that the criteria for a just intervention should be clearly defined and agreed in advance and rigorously and consistently applied in practice'. See Fisher, *Morality and War*, 231–7 (p. 233).

But it is already very difficult to disconnect the reference to humanity and human rights from *everyday* war rhetoric, to return to the preamble of the UDHR and to seek the *peaceful* realisation of the most basic human rights of nameless millions by restoring their place in the world. For this requires patience, a sense of plurality and historicity, awareness of the inevitability of conflict and the provisional suspension of judgment.

## 5 Human rights and moral demands

Why is it that the unwritten constitution of Britain *prima facie* inspires more confidence than the South African Constitution, with its impressively long list of human rights in the second chapter? Perhaps because when human rights can remain unwritten, it tells us something about social trust in the stability of the legal system and the extent to which it is anchored in society.<sup>421</sup> The explicit formulation of human rights in treaties and constitutions, *en vogue* since the French Revolution, is still expanding, and seems to express mutual distrust. We require codification of a fundamental right because we no longer trust the other party: the prince, the parliament, the police, the neighbour and so on. The more specific and comprehensive our catalogue of human rights, the less leeway to the unspeakable mutual trust, and the more legalised our sense of morality.

A profusion of human rights might express the same kind of nihilism that Margalit and Motzkin discerned in the Western world after Auschwitz.<sup>422</sup> We cling fast to our fundamental rights because we only confide in our social morality when it is translated into law. In such an environment, a moral claim acquires social status only if it takes the established form of a legal right. This phenomenon has its roots in modern history: the successful struggle for emancipation of slaves, women, workers, blacks, homosexuals and other groups each time took the form of a legal battle for recognition of equal rights and focused on extending the scope of fundamental norms by abolishing restrictions based on race, gender, income, sexual orientation and the like.<sup>423</sup> Since the twentieth century, partly because of the horrors of the two world wars and partly as a

<sup>421</sup> Leaving aside the fact that the UK is a member of the Council of Europe and a party to the ECHR and many other human rights treaties.

<sup>422</sup> See Margalit and Motzkin, 'The Uniqueness of the Holocaust', 81.

<sup>423</sup> See J. M. Bernstein, *Recovering Ethical Life: Jürgen Habermas and the Future of Critical Theory* (London: Routledge, 1995), 192.

consequence of the expansion of the welfare state in post-war (Western) Europe, the struggle for legal recognition of rights has become the preferred means by which groups of victims of all kinds manifest themselves.<sup>424</sup> Terms such as ‘victim rights’ and ‘animal rights’ are only of recent date, but they mark the provisional end of a constantly accelerating process in which every conceivable moral desire seems to want to translate itself into a fundamental right. This trend, which has repercussions for the relationship between public and private, has already led to critical reflections on the indulgence of Western consumerism.<sup>425</sup> As Costas Douzinas, for example, writes:

[R]ights always agitate for more rights: they create ever new areas of claim and entitlement that again and again prove insufficient. We keep demanding and inventing new rights in an endless attempt to fill the lack, but desire is endlessly deferred.<sup>426</sup>

The proliferation of fundamental rights – usually in the form of a claim that the government will somehow have to try to honour – leads in different ways to a further erosion of human rights discourse. It is easy to see that, by definition, a government with limited resources will never be able to accommodate the surplus of rights. This undermines social confidence and widens the gap between government and citizens. Furthermore, conflicting moral claims, once they become settled in legal language, may provoke a hardening of positions and growing competition between different interest groups comprising stakeholders in a specific fundamental right. In the ensuing political and legal battles, it is reasonable to expect the stronger social groups to be much better placed to gain victory than the weaker groups, such as the dispossessed, the displaced and the deracinated (the list is not exhaustive).<sup>427</sup> In a

<sup>424</sup> See A. Mooij and J. Withuis, ‘Conclusion’, in A. Mooij and J. Withuis (eds.), *The Politics of War Trauma: The Aftermath of World War II in Eleven European Countries* (Amsterdam: Aksant, 2010), 327–31; D. Fassin and R. Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* (Princeton University Press, 2009), 16 ff.; K. McLaughlin, *Surviving Identity: Vulnerability and the Psychology of Recognition* (London: Routledge, 2012), 96–7.

<sup>425</sup> See D. W. J. M. Pessers, *Big Mother: Over de personalisering van de publieke sfeer* (The Hague: Boom Juridische uitgevers, 2003); Douzinas, *Human Rights and Empire*, 34–50.

<sup>426</sup> Douzinas, *Human Rights and Empire*, 49.

<sup>427</sup> See A. Sajó, Preface to A. Sajó (ed.), *Abuse: The Dark Side of Fundamental Rights* (Amsterdam: Eleven Publishing, 2006), 1: ‘The present concern is that even in democratic states, authorities and individuals claim human (fundamental) rights and the rule of law in ways that violate the human rights of other people.’

limited view of human rights, such moral claims would aim to support 'only' people who are deprived of most basic goods<sup>428</sup> – those whose world in which it is meaningful to act and express oneself has been lost or seriously threatened, in Arendt's terms – by offering them a minimum level of accessible legal protection and thus a perspective of a return to an active position in the world.

