INTERNATIONAL HUMAN RIGHTS LAW THEORY

Frédéric Mégret

Assistant-Professor, Faculty of Law, McGill University

Canada Research Chair in the Law of Human Rights Legal Pluralism

International human rights theory is a broad term that describes a variety of foundational and conceptual dilemmas which scholars and practitioners of international human rights engage with. These raise fundamental issues about the nature, purpose, transformation and direction of human rights on the global level. International human rights theory is not human rights "in theory", a sort of utopian blueprint of what might be, but the *theory of* international human rights as the set of assumptions and general understandings that comprehensively structure the project's very daily operation.

International human rights law can be analyzed here as the partly deliberate, partly accidental fusion of three ideas: international (an environment, a political set up, an idea), human rights (an ideological project), and law (a tool and a project). The resulting dilemmas are therefore simultaneously *human rights*, *international* and *legal* dilemmas. Human rights raise issues of the foundation, nature, and content of right; their transplantation in the international arena raises issues about what it means for human rights to become international and for the international to become more dominated by the idea of rights; and the process of legalization of human rights internationally then creates challenges for both human rights (which may suffer distortions) and international law (which may come under challenge). In practice these dilemmas are often difficult to disentangle. This chapter merely aims to give a short overview of the sort of problems they create for those interested in developing a theory of international human rights law.

More perhaps than general public international law, international human rights law has from its inception and increasingly with time become a locus of disciplinary fusion: partly domestic, partly legal; partly legal yet in very crucial ways moral and political.[1] "International human rights" as an object of study has contributed to blur many lines, so that today "human rights studies" are typically a fusion of many approaches.[2] The insights of the social sciences, history, sociology, economics have all contributed tremendously to a study that is often impoverished when it is exclusively envisaged as a legal byproduct.[3] This does not necessarily detract from the distinctiveness of international human rights law as a legal project, but it does raise central questions for international human rights lawyers: how distinct is that law from the values it embodies? How distinct, in turn, are human rights from the international law that has been one of the principal vehicles of their universalization?

This chapter is a broad overview of international human rights theory research. As such, it will be more literature review than systematic substantive engagement with the arguments that have been made over time about the theory of international human rights. However, it is hoped that, in exploring the agendas of scholars and thinkers, some sense of where the discipline's core dilemmas lie will emerge. The chapter will envisage, in succession, the theory of human rights, the theory of international human rights, and the theory of international human rights law, although these three levels of analysis are profoundly integrated.

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[1] M. FREEMAN, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH (2002); H. J. STEINER, P. ALSTON & R. GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS (2008).

[2] As illustrated, for example, by the discipline's (or the object's) flagship journal, Human Rights Quarterly.

[3] T. LANDMAN, STUDYING HUMAN RIGHTS (2006).

THE THEORY OF RIGHTS

THE EXISTENCE, FOUNDATION AND JUSTIFICATION OF HUMAN RIGHTS

Much soul searching has gone into the issue of whether rights actually "exist" in a fundamentally demonstrable way. There has been a feeling that the movement would be on much firmer footing if it could make a strong case about its intellectual bases. Although this is an issue that could be raised in a strictly domestic context, the internationalization of rights has made it much more sensitive,[4] as the human rights movement came under a variety of attacks urging it to better justify its founding assumptions.

The traditional view is that human rights are based on a strong truth or validity claim. Human rights *exist*, in a strong sense.[5] Religious thinkers (e.g.: neo-scholastics such as De Vitoria and Suarez) gave the initial impetus to some ideas about natural law as a ground for at least natural rights,[6] but also human rights;[7] secular natural law theorists believe that rights inhere in human nature or are somehow inherently deducible from it;[8] Enlightenment philosophers believed they could be discovered and justify rights through Reason. Immanuel Kant, for example, is often presented as one of the great human rights thinkers, because of his attempt to deduce universally valid moral principles derived from transcendental considerations.

These strong ontological claims about rights have come under substantial attack, although probably no more so than the Enlightenment project in general and a certain unmitigated faith in the force of Reason. Attacks have come from all kinds of political quarters. Political conservatives, from Burke onwards, for example have had problems with the idea that rights belong equally to all, preferring a more patrician model. A utilitarian like Jeremy Bentham once described rights as "nonsense upon stilts". Marxists were prone to see human rights as little more than a liberal bourgeois ideology.[9] 20th Century totalitarianism have also challenged the foundation of rights.

The reaffirmation of rights after the Second World War has coincided with a reassessment of the foundation of rights. To a large extent, lawyers, whether domestic or international, have sought to affirm the existence of rights on the basis of the existence of the Law itself – when it happens to support the existence of rights - whether it be through constitutions or international instruments. The problem with a merely positivistic theory of the foundation of rights is that most human rights lawyers like to think that certain rights exist regardless of whether the state has recognized them as such. In other words, domestic and international human rights law is always tempted to reach beyond positive law, especially at times when rights are arguably needed most, namely when a

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[4] J. J. Shestack, *Philosophic Foundations of Human Rights, The*, 20 HUM. RTS. Q. 201 (1998); M. Freeman, *Philosophical Foundations of Human Rights, The*, 16 HUM. RTS. Q. 491 (1994).

[5] P. J Fitzgerald, *Do Human Rights Exist - A Reply*, 37 QUIS CUSTODIET 132 (1972). David McCarthy, *Human Rights: Do They Exist - A Reconsideration*, 35 QUIS CUSTODIET 60 (1972).

[6] R. J. Araujo, *Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation, The*, 1 AVE MARIA L. REV. 159 (2003).

[7] J. MARITAIN, LES DROITS DE L'HOMME ET LA LOI NATURELLE (1947).

[8] Ralph McInerny, *Natural Law and Human Rights*, 36 AMERICAN JOURNAL OF JURISPRUDENCE 1 (1991).

[9] J. WALDRON, 'NONSENSE UPON STILTS': BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN (1987).

state, for example, refuses to recognize them at all. Moreover, purely positivist justifications of the existence or importance of rights can be quite shallow, as many different actual attitudes to rights might lie behind the bare act of ratifying a human rights treaty.

Today, the foundation of human rights is more often seen to lie in a variety of alternative foundations which one might describe as "intermediary", i.e. neither entirely metaphysical nor entirely positivist.[10] Rights may not exist in a strong sense, but they are not simply a random political choice and exert some sort of higher claim to our normative commitments. Rights might not exist, in other words, but they can certainly be *justified*. If nothing else, according to one popular interpretation, the late modern claim to rights is based on the historical affirmation, intuitive and empirical as it may be, that rights are necessary if humanity is to avoid a repeat of the Holocaust (or various episodes of systematic rights violations experienced in given society). [11] Alternatively, rights are presented sociologically as a social construct emerging from the need to fight against oppression;[12]

In terms of more distinctly philosophical and speculative discourse, the search for a foundation of rights is marked by work at the intersection between moral and political philosophy. Rights are a moral theory that calls to be translated in a particular political system. Inevitably, the attempt to ground human rights involves difficult exercises about what makes humans human, and how rights can respond to that fundamental intuition. Possible foundations of rights thus include human beings' rationality, their autonomy, their aspiration to happiness, their fundamentally social nature, their inherent freedom, etc. An alternative to looking at what human beings are, is to look at what they *want*. Some utilitarian theorists, in particular, have sought to show how human rights can protect certain values that are in themselves goods that all human beings aspire to. The problem is that we know human beings to want very different things, and that utilitarianism tends not to take their autonomy very seriously.[13] The temptation, thus, is to return to a naturalist or Kantian notion of human rights, based on a moral theory about how human beings should treat each other (e.g.: as ends rather than means), although how one translates an inter-personal theory of morality into a fundamental political system is problematic. A certain skepticism has at times emerged that the tension between utilitarian and deontological conceptions of rights can ever be alleviated.[14]

Much thought has also gone into renovating some of the bases of social contract theory in the context of a renewed interest in the notion of justice. For example liberal theories of rights present them as the minimal requirements of being able to live the good life, in a world that has become skeptical of ever fully determining what the good life might be. In other words, liberalism emphasizes a "thin theory" of the good society, one in which what matters is that individuals be able to self-determine themselves and choose their own ends.[15] Others, expanding on earlier Enlightenment themes, have emphasized that rights are what the members of a particular society

[10] J. W. NICKEL, MAKING SENSE OF HUMAN RIGHTS (2007).
[11] D. Levy & N. Sznaider, *The institutionalization of cosmopolitan morality: the Holocaust and human rights*, 3 JOURNAL OF HUMAN RIGHTS 143-157 (2004). J. Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357 (1993).
[12] Morton Winston, *Human Rights as Moral Rebellion and Social Construction*, 6 JOURNAL OF HUMAN RIGHTS 279-305 (2007).
[13] R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).
[14] H. L.A Hart, *Between Utility and Rights*, 79 COLUMBIA LAW REVIEW 828 (1979).
[15] On the issue of human rights and liberalism generally, see J. Donnelly, *Human Rights and Western Liberalism*, HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 31-55 (1990).

agree to, or would agree to under certain conditions (for example, behind a Rawlsian "veil of ignorance" where participants do not know what their actual condition in society would be).[16] There has been some impatience with Rawls' focus on rights as emerging within particular pre-constituted societies and being of limited applicability internationally,[17] and some of the search for foundations is now oriented towards seeing human rights as one of the basic requirements of a global theory of justice.[18] Human rights, it has been argued, should be grounded in a sense of "social ethics, sustainable by open public reasoning".[19]

Finally, a whole strand of human rights theory is deeply skeptical of all of the above, and argues that the foundational question itself that is *passé*. Postmodern thought for example is very skeptical of any notion of objectivity and with the decline of a faith in Reason and truth comes a decline in the belief in rights as fundamentally "rational" or "true". Interestingly, this skepticism does not necessarily lead those who profess it to entirely abandon the language of rights (although some may), and can lead, as with Rorty, to a pragmatic acknowledgment of the fundamentally emotional, faith-based nature of the *belief* in rights.[20] The question today is not to ask naively whether rights exist but, acknowledging fully their constructed and even localized character, to better understand them as an ongoing struggle informed by a mix of faith and politics. This comes perilously close to giving up any claim to human rights specificity, but in some ways the human rights movement was always marked by a form of faith in its core aspiration ("we hold these truths to be self-evident"), so that late modern thinking may rediscover something that was always there in the first place. The value of international human rights may lie in the fact that it is the last "totalizing Grand Narrative".[21]

THE UNIVERSALITY QUESTION

Closely tied to the foundation question is one of the questions that has been most debated in the last two decades, namely that of human rights' universality. The claim to a certain universality has always featured prominently in the discourse of human rights, although that claim coexisted in practice with substantial degrees of exclusion.[22] One is dealing with a theoretical claim (i.e.: that rights are actually universal), which is of course coupled with a strong normative claim (i.e.: that, because human rights are universal, they should be universally applied and respected).

