

UNIVERSITY OF CALIFORNIA,  
IRVINE

The Space Between: On the Emergence  
of an International Legal Practice of Human Rights

DISSERTATION

submitted in partial satisfaction of the requirements  
for the degree of

DOCTOR OF PHILOSOPHY

in Philosophy

by

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## **DEDICATION**

To

my husband and daughter

in recognition of their support, patience, love, and forbearance.

And for giving me a room of my own.

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And lastly, to my family for their patience and support, my love for you truly knows no bounds.

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## **ABSTRACT OF THE DISSERTATION**

The Space Between: On the Emergence  
of an International Legal Practice of Human Rights

By

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Doctor of Philosophy in Philosophy

University of California, Irvine, 2016

Professor Aaron James, Chair

There is a lacuna in our understanding of what it is to have legal human right. While moral philosophers frequently address what it is to have a human right, *qua* human, and legal philosophers discuss what it is that constitutes a legal right, it is not yet clear what it is to have a legal human right distinct from these pursuits. It is generally agreed that not all human rights in the international practice are legal rights for everyone. Legal effectiveness is largely dependent on treaty ratification and domestic commitments. However, this inequality in the effectiveness of legally claimable rights poses a crucial problem for the international practice of human rights, which takes universality and the demands for equitable treatment as central aims of that practice. This dissertation aims to examine this problem and to discuss the state of the emerging legal practice of human rights. It offers a measure, through a standard of adjudicability, for recognizing when legal human rights claims have become effective. The goal is to provide clarity on how this legal practice of human rights might properly emerge in keeping with its own founding principles.

## INTRODUCTION

Occasionally, there are concepts in the law that are so ubiquitous that the lacuna in our understanding of their fundamental nature goes, for the most part, unnoticed. I take the concept of human rights in international, regional, and domestic legal practices to be one such case. It has never been entirely clear what human rights are to the law. Should they be seen, on the one hand, as concrete legal grounds for claims of individuals against state practices or, in the alternative, as merely persuasive moral or political considerations offered in favor of the demands of just, fair, and equal treatment? Of course, over the past few decades we have seen the development of cases where human rights are argued as “legal rights” in a practice of human rights that is recognizably a “legal practice.” For instance, there have been thousands of cases litigated in international, regional, and domestic Human Rights Courts. But what is less clear is what makes some human rights legal rights while other assertions of human rights—sometimes even in legal contexts—are not taken to be assertions of legal right. One might think that the obvious answer lies in establishing first what it is to have a legal right in a legal practice and then asking whether human rights qualify under these criteria. However, as any legal philosopher will tell you, there is nothing obvious about such an answer. Setting the criteria for the recognition of legal rights and legal practices can prove difficult even in the most established and presently existing systems. It is all the more difficult when searching for that criteria in a system based on fundamental human rights in an emerging and unprecedented international legal practice.

The work here attempts to fill in some of the gaps in our philosophical understanding about the meaning of the concept of a legal human right. At base it asks: What does it take for human rights to be genuinely legal rights, and do the rights affirmed in the existing human rights

practice meet those requisite conditions? As I take this question, it is distinct from other questions that have attracted the attention of philosophers. The present inquiry is not, for instance, intended as an exploration of the foundations of natural rights, *per se*. Rather, it is focused on the legal nature of human rights, whether or not they are also “natural” in some sense.

Of course, it is common enough to call the rights found in legal instruments and interpreted by legal bodies by the name “legal rights.” But the curiosity here is about what it means to say just that. How are the borders of this legal designation to be delineated? What makes it the case that some human rights lie within that designation while perhaps others do not? Is it ever the case that some human rights are so “fundamental” as to automatically become legal rights? And, finally, under what circumstances do human rights give rise to the *legal obligation* to honor them?