The rise of 'animal rights' shows that nowadays human rights are even claimed on behalf of beings who are totally unable to relate to their environment through law – and to whom, for the same reason, legal subjectivity remains alien. In this regard, it is interesting to take note of the failed attempt by the Dutch MPs Ineke Van Gent and Femke Halsema (both in the Green Left Party) to include animal rights in the Dutch constitution. After criticism from the Dutch Council of State, which commented that the term 'animal rights' was constitutionally undesirable because, under Dutch law, animals are not legal persons, but instead 'a special kind of legal objects requiring special care',<sup>429</sup> the MPs focused their efforts on an amended bill seeking a governmental duty of care for the welfare of animals to be included in the constitution. Somewhat surprisingly, the authors described this government duty in the explanatory memorandum yet again as 'the right of animals to have a government [*sic*] who does its utmost to safeguard animals from unnecessary suffering, pain, etc.'<sup>430</sup> According to the memorandum, a constitutionally enshrined duty of care to prevent animal suffering is not enough: animals deserve a fundamental social right, a human right not to suffer, even though they are not legal subjects (and not human beings).

Following a similar logic in *Frontiers of Justice* (2006), the legal philosopher Martha Nussbaum played down the distinction between human beings and animals as she considers this to result in a persistent source of injustice against animals. According to Nussbaum, both 'human' and 'non-human animals' (the terminology is Nussbaum's) are 'legal persons' entitled to all the amenities they need to flourish and to optimally develop according to their different capabilities. Remarkably, Nussbaum also wishes to encourage 'non-human animals' to lead decent, non-violent lives. In this context, she has difficulties with animals still in the wild, where they can commit atrocities. The utopian ideal shining

<sup>428</sup> In the liberal sense of rights (including property rights), liberties and opportunities.

<sup>429</sup> See Parliamentary Papers II, 2006–2007, 30 900, No. 4, 2.

<sup>430</sup> See Parliamentary Papers II, 2006–2007, 30 900, No. 5, 3.

through Nussbaum's argument is that of a benevolent zoo, in which both human and non-human animals have multiple rights to harmonious, fair and well-resourced living conditions.<sup>431</sup> In this vision the 'humanisation' of the animal stays apace with the 'animalisation' of the human<sup>432</sup> in a biopolitical twist that Nussbaum seems to ignore.<sup>433</sup>

## 6 Losing humanity in current human rights discourse

So far, I have briefly explored three levels of human rights discourse. At each of these three levels, the invocation of human rights is problematic and (at least to a certain extent) self-defeating. At the first level, that of the strong political rhetoric in the West concerning the human rights situation in the East (China, for example, but also the Islamic world), what has been lost is the idea that context matters. In other words, that it is gratuitous to condemn China for innumerable violations in the field of human rights, without even trying to relate the values at stake to the languages, cultures, histories, philosophies, traditions and customary orders of this enormous country and the continent in which it is located. In other words, human rights discourse cannot afford to be *indifferent* to the cultural world of the other. Borrowing terms from the philosopher Emmanuel Lévinas, every interest in the rights of the other should always start with *non-indifference*, with (paradoxically) a *breaking away* from a closed and self-referential human rights discourse.<sup>434</sup> Persisting in its own right, such a self-centred discourse may become oppressive, whereas it claims to be liberating. Appeals to human rights may end up

<sup>431</sup> See M. C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass.: Belknap Press, 2006), 392–401.

<sup>432</sup> For critical reflections on the animalisation of the human, see P. Sloterdijk, *Regeln für den Menschenpark. Ein Antwortschreiben zu Heideggers Brief über den Humanismus* (Frankfurt am Main: Suhrkamp, 1999), 48 ff.; M. Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, 1977), 203; H. L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Brighton: Harvester Press, 1982), 138; G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998), 3, 4, 126 ff.; G. Agamben, *The Open: Man and Animal* (Stanford University Press, 2004), 75–7.

<sup>433</sup> This phenomenon was already recognised by Hannah Arendt in *The Origins of Totalitarianism*. There, she critically remarked that human rights organisations, past and present, 'showed an uncanny similarity in language and composition to that of societies for the prevention of cruelty to animals'. See Arendt, *The Origins of Totalitarianism*, 292, also quoted in Douzinas, *Human Rights and Empire*, 118.