Claims about universality are problematically rooted in at least 2, 500 years of Western thinking about the reality and possibility of universal concepts of the good, the true and justice. The internationalization of rights is born from taking seriously the idea of rights' universality, but paradoxically internationalization has also put the question of universality in sharp focus and led to a crisis of claims made about rights.[23] This challenge has taken a variety of forms. As early as 1948, the American Anthropological Association had issued a statement criticizing the concept of

[16] J RAWLS, A THEORY OF JUSTICE (1999).
[17] J. RAWLS, THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED (2001).
[18] C. Beitz, *What Human Rights Mean.*, 132 DAEDALUS 36-47 (2003).
[19] A. Sen, *Elements of a theory of human rights*, 32 PHILOSOPHY & PUBLIC AFFAIRS 315-356 (2004).
[20] R. RORTY, S. SHUTE & S. HURLEY, ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 (1993).
[21] J. A. L. Alves, *The Declaration of Human Rights in Postmodernity*, 22 HUMAN RIGHTS QUARTERLY 478-500 (2000).
[22] A. S. Fraser, *Becoming Human: The Origins and Developments of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999).
[23] Chris Brown, *Universal human rights: A critique*, 1 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 41 (1997).

universal human rights as being in denial of cultural diversity.[24] Saudi Arabia, in what was to inaugurate a complex relationship between human rights and Islam, was one of the states that abstained at the General Assembly session that adopted the UDHR. Lee Kuan Yu, the Prime Minister of Singapore, has famously insisted that "Asian values" emphasized a more communal outlook on social life that was at odds with liberal human rights.[25] Human rights have also disrupted a number of traditional or customary practices. Female genital mutilation has notably become something of a *cause célèbre* of the universalism v. relativism debate,[26] as are a number of women's rights issues that clash with certain traditional and religious practices.

International human rights lawyers have responded in a number of ways to these challenges to universality, seeking to salvage what could be salvaged of the claim, and emphasizing the extent to which claims of difference could be overstated, whilst conceding some points about cultural difference.[27] Some are nonetheless typically unrepentant about the claim to universality, if only because of the argument that international human rights treaties have been ratified broadly.[28] This can be more than a little formalistic, given the superficiality of some accession processes and the remarkable degree of indifference in which human rights instruments are effectively held by some governments.

More significantly, defenders of at least a certain human rights universality have accused culturalists of reifying and simplifying cultures.[29] The disagreement has been recast as an argument about certain concept of human rights over others rather than straightforwardly "against" human rights. Many scholars have called for a greater acknowledgment of the Western origins of human rights.[30] On a more positive note, scholars have sought to re-explore what universality means,[31] or the conditions under which agreement about universality might be reached,[32] the possibility of human rights emerging from inter-subjective consensus rather than any a priori deduction,[33] or to reach some kind of synthesis between the insights of relativism and universalism.[34] They have explored the potential of concepts such as human dignity as having more immediate and intuitive

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[24] K. Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536 (2001); M. B. Dembour, *Human rights talk and anthropological ambivalence*, INSIDE AND OUTSIDE THE LAW: ANTHROPOLOGICAL STUDIES OF AUTHORITY AND AMBIGUITY 19-40 (1996).

[25] Fareed Zakaria & Lee Kuan Yew, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFFAIRS 109-126 (1994).

[26] H. Lewis, *Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); K. Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S LJ 155 (1985).

[27] See, for example, Alison Dundes Renteln, *Unanswered Challenge of Relativism and the Consequences for Human Rights, The*, 7 HUMAN RIGHTS QUARTERLY 514 (1985); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUMAN RIGHTS QUARTERLY 461-509 (1997); D. L. Donoho, *Relativism versus universalism in human rights: The search for meaningful standards*, 27 STAN. J. INT'L L. 345 (1990).

[28] Fernando R Teson, *International Human Rights and Cultural Relativism*, 25 VIRGINIA JOURNAL OF INTERNATIONAL LAW 869 (1984).

[29] O. BRUUN & M. JACOBSEN, HUMAN RIGHTS AND ASIAN VALUES: CONTESTING NATIONAL IDENTITIES AND CULTURAL REPRESENTATIONS IN ASIA (2000).

[30] A. Woodiwiss, *Human rights and the challenge of cosmopolitanism*, 19 THEORY CULTURE AND SOCIETY 139-156 (2002).

[31] Jack. Donnelly, *The Relative Universality of Human Rights*, 29 HUMAN RIGHTS QUARTERLY 281-306 (2007).

[32] C. Taylor, *Conditions of an unforced consensus on human rights*, THE POLITICS OF HUMAN RIGHTS 101-19 (1999).

[33] S. Chesterman, *Human rights as subjectivity: The age of rights and the politics of culture*, 27 MILLENIUM: JOURNAL OF INTERNATIONAL STUDIES 97 (1998).

[34] Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RIGHTS QUARTERLY 400 (1984).

appeal in many cultures than rights talk per se.[35] There has, in addition, been a considerable effort to uncover non-Western origins of rights, and to build bridges between non-Western traditions and human rights (particularly with Islam,[36] African[37] and Asian values). Some of these attempts will clearly be more convincing than others, and may be slightly self-serving. However, they have also opened up a space for an unprecedented level of dialogue that makes human rights a meeting ground rather than a definitive program for the "good society".

Some have pointed out that the universalist/relativist debate has had the consequence of marginalizing more "transformative" practices of human rights operating at the margins of mainstream discourse.[38] Of late, the debate has significantly shifted from the foundational issue of whether rights are universal or values relative, to a debate on the tension between cosmopolitan liberalism and value pluralism, which is both part of an ongoing debate on the nature of liberalism[39] and the possibility and desirability of a cosmopolitan model.[40]

THE STATUS AND NATURE OF RIGHTS

A very significant part of international human rights theory, both a continuation of and an influence on similar domestic debates, is concerned with what rights actually are. First, issues arise about the status of rights. A strong view is that rights are both pre-legal and legal, that they are in a sense recognized by positive law, but exist independently of it. Needless to say, this view raises significant theoretical and doctrinal tensions.[41] A related view is that rights typically stand quite high up in the hierarchy of norms and have some sort of constitutional or supra-legal status. This claim is typically made both domestically (where it translates into demands for constitutionalization) and internationally (where it is associated with claims that human rights have jus cogens and/or erga omnes status). Internationally, it has been particularly made in relation to strong assertions of immunity, or in the context of global economic arrangements by those seeking to argue the normative primacy of rights. Human rights appear as good candidates,[42] moreover, to secure a

[35] O. Schachter, *Human dignity as a normative concept*, 77 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 848-854 (1983).
[36] A. E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS (2006); B. Tibi, *Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations*, 16 HUMAN RIGHTS QUARTERLY 277-299 (1994); A. A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1996). S. Waltz, *Universal Human Rights: The Contribution of Muslim States*, 26 HUM. RTS. Q. 845 (2004).
[37] J. A. M. Cobbah, *African values and the human rights debate: an African perspective*, 9 HUMAN RIGHTS QUARTERLY 309-331 (1987); A. A. AN-NA'IM, A. A. A. NA M & F. M. DENG, HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (1990); Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUMAN RIGHTS QUARTERLY 838 (2000); Ronald Thandabantu Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme*, 3 INT J LAW POLICY FAMILY 1-20 (1989).
[38] Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 COLUMBIA HUMAN RIGHTS LAW REVIEW 1 (1997).
[39] A. Langlois, *Human Rights and Cosmopolitan Liberalism*, 10 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 29-45 (2007).
[40] P. G. Danchin, *Between Rogues and Liberals: Towards Value Pluralism as a Theory of Freedom of Religion in International Law*, ALL FACULTY PUBLICATIONS 633 (2006).
[41] Louis Henkin, *International Human Rights as Rights*, 1 CARDOZO LAW REVIEW 425 (1979).
[42] D. Shelton, *Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 SASK. L. REV. 301 (2002).

relatively elevated place in the emerging hierarch of international norms,[43] even as part of some sort of global constitution,[44] an increasingly important theme in international legal theory.

Second, there is much search for an understanding of the nature of rights as focuses of adjudication. Rights typically function as principles rather than rules, which produces particular forms of adjudication. Because rights are often formulated in sweeping and absolute fashion, the idea may emerge that rights are by nature absolute. A legal theorist like Ronald Dworkin has done much to accredit this idea, insisting that rights should be "taken seriously" and that they should be seen as "trumps".[45] This idea, however, has to be taken with a pinch of salt with all but a very few number of rights (e.g.: torture). As argued by Richard Pildes, rights rather "police the kind of justifications government can act on in different spheres" and are "means of realizing various common goods".[46] The existence of general or specific limitation clauses in most international human rights instruments suggests that rights are indeed a starting point, but that their precise extent needs to be ascertained in the light of potentially countervailing and legitimate societal goals.[47]

Third, a number of debates have emerged about the intensity of human rights obligations. The famous tripartite distinction between obligations to "respect, protect and fulfill" has generated a debate that is very different from general international law's theories of compliance. Particularly the idea of a responsibility to protect poses significant and novel issues of "indirect horizontal responsibility" for states. This debate on the nature of human rights obligations is, in turn, indissociable from the debate on the identify of human rights duty holders and, in particular, the possibility that a variety of non-state actors have "horizontal" human rights duties vis-à-vis each other.[48] The degree to which states should rigorously comply with international human rights standards is an important level of debate. In practice, international human rights law has implicitly acknowledged the importance of a fairly broad tolerance for local variation (something worth considering in the context of the debate on cosmopolitanism and value pluralism), and much scholarly research is dedicated to understanding how in practice the abstract tension between universalism and relativism is mediated by regionalization,[49] subsidiarity[50] and the "margin of appreciation".[51]

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[43] D. Shelton, *Normative hierarchy in international law*, AMERICAN JOURNAL OF INTERNATIONAL LAW 291-323 (2006); J. H. H. Weiler & A. L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUROPEAN JOURNAL OF INTERNATIONAL LAW 545 (1997).

[44] S. Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 749 (2008); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR J INT LAW 907-931 (2004).

[45] R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

[46] R. H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 THE JOURNAL OF LEGAL STUDIES 725-763 (1998).

[47] J. VILJANEN, THE EUROPEAN COURT OF HUMAN RIGHTS AS A DEVELOPER OF THE GENERAL DOCTRINES OF HUMAN RIGHTS LAW: A STUDY OF THE LIMITATION CLAUSES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003).

[48] J. H. Knox, *Horizontal human rights law*, 102 AM. J. INT'L L. 1 (2008); I. Leigh, *Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 57-87 (2008).

[49] T. Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction*, 12 TEX. INT'L LJ 321 (1977).

[50] P. G. Carozza, *Subsidiarity as a structural principle of international human rights law*, 97 AM. J. INT'L L. 38 (2003).

[51] E. Brem, *The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240-314 (1996); J. A. Brauch, *Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law, The*, 11 COLUMBIA JOURNAL OF EUROPEAN LAW

THE CONTENT AND DEVELOPMENT OF RIGHTS

To the extent that human rights is not simply an idea, but a vessel that needs be filled with content, considerable theoretical issues are raised by what count and what do not count as rights. In addition to the doctrinal-descriptive exercise of categorizing rights, for example in "generations",[52] perhaps the most famous debate in that respect has opposed negative, "freedom from", "liberty", "security" rights, to positive, "right to", "entitlement", "subsistence" rights. This closely matches the distinction between civil and political rights on the one hand, and economic and social ones on the other. Whilst civil and political rights have in a sense always been associated with the liberal human rights project, there are long lines of both proponents and opponents of economic and social rights with a distinct welfarist dimension.