As to this last concern, it seems an odd proposition to claim that the determination of any legal obligation created by an international legal practice of “human” rights is strictly a jurisdictional question; that, for instance, any legal obligation to recognize the human rights of an individual or group will be determined by the *locus delicti* of an alleged violation along with some other contingent factor (like the treaty obligations of the parties in question). Nonetheless, this is largely the state of affairs as we find them today. The most obvious cases where human rights are treated as legal rights are when individuals who have been the victim of the actions and sometimes inactions of state actors who are signatories to relevant human rights treaties. This clearly poses a problem of internal consistency for the international legal practice of *human* rights. Indeed, this legal practice of human rights—if it can be said to be a recognizable legal practice—violates its own foundational principles by granting basic human rights protections to a privileged few while denying them to others, many of whom are in the most dire need of those

protections. This is a significant problem for the conception of legal human rights and, as I see it, the solution can go only one of two ways: (1) we could recognize that there are no international legal *human* rights, rather there are only those legal rights ratified and adopted in international treaties or other legal instruments; that is, rights which are cognizable and claimable only for certain individuals in certain jurisdictions. Or (2) we could recognize that there are legal human rights cognizable and claimable in an international legal practice of human rights, but that the system for that recognition is as yet incomplete, inadequate, and in need of improvement in order to meet its mandate to provide basic and fundamental rights to all humans. Only in this last way could an international system of legal human rights become consistent with itself.

Of course, in the first instance, to deny that legal human rights exist would not be the same as saying that *no* human rights exist. There would still remain the *moral* demands of human rights claims that have been the subject of so much recent and excellent philosophical attention, as well as the considerable and notable efforts of others directed toward establishing the *political* nature of human rights.<sup>1</sup> Nonetheless, talk of legal human rights would need to be recognized as a sort of chimera; there are legal rights and there are human rights, but the hybridization of these two notions is nowhere to be found.

The argument here will proceed on the assumption that, despite its obvious challenges, the first solution, of giving up on an international practice of legal human rights, is neither necessary nor warranted. We do already have a practice that exists across numerous iterations under the heading of “human rights law.” So the focus here will be to operate within this limited

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<sup>1</sup> See, e.g., James Griffin, *On Human Rights* (New York: Oxford University Press, 2009); John Rawls, *The Law Peoples*, (Cambridge, MA, Harvard University Press, 1971); Jean Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization,” *Political Theory*, Vol 36. No. 4 (August 2008) pp. 578-606; John Tasioulas, “On the Nature of Human Rights,” in Ernst, G. and Heilinger, J. (ed.s.), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin: Walter de Gruyter, 2011) pp. 17–59; and Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009)

sphere, or function, of human rights, with the aim of exploring how legal human rights have emerged and how their practice might be properly defended. Which, again, as I will make more clear in what follows, is not to deny that there are other functions or spheres in which human rights may operate.

I am not alone in this pursuit of defending the legal nature of human rights. Other philosophers, Allen Buchanan and James Nickel for instance, have argued for the importance of viewing human rights as legal rights and the practice of human rights as a legal practice.<sup>2</sup> However, no work to date has addressed this demand in light of any particular jurisprudential commitments with regard to what it is to *have a legal right* in the first place. This work offers such an account; it offers a set of conditions that must be satisfied for something to count as a genuine legal right, and it shows not only how those conditions are currently met, but also how a better understanding of these conditions can serve to bolster the demand that the international practice of legal human rights becomes consistent with itself in a manner that satisfies its own mandate and foundational principles.

This is, of course, no small task. In the nearly 70 years since the founding of the Universal Declaration of Human Rights [UDHR], there has been much debate as to the effectiveness of the legal apparatus designed to protect those rights. The debate over effectiveness arises in large part due to the uncertain legal status of human rights. The instrument of the UDHR, along with other global international human rights instruments, is often said to offer an “International Bill of Rights.” According to Martin Scheinin, former United Nations

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<sup>2</sup> See, Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013) and James Nickel, *Making Sense of Human Rights*, 2nd edition., (Malden, MA: Blackwell Publishing, 2007); for a discussion of the importance of clarity on function and sphere in discussions of human rights, *see also*, Nickel, “Assigning Functions to Human Rights: Methodological Issues in Human Rights Theory,” *forthcoming* in Adam Etinson, ed., *Human Rights Moral or Political* (Oxford: Oxford University Press, 2016).