<sup>434</sup> Cf. E. Lévinas, 'Les Droits de l'homme et les droits d'autrui', in E. Lévinas, *Hors sujet* (Paris: Fata Morgana, 1987), 169.

in dehumanising others by ignoring, threatening or – by contrasting Western ‘civilised’ human rights to non-Western ‘barbaric’ cultures<sup>435</sup> – degrading cultural worlds in which individual lives become meaningful.<sup>436</sup>

An alternative human rights approach would reject the assumption that particularly non-Western cultures largely consist of self-contained, immutable, often oppressive practices from which individual victims can only be ‘liberated’ by elimination or destruction of these practices.<sup>437</sup> The starting point is that each cultural praxis is constantly changing and that moral change can best be achieved through an *internal* development in the direction of the values at stake.<sup>438</sup> In other words, a *translation* is needed in which human rights are explicitly connected to the languages, histories and background values of the particular culture. This can be stimulated by an intercultural dialogue and other forms of external pressure that bring internal struggles and discussions forward: ‘Through cross-cultural dialogue, external actors can support and influence internal discourse, but they must take care not to undermine internal discourse.’<sup>439</sup> What needs to be prevented is a framing of the situation as a dilemma in which members of a certain community are forced to choose between preserving their own (‘inferior’) culture *or* having access to a different culture based on

<sup>435</sup> The idea that human rights (on behalf of women) may be promoted by the *destruction* of (minority) cultures is proposed by S. M. Okin, ‘Is Multiculturalism Bad for Women’, in J. Cohen, M. Howard and M. C. Nussbaum (eds.), *Is Multiculturalism Bad for Women?* (Princeton University Press, 1999), 22–3.

<sup>436</sup> In Western and Central Europe, populist anti-Islam parties often use human rights discourse as a means to stigmatise Islamic culture and religion as inferior, barbaric and backward.

<sup>437</sup> See A. Schachar, ‘What We Owe Women: The View from Multicultural Feminism’, in D. Satz and R. Reich (eds.), *Towards a Humanist Justice: The Political Philosophy of Susan Moller Okin* (Oxford University Press, 2009), 143–7.

<sup>438</sup> See K. A. Appiah, *The Honor Code: How Moral Revolutions Happen* (London: W. W. Norton and Company, 2010). In this book, Appiah convincingly shows that the ending of violent or oppressive cultural practices such as slavery, binding (Chinese) feet and duelling have only been possible as a consequence of *internal* cultural and social developments, causing changes in local, customary concepts of ‘honor’. In the same vein, Appiah shows that the struggle against honour killings in Pakistan can only be won ‘from within’, in local, internal, social and political battles, which can be energised and stimulated but not completely taken over by forces from outside.

<sup>439</sup> C. I. Nyamu, ‘How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?’, *Harvard International Law Journal* 41 (2000): 394.

(‘superior’) human rights, as if these are two variables which are mutually exclusive. That would be a lose–lose situation.<sup>440</sup>

*Translating* human rights discourse into the *other’s* language and culture implies that one should be able to break away from identifying human rights with *one’s own* particular culture.<sup>441</sup> As the South African judge Albie Sachs once pointed out, *every* nation should have the right to be proud of its own connections between its particular cultures and universal human rights. In this respect, Western countries are not particularly convincing as ambassadors of universal human rights:

Even today all Africans are expected, as Bloke Modisane put it, to be eternal students at the table of good manners, that is, to behave according to rules set for all the people of the world by the West. Thus, we hear much about ‘Western concepts’ of human rights. I wish we could drop that phrase. As far as human dignity was concerned, the impact of the West on Africa was nothing short of disastrous.<sup>442</sup>

At the second level, that of *ill-defined* or *indefinite* military intervention on behalf of human rights, the abstract banner of humanity is used in a utilitarian fashion to justify the (collateral) destruction of people’s homes, lives and livelihoods.<sup>443</sup>

At the third level, endless proliferation of human rights may lead to growing *dissensus* on what exactly human rights are meant to protect or to foster. The idea of extending rights to all that suffers owes a great deal to the philosophical concept of *conatus* – the (not exclusively human) striving for self-preservation, culminating in a natural right to persist into one’s own being – as developed by Spinoza and others, and also to the utilitarian philosophy of Jeremy Bentham.<sup>444</sup> In our time, advocates of victim rights and animal rights justify their claims by pointing to

<sup>440</sup> See *ibid.*, 394, 415; Schachar, ‘What We Owe Women’, 149.

<sup>441</sup> To borrow a phrase from Hans Lindahl, ‘A-Legality’, 55: ‘the human can be irreducibly alien’.

<sup>442</sup> A. Sachs, ‘Towards the Revitalisation of Customary Law in an Egalitarian Constitutional Democracy’, in A. Soeteman (ed.), *Pluralism and Law: Proceedings of the 20th IVR World Congress, Amsterdam, 2001* (Stuttgart: Franz Steiner Verlag, 2004), 118.

<sup>443</sup> It is no coincidence that the massacres and genocides of the twentieth century have all been committed in the name of humanity (or a certain conception of humanity). See A. Finkielkraut, *Humanité perdue: essai sur le XX<sup>e</sup> siècle* (Paris: Seuil, 1996), 68 ff.

<sup>444</sup> See Spinoza, *Ethics*, Part IV, Prop. III ff.; J. Bentham, *Introduction to the Principles of Morals and Legislation*, chap. XVII: ‘The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the

biological proof of human and non-human suffering.<sup>445</sup> Grounding rights in biology enables these activists to ignore the specific, diverse and complex social and cultural worlds in which people are living potentially meaningful lives.<sup>446</sup> Thus, the fragmented wisdom of a plurality of concrete worlds is bypassed by a structure of rights that inscribes itself directly in the biological propensities of human and non-human animals.