Critics emphasize that one cannot have a right to something that is a scarce resource; that economic and social rights prejudge the sort of political economic system that states ought to be able to choose; that economic and social rights are too broad and vague to be adjudicated; that they create a culture of dependency; in short, that economic and social rights are in some way or another a "road to serfdom".[53] Proponents argue for the fundamental justifiability of rights to certain social goods that are absolutely indispensable to the ability to live a good life, at least within particular societies; they emphasize the artificiality of the distinction between negative and positive rights, as most negative rights in fact require positive measures from the state, and some economic and social goods merely require the state to do nothing to stop people from accessing them.[54] Amarty Sen, in particular, has developed the notion of rights as "capability", underlining the formalism of negative rights when the minimum "functionings" are not available (e.g.: what is the point of a right to vote if you do not have public transportation to reach the polling booth?).[55]

The response of such bodies as the Committee on Economic and Social Rights of the United Nations has been very supportive of economic and social rights, whilst recognizing that they do occasionally operate in significantly different ways.[56] For example, the idea of "progressive realization" means that there is an understanding that states that cannot guarantee all economic and social rights here and now, but that they must show that they are "taking economic and social rights seriously" by setting aside the resources needed to tackle, as a matter of priority, the basic economic needs of

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113 (2004); T. A. O'Donnell, *Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights, The*, 4 HUMAN RIGHTS QUARTERLY 474 (1982); E. Benvenisti, *Margin of appreciation, consensus, and universal standards*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 843 (1998); H. C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

[52] K. Vasak, *Human rights: a thirty-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 316-25 (1977).

[53] C. Sunstein, *Against positive rights*, 2 E. EUR. CONST. REV. 35 (1993); Susan Yoshihara, *The quest for happiness : how the U.N.'s advocacy of economic, social, and cultural rights undermines liberty and opportunity*, *in* CONUNDRUM: THE LIMITES OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES (Brett D Schaefer ed., 2009).

[54] H. Shue, *Basic rights*, CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY (2006); R. Peffer, *A defense of rights to well-being*, 8 PHILOSOPHY AND PUBLIC AFFAIRS 65-87 (1978); T. Pogge, *Severe poverty as a violation of negative duties*, 19 ETHICS AND INTERNATIONAL AFFAIRS 55-84 (2005).

[55] A. Sen, *Equality of what?*, CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 476-486 (1998); M. Nussbaum, *Women and equality: the capabilities approach*, 138 INT'L LAB. REV. 227 (1999).

[56] P. Alston & G. Quinn, *The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights*, HUMAN RIGHTS QUARTERLY 156-229 (1987).

their populations.[57] There has been an increasing amount of attention to the international dimensions of economic and social rights, and particularly the issue of the extent of human rights obligations to alleviate world poverty.[58] Moreover, a very significant strand of research on economic and social rights seek to adapt the concept's basic intuitions to specific rights or clusters of rights.[59] The relationship of civil and political to economic and social rights has also been clarified. The UN typically presents them as "interrelated, indivisible, and interdependent". This is a seductive formula, although it may be a little broad for its own good. It has not prevented the emergence of a debate on the possible existence of a hierarchy among human rights.[60]

Another intense area of inquiry deals with so-called "third generation" or collective, "solidarity" rights.[61] This is a quite broad category whose existence is relatively settled in international human rights law, even though it is regularly challenged and its legal implications sometimes seem hard to tease out. Among the rights that have been claimed under that heading, three stand out as having been most formally and consistently recognized: the right to self-determination,[62] the right to development,[63] and the rights of minorities.[64] A good emerging contender is the right to a clean environment.[65] Needless to say, the collective nature of these rights raises significant challenges for both human rights (tension between collective and individual rights) and international law (tension between collective rights and sovereignty).

One should also point out that an essential dimension of the development of rights, which challenges some of the project's theoretical premises, has been a diversification of its beneficiary subjects. For a time, the main challenge seemed to extend the promise of human rights to all human

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[57] Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUMBIA HUMAN RIGHTS LAW REVIEW 363 (2001).

[58] T. W. M. POGGE, FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? (2007); T. POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS (2008).

[59] M. J. Dennis & D. P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, AMERICAN JOURNAL OF INTERNATIONAL LAW 462-515 (2004); A. Eide, A. Oshaug & W. B. Eide, *Food Security and the Right to Food in International Law and Development, The*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 415 (1991); P. ALSTON & K. TOMAŠEVSKI, THE RIGHT TO FOOD (1984); J. H. SPRING, THE UNIVERSAL RIGHT TO EDUCATION: JUSTIFICATION, DEFINITION, AND GUIDELINES (2000); K. Tomasevski, *Education denied*, COSTS AND REMEDIES LONDON: ZED (2002); V. A Leary, *The right to health in international human rights law*, HEALTH AND HUMAN RIGHTS 24–56 (1994); B. C. A. TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW (1999); J. SCANLON, A. CASSAR & N. NEMES, WATER AS A HUMAN RIGHT? (2004); P. H. Gleick, *The human right to water*, 1 WATER POLICY 487-503 (1998); S. M. A. SALMAN & S. A. MCINERNEY-LANKFORD, THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS (2004).

[60] T. Koji, *Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 917 (2001); T. Meron, *On a Hierarchy of International Human Rights*, 80 AMERICAN JOURNAL OF INTERNATIONAL LAW 1-23 (1986).

[61] P. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982); R. N. KIWANUKA, 82 THE MEANING OF" PEOPLE" IN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1988).

[62] P. Thornberry, *Self-determination, minorities, human rights: a review of international instruments*, 38 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 867-889 (2008); R. McCorquodale, *Self-determination: a human rights approach*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 857-885 (2008); H. HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1996).

[63] Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 473 (1985); P. Alston, *Making Space for New Human Rights: the Case of the Right to Development*, 1 HARV. HUM. RTS. YB 3 (1988).

[64] Y. Dinstein, *Collective human rights of peoples and minorities*, 25 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 102-120 (2008); P. THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1993).

[65] ROMINA PICOLOTTI & JORGE DANIEL TAILLANT, LINKING HUMAN RIGHTS AND THE ENVIRONMENT (2003); D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

beings. But increasingly, special instruments have been sought for specific groups or categories within humanity. These claims have been framed as claims for equality, but also claims for a recognition of a certain difference in human rights. After the great anti-discrimination conventions of the 1970s (CERD, CEDAW), for example, more recent treaties fit the description of recognizing claims for at least partially special treatment, whether it be the Convention on the Rights of the Child,[66] the Convention on the Rights of Persons with Disabilities,[67] the Convention on the Rights of Migrant Workers,[68] or the Declaration on the Rights of Indigenous Persons.[69] Finally, it is worth mentioning that the multiplication of international human rights instruments has long raised concerns about their continued quality, and the risk that treaty inflation might dilute the vigor of the norms.[70]

THE THEORY OF INTERNATIONAL HUMAN RIGHTS

THE HISTORY OF INTERNATIONAL HUMAN RIGHTS

A part of international human rights theory is concerned with the historical construction and development of international human rights as a project. There has been a significant effort, in particular, to de-westernize and broaden the historical narrative of human rights by highlighting the diversity of its conceivable origins.[71] Historians have studied the emergence of canonical human rights texts in the Enlightenment, and their diffusion throughout the 19th and 20th Century. Some attention has been devoted to potential predecessors of the "international human rights movement" and the argument has often been made that the anti-slavery movement was an interesting rehearsal.[72] A considerable amount of historical research has concentrated on such a foundational moment as the adoption of the Universal Declaration of Human rights,[73] or the European Convention on Human Rights,[74] or particular institutions in the international human rights edifice. [75] This has in turn encouraged renewed interest in as some earlier 20th Century

[66] E. Verhellen, *Convention on the Rights of the Child*, LEUVEN-APELDORN: GARANT (2000); S. DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1999).
[67] F. Mégret, *The Disabilities Convention Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUMAN RIGHTS QUARTERLY 494 (2008); M. A. Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007).
[68] RYSZARD I. CHOLEWINSKI, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW : THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT (1997).
[69] S. J. Anaya & R. A. Williams Jr, *Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System, The*, 14 HARV. HUM. RTS. J. 33 (2001); R. Stavenhagen, *Indigenous rights: some conceptual problems*, CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA 141–59 (1996); P. THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS (2002).
[70] P. Alston, *Conjuring up new human rights: A proposal for quality control*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 607-621 (1984).
[71] PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS : VISIONS SEEN (1998). M. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA (2008). Eric Engle, *Universal Human Rights: A Generational History*, 12 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 219 (2006).
[72] J. J. S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 YALE LAW JOURNAL (2007).
[73] B. Farrell, *Habeas Corpus and the Drafting of the Universal Declaration of Human Rights*, 11 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 81-101 (2009). S. Waltz, *Reclaiming and rebuilding the history of the Universal Declaration of Human Rights*, 23 THIRD WORLD QUARTERLY 437-448 (2002).
[74] Vladimir Butkevych, *The European Convention on Human Rights in the Context of the History of International Law*, *in* LIBER AMICORUM LUZIUS WILDHABER: HUMAN RIGHTS-STRASBOURG VIEWS= DROITS DE L'HOMME-REGARDS DE STRASBOURG 177-192.
[75] A. J. Hobbins, *Humphrey and the High Commissioner: The Genesis of the Office of the UN High Commissioner for Human Rights*, 3 J. HIST. INT'L L. 38 (2001).

attempts to secure a human rights foothold in international law.[76] This historical work is almost always theoretical in some respect (one might say, genealogical),[77] inscribed as it is in the history of ideas, and therefore indispensable to understand the genesis of international human rights as a particular post-War project.[78] Finally, some scholars have begun writing a contemporary history of international human rights.[79]

This historical study also suggests it is often difficult to distinguish the development of "international human rights" from the development of "international law", because the two have in a sense always been intimately related. Grotius was already reflecting on the relative importance of natural law and Humanity in a world of consolidating sovereignty, and late nineteenth century international legal visionaries were liberal cosmopolitans before they were internationalists.[80] This thinking about the status of values, particularly values emphasizing individual and communitarian accomplishment, has always accompanied the great transformative moments of the international system. Indeed, international human rights theory is intimately linked to the history of international legal theory *tout court*, as reflected by a long list of international legal thinkers who have thought deeply about the role of human rights.[81]

INTERNATIONAL HUMAN RIGHTS, THE INTERNATIONAL PROJECT, AND SOVEREIGNTY

The project of international human rights is one that is fundamentally different, in its ambition and inspiration, from that of international law. International law was the system that emerged from the Peace of Westphalia to regulate the relationship of equal and sovereign entities. The implicit condition of the Westphalian compact was that whatever happened domestically was beyond the realm of international law. Of all things, international law had nothing (or little) to say on how a sovereign treated its own population. The international system was the locus of organized coexistence, not one dedicated to a cosmopolitan ambition or a common social project. Sovereignty acted as a sort of veil that protected the state from outside scrutiny. The system was, in other terms, more interested in securing order between equals than ensuring justice for all.

