

***Christian Tomuschat –  
Human Rights: Between  
Realism and Idealism***

JÖRG FEDTKE\*

*Human Rights: Between Realism and Idealism* by Christian Tomuschat<sup>1</sup> ‘attempts to combine principled legal reasoning with a sharp assessment of the relevant practice’ in the area of human rights protection. This aim, set out in the Preface to the second edition of the book, is a tall order; it promises to provide not only a jurisprudential approach to the topic but also empirical evidence concerning the respect that human rights currently receive beyond the safety of a purely intellectual discourse. And that is not all. The tension between realism and idealism, highlighted by the title and quite possibly an important incentive for many readers to pluck this volume from the crowded shelves of legal bookstores or university libraries, is accompanied by a second, equally challenging dimension. Human rights are today increasingly a joint venture as well as a source of conflict between domestic legal systems and the international legal order. Tomuschat promises to separate fact from

---

\* Jörg Fedtke is Professor of Comparative Law, University College London.

<sup>1</sup> 2<sup>nd</sup> Edn. Oxford Univ. Press 2008.

fiction both within legally organised societies and on the international level.

The result of this ambitious exercise receives a mixed response. Tomuschat’s scholarly potential and extensive international experience – he was, inter alia, a member of the International Commission of Jurists and has for many years served both on the Human Rights Committee and the International Law Commission of the United Nations – is reflected in the ease with which he presents the jurisprudential and international components of his narrative. The history of human rights, the development of different generations of protection (including related aspects such as democracy, good governance, human security, and globalisation), the role of NGOs, the status of humanitarian law, and both the criminal prosecution of human rights violators and the financial indemnification of their victims, are treated with admirable linguistic precision and a considerable degree of detail despite the limited size of the volume. The chapters on the current system of international human rights protection are particularly impressive, and should provide a valuable resource for both practitioners and academics with an interest in the field. This includes the sections about the work of political bodies within organisations such as the United Nations or the

European Union, the contribution of expert bodies to the development of an international human rights culture, and the role of tribunals such as the International Criminal Court or the International Court of Justice, all of which receive extensive coverage.

The downside of this strong emphasis on the international dimension of human rights protection is a rather limited treatment of their implementation on the national level. The amount of domestic material, both in terms of references to 'black letter' law and empirical evidence, is hardly sufficient to meet Tomuschat's self-imposed standard of a 'sharp assessment' of the relevant legal and social practice of human rights protection on the ground.

A second – related – limitation of the book becomes apparent in Tomuschat's approach to the universality of human rights. Following an analysis of the legal framework as currently found in international agreements and domestic law, a discussion of the values underlying human rights in different societies, and an (admittedly generalised) assessment of empirical practice, the reader is directed to a statement by Michael Walzer, an American political scientist and social philosopher, who believes that human rights are today universally accepted as a

'minimal (...) moral code' which at least includes the prohibition of murder, slavery, torture, and genocide (p. 95). Tomuschat expands this catalogue by adding that 'in no country of the world do public authorities claim to be allowed to deal with the life, the freedom, and the physical integrity of citizens according to their arbitrary pleasure' and identifies the International Covenant on Civil and Political Rights as fairly undisputed common ground between the main religious and political systems examined in the book – with exception of the fact that 'they are formulated as individual rights.' This may strike some readers as a rather optimistic assessment of our post-9/11 world, in which even countries belonging to so-called 'Western civilization' have developed very different approaches to the core rights of terror suspects and – if on a somewhat different level – ordinary citizens. Once put to the test in a set of very specific circumstances, most rights (including data protection, personality rights, free speech, the right to engage in political activity, human dignity, and even the concept of democracy) are interpreted very differently in countries as closely related – politically, culturally, and economically – as the United States, the United Kingdom, France, or Germany. Some of the more obvious differences, for example the

approach to the death penalty, abortion, and the targeted killings of suspect individuals by security forces, are briefly touched upon in the text, but a more profound analysis by a human rights expert of Tomuschat's calibre would have been desirable.

An overall assessment of *Human Rights* is thus difficult. The book would have immediately scored top marks had the author openly limited his efforts to covering international systems of human rights protection. The alternative – to expand quite considerably the scope of the

exercise and to enter into a more detailed comparative analysis of both domestic law and international instruments – was neither intended nor feasible. Tomuschat was careful to exclude this option in the Preface by rightly emphasising that, 'given the vast dimensions of the area covered, it was not possible to devote monographic attention to each one of the issues discussed.' Despite this caveat, the book still seems a little lopsided. Perhaps he should consider changing the title to *International Human Rights* once a third edition of the book is contemplated – which will hopefully be the case.

---