What goes wrong at all these three levels takes the form of a negation: the negation of Arendt's idea of 'the deprivation of a place in the world' as 'the fundamental deprivation of human rights'.<sup>447</sup> If a right to a community, to organised living, is considered to be the most basic human right, we cannot *disregard* the other's belonging to a concrete world when we consider that other person's rights. Arendt's intuition that the humanity of the human being somehow resides in her 'worldliness' is firmly rooted in the phenomenological tradition in which she stands. According to Max Scheler in 1928, what separates man from animals is his spiritual ability to be 'open to the word'. 'Such a being has a "world"'<sup>448</sup> – as opposed to other animals, which are immersed in their environments:

Man, then, is a being that can exhibit, to an unlimited degree, behavior which is open to the world. To become human is to acquire this openness to the world by virtue of the spirit.

The animal has no object. It lives, as it were, ecstatically immersed in its environment which it carries along as a snail carries its shell. It cannot

caprice of a tormentor. It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?

<sup>445</sup> See P. Singer, 'All Animals Are Equal', in T. Regan and P. Singer (eds.), *Animal Rights and Human Obligations* (Eaglewood Cliffs, NJ: Prentice-Hall, 1989), 148–62. Cf. Fassin and Rechtman, *The Empire of Trauma*, 16 ff.; K. McLaughlin, *Surviving Identity*, 96–7.

<sup>446</sup> In the same vein, Alain Finkielkraut has criticised the narrow focus on global human suffering in the 'humanitarian era' (Finkielkraut, *Humanité perdue*, 128): 'Ému par la souffrance dans sa contingence immédiate, l'acteur humanitaire n'a pas de préjugés, mais il n'a pas pour autant le souci de *qui* est l'individu souffrant, de son être, du monde qu'il veut contribuer à bâtir, des motifs de sa persécution ou de son agonie, du sens qu'il entend donner à son histoire ou peut-être à sa mort.'

<sup>447</sup> See above.

<sup>448</sup> M. F. Scheler, *Man's Place in Nature* (New York: Noonday Press, 1974), 37 (originally published as *Die Stellung des Menschen im Kosmos* in 1928).



transform the environment into an object. It cannot perform the peculiar act of detachment and distance by which man transforms an 'environment' into the 'world', or into a symbol of the world.<sup>449</sup>

Inspired by Scheler, Arnold Gehlen presents man in *Der Mensch* (1940) as a biological 'special problem', a deficient being ('*Mängelwesen*'), an 'unfinished', imperfect animal. Man's nakedness, his prolonged dependency, the upright position of his body and his inability instinctively to protect himself against a multitude of potential catastrophes make him 'by nature a cultural being' ('*von Natur ein Kulturwesen*'). Unlike other animals, man is 'open to the world' and in need of complex institutions to feel at home in this world.<sup>450</sup>

### 7 Nature, custom, stipulation

Closely related to the 'worldliness' of man is the distinction between three types of good order, already known in antiquity but still present in current legal thought. Aristotle distinguished between the natural order (*eukosmia*), the customary order (*eunomia*) and the deliberately stipulated order (*eutaxia*).<sup>451</sup> James Bernard Murphy, who recently analysed these orders in the works of Aristotle, explains that these orders are closely interrelated and form a 'nested hierarchy', in which custom (or *nomos*) presupposes nature (or *kosmos*) and stipulation (or *taxis*) presupposes custom:

Nature represents the physical, chemical, and biological processes of the cosmos; nature can and did exist apart from human custom and deliberate stipulation. Human custom is rooted in the physiology of habit but transcends habit by becoming a social system of conventions. Custom presupposes nature, but custom can exist without being the object of rational reflection and stipulation . . . Custom arises from nature and stipulation from custom. But doesn't custom also shape nature just as stipulation shapes custom?<sup>452</sup>

<sup>449</sup> Scheler, *Man's Place in Nature*, 39. Clearly inspired by Scheler, Martin Heidegger later writes (*Der Ursprung des Kunstwerkes* (Stuttgart: Reclam, 1977), 45): 'Der Stein ist wertlos. Pflanze und Tiere haben gleichfalls keine Welt; aber sie gehören dem verhüllten Andrang einer Umgebung, in die sie hineinhängen.' See also Agamben, *The Open*, 39 ff., 79–80.

<sup>450</sup> A. Gehlen, *Der Mensch, Seine Natur und Stellung in der Welt* (Wiebelsheim: Aula Verlag, 2004), 9–20, 79–80.

<sup>451</sup> Aristotle, *Politics*, 1299b 16; *Nicomachean Ethics*, 1112b 14.

<sup>452</sup> J. B. Murphy, 'Habit and Convention at the Foundation of Custom', in A. Perreau-Saussine and J. B. Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, 2007), 74.