In many ways, the global projection of human rights challenges this very stable setup – at least there has always been a certain amount of hubris in the discipline about its potential to radically upset the traditional international legal system.[82] The resurgence of human rights in the post-Cold

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[76] J. H. Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUMAN RIGHTS QUARTERLY 447-477 (1992).
[77] Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM LAW REVIEW 301 (1997).
[78] Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR J INT LAW 903-924 (2008).
[79] Kenneth Cmiel, *The Recent History of Human Rights*, 109 THE AMERICAN HISTORICAL REVIEW 117-135 (2004).
[80] This is a point that has been made most consistently by Martti Koskenniemi. See, for instance, M. Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 810 (2004); Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 471 (2002).
[81] H. Lauterpacht, *Universal Declaration of Human Rights, The*, 25 BRIT. YB INT'L L. 354 (1948); Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 237-269 (1969).
[82] Anouncing the end of the Westphalian system is almost a separate genre in the discipline, one that never ceases to find eloquent spokespersons. See for example L. B. Sohn, *New International Law: Protection of the Rights of Individuals Rather Than States, The*, 32 AM. UL REV. 1 (1982).

War era coincides with a reappraisal of some neo-Kantian themes in international law.[83] Human rights has the ambition to "pierce the sovereign veil" and prescribe, sometimes in minute detail, how sovereigns should behave vis-à-vis their own population. Sovereignty, thus, becomes less an end in itself, than (almost) a form of international delegation of authority that is closely monitored by the "international community". International human rights law is therefore potentially part of a fundamental redefinition of what sovereignty means.[84] Sovereignty was the specific form of power that was absolute internally. If sovereignty is no longer that, then it loses much of its analytical trenchant, and becomes one form of power among many. International human rights also fundamentally changes our sense of the relevant political or even moral community. Although no doubt the state remains important, it is ultimately not as important – in the terms of the human rights project – as a broader "world" or "global" community of mankind, which was always a prominent feature of jusnaturalist writing about the international.

In *redefining* sovereignty rather than doing away with it,[85] international human rights have the potential to fundamentally change the nature of the international project. It is sometimes said of the most enthusiastic international human rights lawyers that they proceed by way of "domestic analogy", denying the "international" any irreducible specificity.[86] The goal of the international system is no longer to ensure the coexistence of equals in a system that emphasizes order, but to guarantee that domestic political arrangements are not subverted in ways that fundamentally compromise the rights of persons within a state's jurisdiction. Pushed further, the project can come close to a Kantian horizon of global federalism.

Of course, in practice, this is to a large extent a very tentative move: it may be the implicit ambition of international human rights, but there are powerful forces of resistance.[87] The tension between the world of states and a budding world of human rights is periodically manifested through such flashpoints as the use of force in "humanitarian intervention"[88] or the issue of immunities.[89] It should be read in the context of strong claims about human rights as increasingly a matter of common concern justifying international action and cooperation.[90] However, the fact that it is not simply a vue de l'esprit can be gauged by the profound (even if occasionally problematic) affinity between the supranational ambition to protect human rights and projects of regional integration that seek to profoundly redefine the bounds of community.[91] This is particularly apparent in the

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[83] F. R. Teson, *Kantian Theory of International Law, The*, 92 COLUM. L. REV. 53 (1992).
[84] W. M. Reisman, *Sovereignty and human rights in contemporary international law*, 84 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 866-876 (1990).
[85] On the normative underpinnings of sovereignty and the fact that the current movement is part of the "evolving constitution of sovereignty" rather than the complete desuetude of the concept, see J. S. Barkin, *The evolution of the constitution of sovereignty and the emergence of human rights norms*, 27 MILLENIUM: JOURNAL OF INTERNATIONAL STUDIES 229 (1998); C. Reus-Smit, *Human rights and the social construction of sovereignty*, 27 REVIEW OF INTERNATIONAL STUDIES 519-538 (2001).
[86] H. SUGANAMI, THE DOMESTIC ANALOGY AND WORLD ORDER PROPOSALS (1989).
[87] For a sophisticated response to the criticism that international law cannot become a law of human rights enforcement, see Anthony D'Amato, *Concept of Human Rights in International Law, The*, 82 COLUMBIA LAW REVIEW 1110 (1982).
[88] Samuel M Makinda, *Human Rights, Humanitarianism, the Transformation in the Global Community*, 7 GLOBAL GOVERNANCE 343 (2001).
[89] A. Bianchi, *Immunity versus human rights: the Pinochet case*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 237 (1999).
[90] C. R. BEITZ, THE IDEA OF HUMAN RIGHTS (2009).
[91] E. DE WET, *The emergence of international and regional value systems as a manifestation of the emerging international constitutional order*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 611-632 (2006).

Americas but also, especially, the African continent, where the human rights and regionalization projects are a close match. But even the ECtHR has described the Convention as a "constitutional instrument of European public order" and it is well known that the EU is increasingly influenced by that public order.[92]

INTERNATIONAL HUMAN RIGHTS, STATE BEHAVIOR AND INTERNATIONAL RELATIONS

There has long been an interaction between the claims of international human rights law theorists and those of scholars involved in political science, particularly those interested in international state behavior.[93] At the end of the Cold War, for example, scholarship emerged that emphasized the power of human rights norms in bringing about fundamental change in international politics.[94] Indeed, the dialectics of human rights and power are among the most interesting to understand the development of international relations. Although human rights lawyers typically focus on adjudication and formal law implementation, political scientists can bring a highly useful focus on how human rights are also embedded in logics of power. For example, foreign policy[95] or development conditionality – not to mention so-called "humanitarian intervention" - are probably today among the most powerful ways in which the human rights project expresses itself or is undermined. These obviously raise issues about the nature of human rights as an international project.

One of the great puzzles for international human rights theory remains why states would want to bind themselves to international human rights obligations in the first place. Traditional realist explanations of states' interest typically minimize the importance of "ideas" or even "ideals" in the conduct of international relations, emphasizing instead the key notion of the "national interest" understood as power (military, economic, political). Human rights are thus seen as an even more improbable way of understanding international relations than international law (about which there has always been significant skepticism from political realists) was. Although some work has been done to fit international human rights norms within realist theory,[96] this almost seems to ask too much of the paradigm. Notwithstanding, there are several schools of thought that have sought to transcend this apparent paradox by finding ways to reconcile interest and values. Some have complexified the realist paradigm by emphasizing the extent to which, especially in the international politics of today, power also includes diffuse reputational advantages such as, precisely, respecting (or being seen as respecting) human rights. The so-called "English school" of international relations has always been more sensitive to the role of norms in constructing international society and although some of its key proponents have been skeptical of radical

[92] P. ALSTON, M. R. BUSTELO & J. HEENAN, THE EU AND HUMAN RIGHTS (1999); P. Alston & J. H. H. Weiler, *An'Ever Closer Union'in Need of a Human Rights Policy*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 658 (1998); A. Von Bogdandy, *The European Union as a human rights organization? Human rights and the core of the European Union*, 37 COMMON MARKET LAW REVIEW 1307-1338 (2000).

[93] R. J VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS (1986); D. P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS (2006).

[94] T. RISSE-KAPPEN ET AL., THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (1999).

[95] J. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND US FOREIGN POLICY (2008).

[96] S. D. Krasner, *Sovereignty, regimes, and human rights*, REGIME THEORY AND INTERNATIONAL RELATIONS 139-167 (1993); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INTERNATIONAL ORGANIZATION 599-642 (1986).

change,[97] some have certainly helped outline the scenarios by which human rights might acquire a more dominant worldwide status. [98]

The rather vast set of thinkers associated with "liberal" approaches to political science and IR have also stressed the need to go beyond realist assumptions. One type of analysis emphasizes the nature of certain political regimes as a fairly accurate predictor of whether states will abide by international human rights standards (even though they may not become bound by them formally). Predictably, these theorists often conclude that liberal democracies tend to respect human rights more, all other things being equal, than states that are neither liberal nor democracies. Arrangements like the ECHR are presented as successful precisely because they were based on pre-existing democracies bent on the rule of law and a culture of rights.[99] There may be a gist of truth to this, but it must be recognized that, apart from ample evidence that liberal democracies are very capable of rights violations (e.g.: in the context of the war on terror, or vis-à-vis indigenous, religious, or migrant communities, or in tolerating large amounts of significant poverty), this sort of reasoning is also quite dependent on certain fundamental assumptions about what "complying" with human rights means (see, infra).

Scholars of the transnational dimension of politics have tended to put more emphasis on the role of norms in international relations,[100] particularly a dimension of "moral proselytizing" by "norm entrepreneurs",[101] or the role of transnational activists,[102] including leading human rights NGOs[103] and social movements.[104] Scholars more inclined towards constructivist approaches have emphasized the extent to which ideas such as human rights help construct the world in which we live, including notions of the national interest and sovereignty, rather than simply being shaped by them.[105] Innovative explanations at the intersection between historical research and political strategizing has emphasized the degree to which human rights can be a way for states that have recently emerged from authoritarian histories to protect themselves against a recurrence of such episodes by "anchoring" their commitment to rights internationally.[106]

International human rights also bring attention to the extent to which IR's traditional concept of the main actors of international relations is limited. Non-state actors have steadily become more important in international relations, but perhaps nowhere more so than in a field with which they

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[97] H. BULL, THE ANARCHICAL SOCIETY (1977).
[98] R. J VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS (1986).
[99] A. Moravcsik, *Explaining International Human Rights Regimes:: Liberal Theory and Western Europe*, 1 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 157-189 (1995).
[100] Kathryn Sikkink, *Transnational Politics, International Relations Theory, and Human Rights*, 31 PS: POLITICAL SCIENCE AND POLITICS 517-523 (1998).
[101] C. Powell, *Role of Transnational Norm Enterpreneurs in the US War on Terrorism, The*, 5 THEORETICAL INQUIRIES IN LAW 47 (2004).
[102] S. D. Burgerman, *Mobilizing principles: the role of transnational activists in promoting human rights principles*, 20 HUMAN RIGHTS QUARTERLY 905-923 (1998).
[103] A. M. CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS (2001); P. R BAEHR, NON-GOVERNMENTAL HUMAN RIGHTS ORGANIZATIONS IN INTERNATIONAL RELATIONS (2009).
[104] N. Stammers, *Social movements and the social construction of human rights*, 21 HUM. RTS. Q. 980 (1999). BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW : DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).
[105] D. C. THOMAS, THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM (2001). Reus-Smit, *supra* note___.
[106] A. Moravcsik, *The origins of human rights regimes: Democratic delegation in postwar Europe*, 54 INTERNATIONAL ORGANIZATION 217-252 (2003).

have identified strongly, namely the generation, implementation and even enforcement of international human rights norms. This phenomenon is visible in such landmark events as the Beijing women's rights conferences, the Ottawa landmines conference, or the adoption of the Statute of the International Criminal Court in Rome. It is also clearly visible in traditionally inter-state fora like the Human Rights Council (formerly Commission) where civil society actors have long sought to have their voice heard. [107]

INTERNATIONAL HUMAN RIGHTS AND GLOBALIZATION

A significant area of exploration for scholars of international human rights, in addition to the traditional study of international relations, has been the intersection with the phenomenon of globalization.[108] One would tend to think that globalization has been broadly facilitative of the diffusion of human rights as an ideology, and there is probably much truth to this. Seeing the diffusion of ideas about human rights as a byproduct of globalization opens very interesting avenues for research. The typical emphasis has traditionally been on international or *supranational* human rights as a set of norms being channeled from above, in very "top down" fashion, by the "international community" first to the state and ultimately to the end beneficiaries of human rights. Globalization studies, on the other hand, tend to emphasize how the phenomenon is reshaping the nature of processes occurring both at the micro-local and at the global level.