Murphy presents custom as a complex phenomenon, oscillating between nature (custom as a bodily habit, or 'second' nature) and stipulations (custom as a social convention or unwritten law). On the one hand, custom is related to and dependent on nature, as can be shown within education, where implied and explicit knowledge is transmitted by training the innate (natural) faculties and cultivating bodily movements, 'ethos' and habits. Custom, in a broad sense, also transforms nature, as can easily be seen in the landscapes in which we work and live. On the other hand, our deliberately stipulated, enacted legal order is dependent on and connected to custom. Laws are not promulgated *ex nihilo*, but instead are dependent upon the customary and natural orders they intend to supplement, reinforce or revise.<sup>453</sup>

The recurring idea in this chapter is that 'humanity' somehow resides in our having access to a plurality of (dynamic) concrete social worlds of habits and conventions which enable us to live and breathe as multiple 'cultural beings', as embodied, though free creatures, necessarily *in between* (moving back and forth) the 'rigidities' of biological nature and the 'freedom' of the powers of reason. *Dehumanisation occurs when people are forcefully deprived of these protective, intermediate worlds*. The temptation to ignore or erase custom altogether and to establish a society *de novo* solely by stipulation is characteristic of totalitarianism,<sup>454</sup> and tantamount to the human disasters in Europe, the Soviet Union, China, Cambodia, and elsewhere in the twentieth century.

Interestingly, within totalitarian thought, the desire to found a new order based on stipulation and clean slates ('decisionism') is accompanied by the urgent need to fixate the 'human' directly in a natural or biological category. As Lévinas remarked in his essay on 'the philosophy of Hitlerism', within totalitarian (i.e. National Socialist) thought:

<sup>453</sup> See Murphy, 'Habit and Convention at the Foundation of Custom', 75; see also L. D. A. Corrias, *The Passivity of Law: Competence and Constitution in the European Body Politic* (Dordrecht: Springer, 2011), 109–13; H. Heller, *Staatslehre* [1934] (Leiden: A. W. Sijthoff, 1970), 255: 'Die rechtlich normierte Verfassung besteht niemals bloss aus staatlich autorisierten Rechtssätzen, sondern bedarf zu ihren Geltung immer einer Ergänzung durch die nicht normierten und durch die ausserrechtlich normierten Verfassungselemente . . . Es ist . . . das gesamte Natur- und Kulturmilieu, die anthropologischen, geographischen, volklichen, wirtschaftlichen und sozialen Normalitäten, mit welchem oder gegen welchen die rechtlich normierte Verfassung ein Ganzes bilden soll, welche ihren Inhalt erst konkretisiert und ihre Individualität bestimmt.'

<sup>454</sup> See Murphy, 'Habit and Convention at the Foundation of Custom', 76.

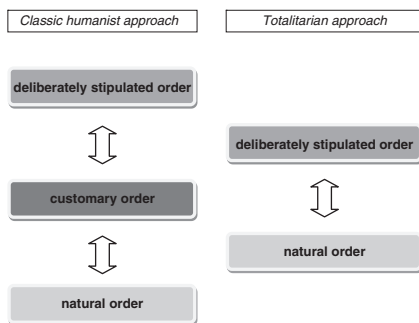


Figure 8.1

Être véritablement soi-même, ce n'est pas reprendre son vol au-dessus des contingences, toujours étrangères à la liberté du Moi; c'est au contraire prendre conscience de l'enchaînement originel inéluctable, *unique à notre corps*; c'est surtout accepter cet enchaînement.<sup>455</sup>

In the totalitarian mindset, the intermediate (and *ipso facto* irrevocably dense and plural) customary order, with its unwritten codes and loyalties, habits, conventions, rituals, religions, heresies, exceptions, superstition and ancient wisdom, is considered a threat to the system. Thus, the sense of human belonging should be located elsewhere. It cannot be transplanted to the empty space of sovereign decisions; therefore, it must be petrified in nature, in race, ethnicity, eugenetics, vitality, nativity or blood (see Figure 8.1).

A fear that haunts the work of Giorgio Agamben is that it is precisely the rise of human rights in the Age of Enlightenment that contributed to the removal of the customary order (*bios*) from the sphere of politics (and thus prepared the ground for the totalitarian catastrophes of the twentieth century):

Human rights, in fact, represent first of all the originary figure for the inscription of natural naked life in the political-judicial order of the nation-state. Naked life (the human being), which in antiquity belonged to God and in the classical world was clearly distinct (as *zoë*) from political life (*bios*), comes to the forefront in the management of the state and becomes, so to speak, its earthly foundation. Nation-state means a

<sup>455</sup> E. Lévinas, *Quelques réflexions sur la philosophie de l'hitlérisme: suivi d'un essai de Miquel Abensour* (Paris: Éditions Payot and Rivages, 1997), 19 (emphasis mine). See also Finkielkraut, *Humanité perdue*, 149.

state that makes nativity or birth [*nascita*] (that is naked life) the foundation of its own sovereignty.<sup>456</sup>

Agamben's (traumatic) fear can be supported by the dry observation that, since John Stuart Mill launched his famous attack on the stupidity of custom in the introductory chapter of his groundbreaking *On Liberty* (1859),<sup>457</sup> custom and law have not got along together very well within Western legal traditions. In his essay on custom, Murphy notes that, nowadays, 'custom is widely neglected in legal theory and legal philosophy' and states that:

many heirs of the Enlightenment today think that law and custom are incompatible, that social progress means the replacement of irrational custom by rational law.<sup>458</sup>