A certain aspiration to world government to which the human rights project was partly tied is increasingly being replaced by an emphasis on the very multiple ways in which something as loosely defined as "global governance" occurs. There are clear legal implications to this research agenda. As opposed to a vision of international law being the driving force behind the spread of human rights, "globalists" stress the importance of transnational diffusion of norms, of networks of interest, of social movements, of new geographies, and of exchanges between different levels of governance. Scholars such as Sally Engle Merry have emphasized the extent to which the production of international human rights norms is increasingly marked by a very close association between local NGOs, states and international governance structures.[109]

Yet at the same time, globalization creates strong phenomena of resistance that can militate against the spread of rights. The very erosion of sovereignty, so often seen as a goal for human rights activists, can have powerfully corroding effects on the ability of anyone to guarantee rights.[110] Moreover, globalization creates distinct and relatively new threats to rights, whether economic, political or technological.[111] Whilst international human rights law traditionally focused on the state

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[107] J. Smith, R. Pagnucco & G. A. Lopez, *Globalizing human rights: The work of transnational human rights NGOs in the 1990s*, 20 HUM. RTS. Q. 379 (1998).

[108] A. BRYSK, GLOBALIZATION AND HUMAN RIGHTS (2002).

[109] S. E. Merry, *Transnational human rights and local activism: Mapping the middle*, 108 AMERICAN ANTHROPOLOGIST 38 (2006); S. E. Merry, *Rights talk and the experience of law: Implementing women's human rights to protection from violence*, 25 HUM. RTS. Q. 343 (2003); S. E. Merry, *Human rights and global legal pluralism: reciprocity and disjuncture*, F. VON BENDA-BECKMANN, K. VON BENDA-BECKMANN, AND A. GRIFFITHS (EDS) MOBILE PEOPLE, MOBILE LAW. EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD. ALDERSHOT: ASHGATE 215–32 (2005); S. E. Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. JL & SOC. 247 (1997); S. E. Merry, *Constructing a Global Law-Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941 (2003).Zakaria et Yew, *supra* note__.

[110] Louis Henkin, *That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM LAW REVIEW 1 (1999).

[111] R. McCorquodale & R. Fairbrother, *Globalization and human rights*, 21 HUMAN RIGHTS QUARTERLY 735-766 (1999).

and what was happening "within it", it increasingly has shifted its gaze to more complex phenomena generated by globalization. Among these three perhaps stand out. First, the importance of the "extra-territorial". States are increasingly – although this is a phenomenon that has its roots in the colonial age – projecting their sovereignty outside their territory, raising questions about their human rights responsibilities in far-flung locations.[112] Second, the importance of "transnational" dimension for human rights. The transnational is the space that opens up "in between" and beyond states. It creates significant human rights challenges, whether it be for refugees, migrants, fugitives, or victims of trafficking. Finally, globalization brings attention to a number of specifically global phenomena that might have a considerable impact on rights: the global distribution and circulation of capital and investment, and therefore more generally the importance of the economy; the global degradation of conditions on the planet; the global privacy and freedom implications of a medium such as the internet.[113]

In this context, international human rights law certainly has the ambition to not simply be a branch of international law regulating state conduct at home but, increasingly, an international regulatory framework bent on orienting globalization in a certain direction – even as globalization threatens to undermine the international legal model on which rights promotion relied so crucially.[114] Human rights in a time of globalization seek to redefine the nature of international political association. This is manifested, for example, in the increasing association between at least certain internationally protected human rights and the idea of international constitutionalization,[115] although it also raises persistent issues about international human rights' democratic deficit.[116] This claim is reinforced by a whole strand of authors who seek to bring attention to the strong association of human rights with self-determination[117] or the idea of (national) democracy,[118] and the attendant risks of "de-localized" human rights.

CRITICAL VIEWS OF INTERNATIONAL HUMAN RIGHTS

Critical views of international human rights have emerged strongly in the last two decades as a result of the rising fortunes of the movement, but have existed for much longer, and have had famous proponents (among the more respectable) including Jeremy Bentham and Edmund Burke. They challenge "mainstream" international human rights theory from a number of angles and come

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[112] M. J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 119-141 (2005); M. Happold, *Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights*, 3 HUMAN RIGHTS LAW REVIEW 77-90 (2003); Sigrun I Skogly & Mark Gibney, *Transnational Human Rights Obligations*, 24 HUMAN RIGHTS QUARTERLY 781 (2002).

[113] R. A. FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD (2000).

[114] T. Evans & J. Hancock, *Doing something without doing anything: international human rights law and the challenge of globalization*, 2 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1-21 (1998).

[115] An idea already implicit in the designation of the UDHR/ICCPR/ICESCR trio as the « International bill of rights » as if they formed collectively the backbone of an emerging world polity. See S. Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 749 (2008).

[116] D. L. Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT'L LJ 1 (2003).

[117] R. McCorquodale, *Self-determination: a human rights approach*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 857-885 (2008).

[118] H. J. Steiner, *Two Sides of the Same Coin? Democracy and International Human Rights*, 41 ISRAEL LAW REVIEW 445-476 (2008); J. O. McGinnis & I. Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2008).

from both the political right[119] and the political left,[120] as well as a variety of conservative,[121] romantic or post-modern backgrounds, prompting some to herald "the end of human rights".[122] Human rights have been criticized on a number of grounds. Some have to do with the project itself and, apart from various foundationalist or relativist critiques that have already been alluded to, have tackled rights' discourse excessive individualism and socially-disaggregating effects,[123] or its fundamentally anti-democratic nature,[124] or simply its infatuation with self.[125] Some critiques focus on specific facets of international human rights' deployment and the particular forms this takes. For example, the excessive dominance of legal discourses on international human rights,[126] and the risks that come with overlegalization,[127] have long been a critical concern.

But most critiques operate at a deeper philosophical, jurisprudential, ideological, or political level. Some are critiques of a version of "human rights in power", in regions where they have become very well entrenched. Their determinacy of rights and the whole notion of human rights adjudication has been challenged as vacuous, or as a way of conducting politics under the cloak of law. Enforcing human rights is presented as endless repetition of the liberal dilemmas that gave rise to them, and always at risk of degenerating into discretionary disserting on the meaning of such notions as "reasonable" or "proportional".[128] Outside the areas where they are dominant, international human rights have been criticized for constituting a thinly veiled attempt to impose a particular Western, liberal project on the rest of the world, and as a process of subtle "otherization". For example Makau Mutua has argued that the project is embedded in a "savages, victims and saviors" metaphor that systematically portrays the periphery as a place in need of being "saved" by human rights, in ways that are strongly reminiscent of the "White man's burden".[129] Nathaniel Berman has uncovered some of the deep affinities between early human rights movements and colonialism,[130] and Ratna Kapur has emphasized the continuing strength of such legacies.[131] Feminists have critiqued international human rights law's persistent androcentrism,[132] and in turn been criticized

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[119] See for example the various human rights chapters in the CATO sponsored CONUNDRUM: THE LIMITS OF THE UNITED NATIONS AND THE SEARCH FOR ALTERNATIVES, (2009).
[120] M. Tushnet, *Essay on rights*, 62 TEX. L. REV. 1363 (1983); W. BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995); D. Kennedy, *The critique of rights in critical legal studies*, LEFT LEGALISM/LEFT CRITIQUE 178–228 (2002).
[121] Maurice Cranston, *Are There Any Human Rights?*, 112 DAEDALUS 1-17 (1983).
[122] C. Douzinas, *End (s) of Human Rights, The*, 26 MELB. UL REV. 445 (2002).
[123] A. ETZIONI, RIGHTS AND THE COMMON GOOD: THE COMMUNITARIAN PERSPECTIVE (1995).
[124] G. SOUILLAC, HUMAN RIGHTS IN CRISIS: THE SACRED AND THE SECULAR IN CONTEMPORARY FRENCH THOUGHT (2005).
[125] MICHAEL IGNATIEFF, KWAME ANTHONY APPIAH & AMY GUTMANN, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2003).
[126] T. Evans, *International human rights law as power/knowledge*, 27 HUM. RTS. Q. 1046 (2005).
[127] Laurence R Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUMBIA LAW REVIEW 1832 (2002). C. Chinkin, *International law and human rights*, HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 105–29 (1998).
[128] M. Koskenniemi, *Corten, Olivier. L'utilisation du" raisonnable" par le juge international: Discours juridique, raison et contradictions*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 198 (2000); Koskenniemi, *supra* note___; M. Koskenniemi, *The effect of rights on political culture*, THE EU AND HUMAN RIGHTS 99-116 (1999); M. Koskenniemi, *Occupied Zone: A Zone of Reasonableness?*, 41 ISR. L. REV. 13-677 (2008).
[129] M. Mutua, *Savages, victims, and saviors: the metaphor of human rights*, 42 HARV. INT'L LJ 201 (2001); Makau Wa Mutua, *Ideology of Human Rights, The*, 36 VIRGINIA JOURNAL OF INTERNATIONAL LAW 589 (1995); M. MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002).
[130] Nathaniel Berman, *'The Appeals of the Orient': Colonized Desire and the War of the Riff*, *in* GENDER AND HUMAN RIGHTS (Karen Knop ed., 2004).
[131] Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side*, 28 SYDNEY LAW REVIEW 665 (2006).
[132] Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARVARD HUMAN RIGHTS JOURNAL 87 (1993).

by critical race feminists for their western-centrism.[133] Various strands of critical race theory have challenged the "whiteness" of the dominant human rights narrative,[134] whilst others have challenged the dominance of an unproblematized human "subject" of human rights, whether from the perspective of indigenous people,[135] or the gay and lesbian community.[136] Common to these critiques is a vision of human rights as power and as a device that is, in a variety of contexts, a lot more apologetic and legitimating of the status quo than it cares to recognize.[137] David Kennedy, in particular, has long challenged the praxis of human rights lawyering as one rooted in differentials of power, dominance, and at risk of being reductionist.[138]

THE THEORY OF INTERNATIONAL HUMAN RIGHTS LAW

As human rights challenge the fundamental tenor of the international project, so does international human rights law challenge some fundamental tenets of public international law.[139] Human rights as a project could only become "international" by becoming binding under international law. However, the integration of human rights into public international law creates a complex dialectics. On the one hand, human rights law is constantly tempted to retreat from international law and "play by its own rules" (or to conquer and dominate international law). Public international law's voluntarism (i.e.: the idea that states are bound only by that which they consent to) is in tension with human rights' claimed immanence (the idea that rights exist and are in at least some way enforceable even though they have not been ratified formally). For example, international human rights lawyers may be tempted to revert to the discipline's default position that rights exist independently of positive international law whenever the rules of international law do not allow them to reach certain goals. International human rights law is often the site of unorthodox normative practices, from the point of view of classical international law.[140]

In practice of course this is not very sustainable and so the goal of every self-respecting human rights lawyer and activist in the last 200 years has been to convert rights' naturalist claim into the hard currency of positive law. In that respect the international human rights movement merely tries to replicate the best successes of domestic liberal revolutions that have culminated in the

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[133] Penelope E Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 JOURNAL OF GENDER, RACE AND JUSTICE 373 (1999). A. K. Wing, *Critical race feminism and the international human rights of women in Bosnia, Palestine, and South Africa: Issues for LatCrit Theory*, THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 337-360 (1996).

[134] Hope Lewis, *Reflections on Blackcrit Theory: Human Rights*, 45 VILLANOVA LAW REVIEW 1075 (2000).

[135] R. A. Williams Jr, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, DUKE LJ 660 (1990).

[136] D. Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 HUM. RTS. Q. 67 (1996).

[137] A. M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (2007); J. H. H. Weiler, *Human rights, constitutionalism and integration: iconography and fetishism*, 3 INT'L LFD INT'L 227 (2001).

[138] DAVID KENNEDY, THE DARK SIDES OF VIRTUE : REASSESSING INTERNATIONAL HUMANITARIANISM (2004); D. Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); D. Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1984); D. Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, SARAT AND KEARNS 1993B (1993).

[139] M. T. Kamminga & M. Scheinin, *The impact of human rights law on general international law*, (2009).

[140] M. Koskenniemi, *The Pull of the Mainstream*, 88 MICHIGAN LAW REVIEW 1946-1962 (1990).

adoption of bills of rights and the like. Human rights therefore need to engage with international law and many international human rights lawyers seek to present themselves as orthodox – if progressist - public international lawyers.[141] As a result of their historical alliance with international law, human rights have become at least formally universalized.

However, tensions arise as a result of this embededness in public international law, a law that was designed originally with a very different purpose in mind than the worldwide promotion of an ideal of the good society. The tensions are between the mythology of human rights as rights inhering in human beings and the reality of human rights as rights that only have much traction if they have become positive law. These tensions can be seen to emerge at the level of sources, status and even subjects of international human rights norms and to redefine such key notions as enforcement. In the process of seeking to deal with those tensions, human rights continues to have a profound impact on the various strands of doctrinal theorizing about public international law.

THE SOURCES OF INTERNATIONAL HUMAN RIGHTS

A priori, international human rights as a branch of international law should draw on the same sources and in the same way as general international law, namely article 38 of the Statute of the ICJ and its emphasis on custom, treaties, and general principles, complemented by precedents and the writings of the most senior publicists. In some respects, international human rights law very much mimics public international law. For example, international human rights treaties typically come into existence in the same way as ordinary treaties (they are negotiated, drafted, signed, and ratified). Much of the Vienna Convention on the law of treaties is applicable to human rights treaty. Indeed, international human rights has perhaps most clearly converged with public international law in its acquiescence to the idea that the treaty is increasingly the "gold standard", with custom only a second best.

Without rejecting this, international human rights lawyers have arguably taken considerable liberties with the canons of sources. A good example is customary international law, an old and venerable source of public international law, whose understanding human rights have contributed to renovate or even revolutionize. Human rights lawyers have not been adverse to resorting to customary international law when it serves their purpose, i.e.: typically when it allows them to dynamically adapt, even expand the content of applicable human rights law, or to consider that states are bound by human rights norms even when they have not ratified the relevant treaties.

But customary law does create difficulties for human rights. For example, it is above all indexed on state behavior and an element of state *practice*. The problem with practice is that human rights are often, unfortunately, honored in the breach. What is one to make, for example, of the fact that, according to Amnesty International, as many as 70 states regularly practice torture? One may draw some comfort from the fact that none (or very few) of these states actually officially condone torture: most will claim that they do not commit any, in a sort of tribute paid by vice to virtue. In fact, one typical strategy for human rights lawyers has been to foreground opinio juris – states' vehement proclamations that they respect human rights and recognize them as such – at the

[141] T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

expense of practice, thereby accelerating a process of unorthodox development of custom. States have been taken at their word, rather than held up to their own actual standard of behavior.

This can be criticized as arbitrary, however, and as coming at a significant risk of compromising international law's theory of custom.[142] Others have emphasized the need to diversify the circle of relevant "participants" for the purposes of elucidating human rights custom, including non-state actors and inter-governmental organizations.[143] However, the often unacknowledged bottom line is that most human rights lawyers would probably consider torture and many other human rights violations to be illegal regardless of the fact that most states practiced them, or indeed even if states affirmed that they did not consider the prohibition on torture to be binding. That is because the source of the prohibition of torture is not really the treaties that say so, even though having the treaties creates both reinforces the status of the prohibition and creates an ambiguity about its foundation.

Even human rights' concept of treaty law is somewhat at variance with the mainstream of international law. International human rights treaties may superficially look like any other international law treaty (a binding agreement between sovereigns), but they differ in both form and substance. First, their grand proclamative and programmatic aspect suggests that something else is at stake than the ordinary manifestations of voluntarism: it is the voluntarism of recognizing something that is already supposedly there. Second, international human rights treaties are perhaps one of the clearest manifestations of "law-making" or even "constitutional" treaties, rather than the more "contractual" model traditionally envisaged by international law.[144] International human rights law has also developed its own theory of interpretation that is at variance with the mainstream of international law, emphasizing sui generis tools such as the idea of treaties as "living instruments" and their teleological and dynamic interpretation,[145] that would be inconceivable with normal international treaties.[146]

Another characteristic of the sources of international human rights law is an increasing focus on "soft sources" (resolutions – starting with the UDHR, declarations, rather than conventions), and a tendency for the discipline to think of its sources in "self-contained" terms. This leads to significant trans-judicial dialogue about human rights between constitutional judicatures (which increasingly find, in international human rights law, a common language), but also between different international human rights bodies, judicial or not.[147] However, one might argue that international human rights law is to some extent going even further and that there is a clear departure from, for

[142] B. Simma & P. Alston, *Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, The*, 12 AUST. YBIL 82 (1988).
[143] Jordan J Paust, *Complex Nature, Sources and Evidences of Customary Human Rights, The*, 25 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 147 (1995).
[144] M. Craven, *Legal differentiation and the concept of the human rights treaty in international law*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 489 (2000).
[145] G. Letsas, *A theory of interpretation of the European Convention on Human Rights*, (2007).
[146] In fact, international human rights courts are criticized whenever they interpret human rights treaties according to traditional international law principles emphasizing restrictive interpretation to protect state voluntarism. A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 529 (2003).
[147] A. Clapham, *Symbiosis in International Human Rights Law: The Ocalan Case and the Evolving Law on the Death Sentence*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 475-489 (2003).

example, article 38 of the ICJ. For example, there has been a broadening of what counts as a source to include reference to certain societal or communal values.[148] In fact, the movement is also at times transcending the notion of sources altogether, through reliance on certain fundamental values that are so broad to not really qualify as sources at all,[149] and even an affirmation (which is also in some ways a return to human rights' inspiration) that some rights exist for no other reason than the fact that they are believed in or are essential, or are morally and philosophically justified. In other words, international human rights law marks the resurgence of a sort of denaturalized natural law that is an implicit rejection of positivism's "scientific" theory of sources, although that process is of course never quite explicit.

THE STATUS AND NATURE OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

In more ways than one, international human rights obligations differ significantly in their status and nature from traditional international legal obligations. First, their beneficiaries are individuals rather than states. Second, they apply primarily domestically where most traditional international legal obligations apply primarily internationally. Third, they are typically considered to have a high axiological validity and, for example, seen as transcending domestic and even other international norms.

A good example of how human rights lawyers have tackled such a potential tension is by forging what is sometimes known as the "special character" of human rights obligations. Essentially, the idea of the "special character" is a claim - somewhat circular and never fully substantiated except by appeal to the very notion of rights – that human rights norms operate in significantly, even radically different ways from normal international legal obligations. This special character is most typically invoked in the context of treaty obligations, but one can make the case that it also has an impact on how obligations emerging from other sources (e.g.: custom) should be understood. The idea of the special character has been referred to in the case law of the ICJ,[150] the EComHR[151] and ECtHR,[152] and the Inter-American Court.[153]

The key intuition is that international human rights treaties are in some ways only treaties in form. Superficially, they resemble an exchange of promises between states, just like any treaty. Yet in reality what is occurring is very distinct and more complicated. What states are really doing is they are committing to respect the rights of persons within their jurisdiction. That promise is only

[148] What is necessary in a "democratic society" for the purposes of limiting rights, for example, is almost never ascertained by reference to state practice and opinio juris, but through an exploration of degrees of convergence within regional systems or even an exercise of speculative deduction from human rights first principles and jurisprudence. The African Convention on human rights is also noteworthy for including a reference to "African practices" as a regional and domestic standard that would have had no equivalent in classical international law.

[149] The Martens clause would be a good example in international humanitarian law. Its reference to "the laws of humanity and the requirements of the public conscience" seems to act as a pseudo-positive conduit for the introduction of all kinds of considerations about how that particular regime should operate. T. Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 78-89 (2000); A. Cassese, *The Martens Clause: half a loaf or simply pie in the sky?*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187 (2000).

[150] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Report 1951.

[151] ECmHR, Austria v. Italy, 1961.

[152] ECtHR, UK v. Ireland, 1978.

[153] IACHR, Advisory opinion, The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights, 1982.

tangentially made to other states (as reflected, for example, in the marginalization of inter-state procedures in advanced protection systems), and is in significant ways a promise to the beneficiaries of rights (populations), the international community, or even a complex form of "promise to self" anchored in international commitment. This means that international human rights are less a commitment that is exchanged between equals in exchange for something, and more in the nature of a "common interest" protected together; they represent less subjective than objective obligations; and they are in nature more unilateral than reciprocal. In other words, although human rights obligations appear under the a priori synallagmatic, and reciprocal form of treaties, this in tension with their content as norms that are neither synallagmatic nor reciprocal.[154]

The notion of the "special character" of human rights obligations has been associated with a whole series of remarkable developments in international law that seem to challenge core assumptions about the nature of international legal obligation: the jus cogens[155] and erga omnes[156] of international human rights obligations; stricter rules in terms of permissible reservations[157] and the consequences of reservations being found incompatible with the object and purpose of a treaty;[158] a regime of quasi-automatic succession to human rights treaties unlike the default regime in international law;[159] an inability to withdraw from substantive[160] and even institutional or jurisdictional international human rights obligations;[161] a rejection of the defense of necessity to justify non-compliance and its replacement by a sui generis and embedded regime of derogations in times of national emergency;[162] a rejection of non-compliance as a remedy to non-execution of

[154] This is what Matthew Craven has described as a fundamental tension between "form" and "function" in human rights treaties. Craven, *supra* note___.