However, whenever human rights are used as a stick blindly to chase customs as irritating stumbling blocks along the route to progress and purport to fixate the human in its biological nature, the very humanity they proclaim to protect may become irretrievably lost.<sup>459</sup>

## 8 Not in our name!

Can we go beyond human rights? Agamben's way out of the predicament takes the form of an anarchic 'exodus from any sovereignty'. He is seeking 'a political life directed towards the idea of happiness' that is cohesive with 'a form-of-life, a life for which living itself would be at stake

<sup>456</sup> G. Agamben, 'Beyond Human Rights', in G. Agamben, *Means without End: Notes on Politics* (Minneapolis, Minn.: University of Minnesota Press, 2000), 20–1; see also Agamben, *The Open*, 76.

<sup>457</sup> J. S. Mill, *On Liberty* (London: Longman, Roberts and Green, 1869), 5–7, especially p. 6, where Mill mocks 'the magical influence of custom, which is not only, as the proverb says, a second nature, but is continually mistaken for the first'.

<sup>458</sup> Murphy, 'Habit and Convention at the Foundation of Custom', 78.

<sup>459</sup> Cf. Sachs, 'Towards the Revitalisation of Customary Law in an Egalitarian Constitutional Democracy', 121: 'It is important that democracy not be regarded as a blunt instrument that clubs customary law on the head. On the contrary, democracy finds protected space for customary law while freeing it at the same time from rigidly established (in colonial and apartheid times, frequently invented) and increasingly out of touch formalised codes. To recover its original vitality, customary law must respond to the lives that people lead now, to their sense of justice and fairness, and to the multifarious and at times contradictory ways in which an actively and evolving culture impacts on the actual lives of actual people. People are not being forced willy nilly to "modernise" or to "develop"; they are being freed to enjoy all the aspects of the modern world to which they voluntarily choose to have access.'

in its own living', a project that he associates with 'thought'.<sup>460</sup> Earlier in the century, Scheler declared that to be human meant 'to oppose [the] reality with an emphatic "No"'.<sup>461</sup> In his latest work, Scheler located the difference *in kind* between the animal and the human being in the latter's spiritual side, which is accessible through complex mental acts of cancelling all manifestations of life, by suppressing and repressing 'his own vital drives and deny[ing] them the nourishment of perceptual images and representations'.<sup>462</sup>

In the same vein, within the philosophy of Lévinas, thought is the way by which we can escape from the sense-driven self-centredness of human coexistence. As Ad Peperzak notes in an essay on transcendence in the work of Lévinas:

Thinking addresses some other that is elsewhere and different, some other beyond the parts or elements of a context or an economy in which the thinker feels at home. To think is to leave the familiarity of one's home country for a foreign place, which is 'elsewhere' . . . This exodus does not lead to the heights of heaven or the depths of a netherworld . . . Exodus leads to others who share the earth with me. For 'we are in the world'. *This world is more than a space to dwell in and more than a general condition of a common ethos; as universe it embraces all possibilities of exodus and wandering.*<sup>463</sup>

Thinking beyond and against human rights as rights that affirm *our own* humanity, rights that proclaim a *common (our) ethos for all* humankind or rights that are meant to foster the *biological* propensities of the *human species*, Lévinas discovers *other* human rights, truly inalienable rights that protect the uniqueness of the other human being. In his text '*Les Droits de l'homme et les droits d'autrui*' (1985), he states that these rights *precede* all granting of rights, that they are the expression of the absolute uniqueness or alterity of each human being, suspending all reference to the determinism of the natural order and the social body in which everyone is implicated. The incomparable alterity of each human being somehow refers to the being's belonging to the human species, but this reference

<sup>460</sup> G. Agamben, 'Form-of-Life', in Agamben, *Means without End*, 8–9.

<sup>461</sup> Scheler, *Man's Place in Nature*, 52. See also *ibid.*, 54–5: 'Compared with the animal that always says "Yes" to reality, even when it avoids it and flees from it, man is the being who can say "No", the "ascetic of life", the protestant par excellence, against mere reality.'

<sup>462</sup> Scheler, *Man's Place in Nature*, 54.

<sup>463</sup> A. T. Peperzak, 'Transcendence', in A. T. Peperzak (ed.), *Ethics as First Philosophy: The Significance of Emmanuel Lévinas for Philosophy, Literature and Religion* (New York: Routledge, 1995), 187 (emphasis mine).

‘annuls itself’ in order to leave each human being ‘unique in its kind’. According to Lévinas, the uniqueness of the other human being *transcends* the being’s belonging to the human species: the human being’s alterity goes beyond the individual differences of members of the same species or members of the same social body.<sup>464</sup>

Common to these three (very different) thinkers is their desire to save the world by meta-physical retreat. Accompanied by a silent ‘not in our name!’ their ‘exodus’ can be seen as a means of saving humanity (and current human rights discourse) from its totalitarian tendencies. ‘Thought’ may help us to rediscover the fundamental *other*-directedness of human rights and the dangerousness of biological and social determinism. Being truly ‘open to the world’ is a highly difficult, if not impossible human endeavour. However, the ultimate *success* of human rights is dependent on their passivity and their patient receptiveness to the infinite plurality of our social and natural worlds. This receptivity is not just a philosopher’s dream: it can be detected in the European Court of Human Rights’ doctrine of margin of appreciation and in the dialectics of human rights and customary law in the case law of the South African Constitutional Court.<sup>465</sup>

## 9 Humanity as a people (epilogue)

In a short text entitled ‘Signature’, Lévinas writes his ‘biography’ in a few sentences. This ‘biography’, Lévinas writes in guise of a conclusion, ‘is dominated by a premonition of the Nazi terror and the memory of it’. In one of the earlier sentences of this mini-autobiography he mentions another, much more positive, source of personal inspiration, when he alludes to his coming to France, his studies and intellectual encounters at the University of Strasbourg, and the ‘for a newcomer blinding vision of a people that is equivalent to humanity and of a nation to which one can be attached just as strongly by spirit and heart as by descent’.<sup>466</sup> In the life and work of Lévinas, the domineering premonition and memory of the Nazi terror is juxtaposed to a blinding vision of humanity as a

<sup>464</sup> Lévinas, ‘Les Droits de l’homme et les droits d’autrui’, 160–1.

<sup>465</sup> For South Africa, see Sachs, ‘Towards the Revitalisation of Customary Law in an Egalitarian Constitutional Democracy’, 114–25.

<sup>466</sup> E. Lévinas, ‘Handschrift’, in E. Lévinas, *Het menselijk gelaat: Essays van Emmanuel Lévinas* (Baarn: Ambo, 1969), 27 (translation mine).

nation to which one can adhere just as strongly by heart and mind as by birth or descent. This nation is France.

There is a lot to say about the utopian vision of humanity as equivalent to a nation or a people. It seems to oppose the more cosmopolitan vision of humanity as a concept that necessarily transcends the level of nation states and particular peoples. There is also a lot to say about the equivalence between humanity and a particular country, France. What does it mean, when a nation understands itself as *pays des droits de l'homme* (country of human rights) or is understood as such by newcomers?

One of the things it appears to say is that humanity somehow resides in a very specific experience of arriving somewhere – especially of strangers, or newcomers – i.e. the experience of homecoming. If the concrete experience of coming home has something to do with humanity – and Lévinas refers to the concept of humanity in this very specific context – the association between humanity and a particular place is by no means accidental. On the contrary, if we connected the concept of humanity to the *world at large*, that is, to an indefinite space we cannot enter and from which we cannot escape – a non-place, in other words, in which we will never feel at home – we would lose this association between humanity and homecoming. In the context of my reading of Lévinas's autobiographical note, humanity is a concept that primarily *opens up a particular space or concrete world* in which it is possible to 'come home'. In this light, the actual existence of a particular country that understands itself (or is understood as such by outsiders) as *pays des droits de l'homme* is important, as it permanently reminds us of the connection between humanity and the possibility of homecoming at a particular place.

In the context of this understanding of France as 'country of human rights', it is interesting how French politicians and lawyers struggle with the notion of humanity on a daily basis. 'French law seems quite unique in how it uses the notion of humanity', Xavier Bioy argues somewhat paradoxically in a paper presented in 2011 at the conference 'The Concept of Humanity' at VU University Amsterdam.<sup>467</sup> The concept of humanity – and the related notion of human dignity – in French political and legal life is multilayered, ambiguous and affluently used for different purposes. The well-known dwarf-tossing case may illustrate this French approach. The dwarf's right to be tossed has been limited by French courts, with the argument that his human dignity, bestowing upon him

<sup>467</sup> X. Bioy, 'The Use of the Notion of Humanity in French Law', paper presented at the conference 'The Concept of Humanity', VU University Amsterdam, 17–18 March 2011.

the duty not to let himself be tossed, *trumped* his personal freedom of choice. In this approach, human dignity imposes certain 'objective' limits on the use of the human body: human dignity is understood as a burden, a social responsibility not to make use of the human body in reputedly degrading ways.<sup>468</sup> The dwarf's possible reply 'my body is not a temple, it is an amusement park', would not have helped him any further.

What is remarkable in this case is not so much the outcome but the framing of the case as a human rights issue, in which solemn concepts such as human dignity and humanity have served as tools in determining the result. From an outsiders' perspective, the dwarf-tossing case has nothing to do with 'human dignity', it is a case of French local morality, *bonnes mœurs* in the sense of the French Civil Code, which, as a matter of fact, always puts certain limits on the individual's freedom of choice.<sup>469</sup> The ponderous reference to human dignity can be read as a complicated French way of saying: 'in our particular community, we do not accept this behaviour which we consider to be degrading and therefore immoral'. It is not very difficult to imagine a different social world in which the right to be tossed around, under certain safety regulations, would make perfect moral sense or would not raise any moral questions.