[155] Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR J INT LAW 491-508 (2008); E. De Wet, *The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 97 (2004).

[156] A. Shapira, *The Erga Omnes Applicability of Human Rights. Comment on Dinstein-The Erga Omnes Applicability of Human Rights*, 30 AVR 22-27 (1992); Y. Dinstein, *The erga omnes applicability of human rights*, 30 ARCHIV DES VÖLKERRECHTS (1992); K. Oellers-Frahm, *Comment: The erga omnes Applicability of Human Rights*, 30 ARCHIV DES VÖLKERRECHTS, BD 28-37 (1992).

[157] L. LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? (1995); E. A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277 (1999); W. A. Schabas, *Reservations to human rights treaties: time for innovation and reform*, 32 CAN. YB INT'L L. 39 (1994).

[158] Makinda, *supra* note___.

[159] M. T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 469—485 (1996).

[160] N. P. Concepcion, *Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights, The*, 16 AM. U. INT'L L. REV. 847 (2000); E. Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence*, 8 AJHR 1 (1999); Ed Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 751-788 (2008).

[161] N. Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, AMERICAN JOURNAL OF INTERNATIONAL LAW 563-568 (1998); M. F. Tinta, *Individual Human Rights v. State Sovereignty: The Case of Peru's Withdrawal from the Contentious Jurisdiction of the Inter-American Court of Human Rights*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 985-996 (2004); K. C. Sokol, *Ivcher Bronstein v. Constitutional Tribunal. Inter-American Court of Human Rights judgment on right of a state to withdraw its acceptance of compulsory jurisdiction*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 178 (2001).

[162] D. McGoldrick, *The interface between public emergency powers and international law*, 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 380-429 (2004); S. Joseph & PR ICCPR, *Human Rights Committee: General Comment 29*, 2 HUMAN RIGHTS LAW REVIEW 81 (2002).

obligations by another party; a specific regime of enforcement emphasizing supranational scrutiny and individual triggering rather than inter-state disputes.[163]

THE SUBJECTS OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Human rights have also been at the source of much speculation about international law's theory of its legitimate subjects. As is well known, international law traditionally defined the only subjects of international law as being states. To a certain degree, international human rights law bows to this reality, if only because human rights have themselves been deeply marked by the state domestically, and because internationally states are effectively among the actors that have most potential to harm human rights (and, correlatively, to fulfill them). However, the international human rights movement has also contributed significantly to the renewal of international law's perception of its rightful subjects through at least two developments emphasizing the status of individuals:[164] first, the idea – once seemingly unattainable -[165] that individuals have standing before international bodies and courts to complain of violations of human rights committed by certain states,[166] and even in many cases to invoke the benefit of human rights treaties before domestic courts;[167] second, the idea that individuals can commit international crimes which, although they may not be the same thing, are often at least implicitly conceived in terms of (massive) human rights violations.[168]

More generally, one could argue that human rights as a project is clearly less committed to the idea of the state's exclusivity as a subject of international law than public international law was. This is partly because there is an occasionally anti-sovereign bias in human rights activism. It is also because international human rights is a priori mostly interested in what social arrangements, domestically or internationally, might negatively affect or maximize human rights, and therefore more agnostic about what the legitimate subjects of ought to be (as opposed to a normative system like public international law which is committed to a particular theory of legitimate subjects as part of its very normative project). If it turns out that multinational corporations,[169] guerilla groups[170] or

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[163] T. Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AMERICAN JOURNAL OF INTERNATIONAL LAW 754-778 (1982).

[164] I. Brownlie, *Place of the Individual in International Law, The*, 50 VA. L. REV. 435 (1964); R. Higgins, *Conceptual thinking about the individual in international law*, BRITISH JOURNAL OF INTERNATIONAL STUDIES 1-19 (1978).

[165] J. W. Bruegel, *The Right to Petition an International Authority*, 2 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 542-563 (1953).

[166] K. Boyle & H. Hannum, *Individual Applications under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case*, 68 AM. J. INT'L L. 440 (1974); Liz Heffernan, *Comparative View of Individual Petition Procedures under the Human Convention on Human Rights and the International Covenant on Civil Political Rights, A*, 19 HUMAN RIGHTS QUARTERLY 78 (1997).

[167] A. Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY (1998).

[168] L. S SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS (1992).

[169] S. R. Ratner, *Corporations and human rights: a theory of legal responsibility*, 111 YALE LJ 443 (2001); A. CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); PHILIP ALSTON, ACADEMY OF EUROPEAN LAW. & NEW YORK UNIVERSITY. CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE., NON-STATE ACTORS AND HUMAN RIGHTS (2005); C. Jochnick, *Confronting the impunity of non-state actors: new fields for the promotion of human rights*, 21 HUM. RTS. Q. 56 (1999); B. Stephens, *Amorality of Profit: Transnational Corporations and Human Rights, The*, 20 BERKELEY J. INT'L L. 45 (2002); J. J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); J. G. Ruggie, *Business and human rights: The evolving international agenda*, AMERICAN JOURNAL OF INTERNATIONAL LAW 819-840 (2007).

[170] A. Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 491-523 (2007).

intergovernmental organizations[171] have most impact on human rights, a human rights pragmatist will be inclined to think, then these should be subjects of international human rights law (and therefore, at least to a limited extent, of public international law) at least insofar as this will enhance the goals of human rights. This of course raises not just technical but theoretical problems: under what theory should non-state actors have human rights obligations? How might their responsibility relate to that of states? What kind of subjecthood results? International human rights law is beginning to answer these important legal questions.

INTERNATIONAL HUMAN RIGHTS LAW, IMPLEMENTATION AND DOMESTIC LAW

No branch of international law has done more to revive theoretical debates about implementation than international human rights law, especially in view of the largely shared view that domestic courts should be at the forefront of human rights enforcement,[172] and that international human rights treaties are of little use if they do not impact domestic law.[173] In international legal theory, of course, states can be found liable directly under international law for violations of human rights. But, apart from the fact that no human rights court may be available to engage that responsibility (and that the ICJ is for most purposes an unlikely forum), even when a human rights court does exist state complaints are the exception, and international remedies always distant, so that domestic courts should be able to provide a first remedy.

The problem is that, for all the individual-orientedness of human rights, there is much resistance to international human rights obligations, particularly treaties, being applicable directly in domestic law. This has been especially noticeable in dualist countries that have, historically, proved to offer most opposition to the domestic incorporation of international human rights obligations.[174] Human rights may appear to some as naturally self-executing treaties, but in countries with a strong tradition of parliamentary sovereignty and possibly no tradition of constitutional rights protection, international ratification without implementation will make prospects of human rights domestic enforcement very unlikely. Dualism has been criticized for creating a situation largely incompatible with the spirit of international human rights obligations: states ratify international human rights treaties, supposedly to protect individuals within their jurisdiction, but these individuals cannot complain of human rights violations under these treaties, which are considered to be only commitments made between states.

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171 F. Mégret & F. Hoffmann, *The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities*, 25 HUMAN RIGHTS QUARTERLY 314-342 (2003); T. Ahmed & I. de Jesus Butler, *The European Union and human rights: An international law perspective*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 771 (2006); A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, AMERICAN JOURNAL OF INTERNATIONAL LAW 851-872 (2001); C. Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1 (2002); C. Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1 (2002); Herbert V Morais, *Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights, The*, 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 71 (2000).

172 B. CONFORTI & F. FRANCIONI, ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (1997).

173 C. Heyns & F. Viljoen, *The impact of the United Nations human rights treaties on the domestic level*, 23 HUMAN RIGHTS QUARTERLY 483-535 (2001).

174 Louis Henkin, *Implementation and Compliance: Is Dualism Metastasizing*, 91 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 515 (1997).

This is also in tension with the "special character" of human rights treaties, and human rights bodies regularly plead for the direct applicability of their norms in domestic law. Some have spotted a "creeping monism" in traditionally dualist countries when it comes to human rights, through techniques of interpretative incorporation.[175] In certain regional contexts, particularly that of the Council of Europe, dualism has become gradually unsustainable for states, as it exposed them to too many findings of being in breach because of the inadequacy of domestic remedies,[176] prompting the adoption of such landmark implementing legislation as the British Human Rights Act.[177] Indeed, whether dualist or monist, the increasingly constitutional force of human rights guarantees and the openness of at least some constitutions to the supra-legislative force of international treaties has made incorporation a much more significant reality than ever.[178]

INTERNATIONAL HUMAN RIGHTS, FRAGMENTATION AND OTHER BRANCHES OF PUBLIC INTERNATIONAL LAW

International human rights law is still classically seen as a branch of public international law, and not an isolated and self-contained regime – despite elements of strong self-reliance.[179] Nonetheless, some of the most interesting theoretical debates on the nature of international human rights law in the past decade have been part of a larger discussion about the fragmentation of international law and the competing pull of other significant and, each in their own way, potentially hegeomonizing branches of international law. For example, considerable attention has been paid to policing/problematizing the frontier between international humanitarian and international human rights law,[180] specifically as a problem of fragmentation.[181] Part of the work in this vein is merely concerned with filling gaps between the two,[182] but some has been more riddled with fundamental value conflicts. Whilst international humanitarian lawyers are prompt to make a claim on behalf of the laws of war as a lex specialis,[183] some emphasize the influence of human rights on the laws of war,[184] some would displace international humanitarian law in at least cases of non-international

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[175] M. A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).
[176] A. Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY (1998).
[177] I. Leigh & L. Lustgarten, *Making rights real: the courts, remedies, and the Human Rights Act*, 58 THE CAMBRIDGE LAW JOURNAL 509-545 (1999).
[178] Yuval Shany, *How Supreme Is the Supreme Law of the Land - Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOKLYN JOURNAL OF INTERNATIONAL LAW 341 (2005); Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 211 (1998).
[179] Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 International & Comparative Law Quarterly 217-231 (2007); Stephan Pastor Ridruejo & José Antonio, *Droit international et droit international des droits de l'homme: unité ou fragmentation?*, *in* Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber (Stephan Breitenmoser ed., 2007).
[180] RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002).
[181] A. Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 161 (2008); A. E. Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 623-639 (2008).
[182] A. Eide, A. Rosas & T. Meron, *Combating lawlessness in gray zone conflicts through minimum humanitarian standards*, AMERICAN JOURNAL OF INTERNATIONAL LAW 215-223 (1995).
[183] K. Anderson, *Who Owns the Rules of War?*, 13 NEW YORK TIMES MAGAZINE (2003).
[184] T. Meron, *The humanization of humanitarian law*, 94 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 239-278 (2000).

armed conflict,[185] and yet others remain uncomfortable with what seems an excessive toleration for violence and the killing of the innocent.[186] A similar tension arises in the context of the so-called "war on terror" and opposes those who think that global terrorism should be dealt primarily under humanitarian or human rights law.[187]

Another very significant fault line has opened between international human rights and international trade law.[188] One scholar in particular, Ernst Ulrich Petersman, has energetically argued for the integration of human rights in world trade law.[189] This has been met by an equally vigorous series of responses.[190] There has also been much discussion of the intersection of what might be termed international security law (particularly action by the Security Council) and international human rights law;[191] international criminal law, despite being apparently significantly driven by rights concerns,[192] raises periodic issues about how seriously it should take human rights;[193] some have suggested that refugee law be framed more in terms of human rights;[194] development law is increasingly under the influence of human rights "mainstreaming";[195] significant tensions exist between international labor law as a model of worker protection and rights approaches;[196] and human rights are presented as one way to instill a sense of urgency about international environmental obligations.[197] In short international human rights law is at once potentially hegemonic, vigorously challenged by the dominance of other agendas and, quite possibly, harbors the ambition to be in a position to arbitrate value conflicts with all of the above, from the point of view of the best interest of human beings.

INTERNATIONAL HUMAN RIGHTS AND THE NOTION OF ENFORCEMENT

As with international law, much scholarship in international human rights is geared towards specifying the conditions under which international human rights law is most likely to be

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185 W. Abresch, *A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741 (2005).
186 Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS JOURNAL OF INTERNATIONAL LAW & POLICY 171 (2004).
187 Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 675 (2004).
188 T. Cottier, *Trade and Human Rights: a relationship to discover*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 111 (2002).
189 For one in a long series of such articles, see E. U. Petersmann, *Time for a United Nations' Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 621 (2002).
190 R. Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EJIL 651-659 (2002); P. Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 815 (2002).
191 D. L. Donoho, *Role of Human Rights in Global Security Issues: A Normative and Institutional Critique, The*, 14 MICH. J. INT'L L. 827 (1992); Ian Johnstone, *The UN Security Council, Counterterrorism and Human Rights*, *in* COUNTERTERRORISM: (Andrea Bianchi & Alexis Keller ed., 2008).
192 D. F. Orentlicher, *Settling accounts: the duty to prosecute human rights violations of a prior regime*, 100 YALE LJ 2537 (1990).
193 S. ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS (2003).
194 J. C. Hathaway, *Reconceiving refugee law as human rights protection*, 4 JOURNAL OF REFUGEE STUDIES 113 (1991).
195 B. I Hamm, *Human Rights Approach to Development, A*, 23 HUMAN RIGHTS QUARTERLY 1005 (2001); P. Alston, *Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755 (2005).
196 P. ALSTON, LABOUR RIGHTS AS HUMAN RIGHTS (2005).
197 W. Sachs, *Climate change and human rights*, 51 DEVELOPMENT 332-337 (2008).

"enforced".[198] International human rights lawyers have always been very keen on institutional work, for the obvious reason that human rights that are not implemented are of little interest to those they are supposed to benefit. In this respect, there has often been a perceived considerable gap between proclaimed intentions, the relative success of human rights *discourse*, and the reality of rights.[199] This has led to periodic disenchantment, but also a vigorous search and international legal activism in favor of stronger international human rights mechanisms and occasionally an urge to raise old questions anew.[200]

In this respect, the search for the "best possible" international human rights institutions is linked to a respectable and ancient study of the reality and prospects of "International Organization" (the macro-organization of the system itself) and international organization*s* (the actual mechanisms).[201] It has contributed to the creation and better understanding of a number of quite remarkably sui generis mechanisms for international human rights promotion. For example, to a much more considerable degree than classical public international law, international human rights law emphasizes the importance of human rights implementation.[202] This was not so much of an issue for international treaties that were not meant to create particular benefits, let alone rights, for individuals, but it obviously is foremost in the minds of international human rights lawyers. International human rights bodies have also considerably broadened our concept of what might count as enforcement. There has been and continues to be considerable interest in what traditional international lawyers might consider remarkably unorthodox ways of enforcing an international legal regime (supervision, reporting, recommendations, codes of conduct).[203]

The move from lofty rhetoric about rights to talk of their enforcement – especially when enforcement is understood quite literally as the use of force – has historically generated a significant resistance. For many states and scholars, international human rights law, though important, should never trump sovereignty to the point of undermining a fundamental tenet of public international law, namely the non-use of force. For others, the international human rights corpus does not amount to much if states cannot rise up to the occasion of fundamental threats to populations by using force when absolutely necessary and as a last result. The Kosovo debate, in that respect, has crystallized many anxieties about the current predicament of international law in an age of rights, and strongly given the impression that human rights were part and parcel of logics of dismantlement of the international legal order, or even a new form of imperialism.[204] However, it is not just the use of force that has generated resistance and even the comparatively mild scrutiny

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[198] H. H. Koh, *How is international human rights law enforced*, 74 IND. LJ 1397 (1998).
[199] Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most*, 44 JOURNAL OF PEACE RESEARCH 407-425 (2007); E. M. HAFNER-BURTON & J. RON, CAN THE HUMAN RIGHTS MOVEMENT ACHIEVE ITS GOALS? (2007).
[200] Richard B Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WISCONSIN LAW REVIEW 171 (1969).
[201] P. ALSTON & F. MEGRET, THE UNITED NATIONS AND HUMAN RIGHTS (2010); L. R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125 (2008).
[202] BENEDETTO CONFORTI & FRANCESCO FRANCIONI, ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (1997).
[203] Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1 (2006).
[204] D. CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION (2006); A. ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW (2003).

of international bodies or transnational human right litigation[205] have been criticized as illegitimate, often on principled grounds. The remoteness of all things international, the non-democratic character of international institutions, are all aspects that have been drawn upon to seek to limit the growing reach of human rights enforcement.

Moreover, enforcement has been criticized as not happening or at least as not happening the way the mainstream international human law theory sought to portray it. Scholars operating at the intersection of international human rights and international relations, for example, have been willing to ask a number of hard questions about the treaty, which has long been established as the "gold standard" of the international human rights movement. But how much of a difference do international human rights treaties actually make? Various authors have provocatively argued that treaties have very little influence: they tend to be ratified most readily by states with bad human rights record who typically do not take their human rights obligations seriously, where states that are relatively more scrupulous about human rights and take treaties seriously may decide not to ratify them on narrow technical grounds.[206] This sort of work, which blossomed like a fad during the last decade, raises interesting challenges to international lawyers who might a little too readily assume that treaties must *necessarily* make a difference, although its epistemological stance and empirical data has been questioned.[207]

Scholars of how enforcement actually takes place have sought to go beyond ideological debates about enforcement and to show enforcement to be a much more complex issue theoretically. The idea that treaties probably do not make a difference as such, and certainly not in any narrow command-and-control fashion, was probably always rather obvious. Instead, human rights "performance" if there is such a thing will depend on how treaties operate in conjunction with a set of other factors,[208] or through unexpected and indirect ways such as encouraging civil society.[209] Contra notions that enforcement is mostly a vertical process of "international community imposition", they have emphasized the horizontal dimension of enforcement, one that allows local and transnational participants in the debate to use "norm portals" to reform domestic law from within by pointing to its remoteness from "evolving standards".[210]

The term "enforced", in fact, may be part of the problem in that it already betrays an indebtedness to a concept of Law as a form of "command backed by force", a vision that many find outdated and reductionist. One strand of contemporary international human rights theory, inspired by a whole tradition of international law as a socializing process, has thus sought to emphasize not so much

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[205] C. A. Bradley & J. L. Goldsmith III, *Current Illegitimacy of International Human Rights Litigation, The*, 66 FORDHAM L. REV. 319 (1997).

[206] Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 JOURNAL OF PEACE RESEARCH 95-118 (1999); O. A. Hathaway, *Do human rights treaties make a difference*, 111 YALE LJ 1935 (2001); Hafner-Burton et Tsutsui, *supra* note___.

[207] R. Goodman & D. Jinks, *Measuring the effects of human rights treaties*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2003).

[208] E. Neumayer, *Do international human rights treaties improve respect for human rights?*, 49 JOURNAL OF CONFLICT RESOLUTION 925 (2005); D. Cassel, *Does international human rights law make a difference*, 2 CHI. J. INT'L L. 121 (2001).

[209] Emilie M. Hafner‐Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AMERICAN JOURNAL OF SOCIOLOGY 1373-1411 (2005).

[210] Margaret E McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME LAW REVIEW 755 (2006).

force than implementation, not so much orders as influence.[211] The dominant international legal theory on human rights still tends to be very top-down, and interested in what rights are "from above." Its concept of human rights norm production is one that emphasizes states and the "international community". It focuses on the role of international organizations and courts in implementing human rights.

Curiously, for an idea that otherwise almost idealizes the idea of human agency, it seemingly has little to say at times on how human rights norms are not only received but also produced locally. A new generation of work on human rights has, on the contrary, emphasized a sense of "human rights from below", of rights evolving through struggles and social movements, rather than through the superstructure of liberal institutions.[212] Others, particularly anthropologists have emphasized the need to actually go in the field and better understand how rights are absorbed, incorporated, adopted but also resisted and rejected or reimagined and reinterpreted.[213] Yet others have emphasized new modes of regulations, including soft-regulation, as better approximating what human rights law might come to resemble in the future.[214] Legal pluralism is increasingly emerging as a possible paradigm to analyze the coexistence of multiple legal orders conducive to human rights.[215]

CONCLUSION

A few words of conclusion are in order on international human rights theory's relationship to the practice of the discipline. International human rights law is seen as a practice, which in many ways it very much is. However, even though some human rights lawyers probably aspire to this, it is very difficult to "bracket out" the theory of human rights from their application. Much of the international law of human rights is deeply embedded – indeed, defined – by some of the perennial debates that gave rise to human rights in the first place, and is part of a tricky and ongoing conversation about the nature and development of international law. International human rights theorizing, in this respect, is not a distraction from the serious work of practice, but a way of thinking about what it means to "do international human rights law" that foregrounds the active role of the human rights practitioner not as a slave to the law, but as an ideally conscious and articulate interpreter of a project in the making.

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[211] R. Goodman & D. Jinks, *How to Influence States: Socialization and International Human Rights Law.*, 54 DUKE LAW JOURNAL 621-704 (2004).

[212] B. de Sousa Santos & C. A. Rodríguez-Garavito, *Law, politics, and the subaltern in counter-hegemonic globalization*, LAW AND GLOBALIZATION FROM BELOW (2005); B. Rajagopal, *Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy*, 27 THIRD WORLD QUARTERLY 767-783 (2006); Balakrishnan Rajagopal, *International Human Rights Movement Today, The*, 24 MARYLAND JOURNAL OF INTERNATIONAL LAW 56 (2009).

[213] M. GOODALE & S. E. MERRY, THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL (2007).

[214] D. Kinley & R. Chambers, *The UN Human Rights Norms for corporations: The private implications of public international law*, 6 HUMAN RIGHTS LAW REVIEW 447 (2006).

[215] F. Mégret, "International human rights and legal pluralism: a Reseach Agenda", in René Provost & Colleen Sheppard (eds.) Human Rights and Legal Pluralism (2010).