Conceived as a clear example of morality of a specific community, and thus belonging to local custom or to local law, this specific limit on human behaviour must be clearly distinguished, as has been done since antiquity, from certain fundamental norms supposedly shared by *all* human beings (belonging to the so called *ius gentium* or *ius naturale*).<sup>470</sup> For certain reasons, in the dwarf-tossing case, French local morality has been filled with equally local notions of humanity and human dignity. However, when, as a result, these notions are used as vehicles of typical French morality and culture, the *openness* or *receptivity* of these concepts towards other, different social worlds and possibilities of being human may be lost or threatened.

In this context, it is more than interesting that in Lévinas's approach to human rights the common concept of 'human dignity' does not exist. That is because, for Lévinas, human rights should exist independently 'from any distribution of privileges, *dignities* or titles, from any

<sup>468</sup> See Conseil d'État Assemblée, 27 October 1995, Recueil *Dalloz* (1996), jurisprudence, 177 (*Commune de Morsang-sur-Orge* and *Ville d'Aix-en-Provence*).

<sup>469</sup> See section 6 of the French Civil Code: 'On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs.'

<sup>470</sup> See, for example, the well-known formula in Gaius, *Institutiones*, 1, 1.



consecration by a will which abusively pretends to be reason'.<sup>471</sup> Lévinas seems to refer to dignity primarily as *dignitas*, a typical culturally subjective social good, that is something that can be bestowed upon you but also taken away from you by local powers and authorities. If dignity as an ostensibly universal but in reality inherently local, customary concept presupposes 'bestowal', deprivation of dignity as a social possibility can never be excluded. Following this line of thought, the Kantian 'inviolability of human dignity'<sup>472</sup> is a problematic, if not misleading, concept, in which the professedly universal promise shields local customs, powers and interests.

A similar point can be made regarding other examples of the way the concepts of humanity and human dignity are currently used, in France and elsewhere. We can draw attention to new technologies in the field of biogenetics, such as genetic manipulation of human and non-human material, which put pressure on legal and philosophical notions of humanity and human dignity. These matters raise profound moral and ethical questions on the limits of human interference with the material, biological world. A natural limit will be reached when human intervention in our natural and biological habitats (including interference in human and non-human DNA structures) will affect the planet at large in such a way that it jeopardises the survival of the human 'race' in some parts of the planet, or destroys – instead of enhances – a range of possibilities of being human.

However, it appears that currently the destruction of biodiversity in general, climate change and the exhaustion of natural resources are much bigger threats to the viability of a plurality of dynamic human worlds (in which it is possible to live and breathe) than developments in *human* biogenetics.<sup>473</sup> Therefore, these biogenetic questions are important, but they are only a subcategory in a much larger set of threats to the material and biological preconditions of a natural environment in which a plurality of dynamic human worlds can coexist peacefully. Besides these *threats* that directly affect the so-called human condition, it does not seem particularly helpful to attach the concept of humanity to a *particular*

<sup>471</sup> Lévinas, 'Les Droits de l'homme et les droits d'autrui', 159–60 (translation and emphasis mine).

<sup>472</sup> See, for example, the first article of the German Basic Law (*Grundgesetz*).

<sup>473</sup> The (non-binding) UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations, proclaimed on 12 November 1997, is relevant in this context.

*moral* stance in the debate on the manipulation of human genes, on similar grounds to the dwarf-tossing example. It is perfectly legitimate to oppose dwarf-tossing or genetic manipulation on specific moral (secular and or religious) grounds, but in that case you should plainly say so, leaving humanity and human dignity – concepts, which, as I have argued, in order to be effective, should always embrace a plurality of human worlds and therefore a plurality of possible value-systems – out of the equation.

For similar reasons I am reluctant to confide in international committees, organisations or tribunals when they are speaking with self-assurance in the name of humanity, which, at the end of the day, appears to be nothing more than a reference to a fragile, infinite plurality of possible and forever changing human worlds. Attributing symbolic legal properties to humanity as such<sup>474</sup> might lead to an erroneous reification – and, in its wake, a fragmentation – of the concept. Humanity is not a people, even if, paradoxically, the concept only makes sense in its intricate connections with particular places and peoples: humanity *as* a people or nation, committed to universal grace or openness.

To conclude this epilogue, humanity as a French phenomenon may lead us in both directions: on the one hand, it reminds us of the necessary connection between the concept of humanity and the openness and preconditions of particular places in which it is possible to come ‘home’ (it is also in this context that human rights become meaningful); on the other hand, French politics and adjudication do not escape the widespread tendency to translate particular and provisional moral convictions into universal truths and symbols by identifying their own ways with the ways of humanity as a reified whole.

<sup>474</sup> For example, I do not grasp what exactly is gained by Article 1 of the UNESCO Universal Declaration on the Human Genome and Human Rights, adopted at UNESCO’s 29th Session in 1997: ‘The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. *In a symbolic sense, it is the heritage of humanity*’ (emphasis mine). I only see what is lost: a concept of humanity that is incorporating (more and more) symbolic meanings will become exclusive and inevitably clash with other ways of symbolically viewing the world (including the human genome).