Special Rapporteur on Human Rights, every nation in the world has ratified at least some of the human rights treaties, and a vast majority of states have ratified in treaty form the whole catalogue of rights found in the UDHR.<sup>3</sup> But despite a great amount of evolution in human rights law and numerous decades of judicial and scholarly dialogue about the status of human rights, it is still not entirely clear what they are in the “legal” sense, i.e., what makes it the case that individuals can make legal claims on their basis. What we can say for certain is that the law of human rights sits precisely where the promise of the human rights system meets the fervent demands of people who are deprived of those rights. But what can we say about this conceptual space? Is there an identifiable and enforceable Bill of Rights? Of course, the answers to these questions are themselves dependent upon functional judgments about the system at large. Does the international system, which has formed to protect human rights, function as a “legal system” in its own right? Or is it merely a loosely associated critical apparatus aimed at appraising domestic legal systems and issuing reports when those systems fail in important moral respects?

If in the latter case, the functional aim of the human rights practice is directed at critical appraisal of state actions, then we need not look any further into jurisprudential questions. We can say simply that states *ought* to treat their citizens and the citizens of other states according to their rights—for example those listed in the UDHR or agreed to in specific treaties—and when they do not do so, then their wrongdoing will not go unnoticed by the international community. We can also forcefully argue as a matter of statecraft that they ought to do better. We can make arguments that shame them and blame them, we can make decisions to avoid trading and dealing with them, we can provide comfort and aid to their victims, and perhaps even morally justify

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<sup>3</sup> Oxford Debate “On Creating a World Court for Human Rights,” sponsored by the Oxford Martin Programme on Human Rights for Future Generations, May 16, 2016. Available at <https://www.youtube.com/watch?v=3XyNXBf2CPc>. (Minute 12:00) It should be noted that the United States is a prominent hold-out in this regard.

stopping their harmful behavior with force in defense of those victims. And we need never talk about the role of law or legal rights to do so. But if we want to talk about an international *law* of human rights, about the legal claims that individuals have to be treated according to the law of human rights, then we need to talk not only about what that law is and where it is found, but also about “what law is” more generally. What makes this law “law” and what makes these rights “legal rights”?

Before embarking on such a project, it is worth considering whether there might be good reason to have reservations about the desirability of treating human rights as legal rights. When we begin to consider the full and extensive catalogue of recognized human rights in the UDHR and the ensuing international human rights treaties,<sup>4</sup> we find that as the list of those rights expands, the list of the violations of those rights also climbs precipitously, amounting to millions upon millions of potential legal claims. The challenge in terms of administrative cost alone seems insurmountable.

Certainly there have been gains and clear evidence of progress over the past seven decades—stories of successful prosecutions and civil awards for victims of recognized atrocities. And there is now widespread commitment among nations to human rights, at least as

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<sup>4</sup> The Universal Declaration of Human Rights (1948) recognizes civil, cultural, economic, political and social rights. In transforming the provisions of the Declaration into legally binding obligations, the United Nations adopted in 1966 the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination in 1965; the first Optional Protocol to the International Covenant on Civil and Political Rights in 1966; the Convention on the Elimination of All Forms of Discrimination against Women in 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984; the Convention on the Rights of the Child and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, in 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 1990; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in 1999; the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography in 2000; the Optional Protocol to the Convention against Torture in 2002; the Convention on the Rights of Persons with Disabilities and its Optional Protocol, and the International Convention for the Protection of All Persons from Enforced Disappearance in 2006; the Optional Protocol to the Covenant on Economic, Social and Cultural Rights in 2008; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in 2011.

demonstrated through treaty ratification and rights provisions added to domestic constitutions. However, in the legal sense, compliance and enforcement efforts have proved markedly challenging and they will continue to do so.

It was nearly ten years ago that Joseph Raz famously remarked that “[t]his is a good time for human rights. Not that they are respected more than in the past.” Unfortunately, this observation still holds true today. International NGOs like Amnesty International and Human Rights Watch have recently warned of waning support from state governments and even of overt attacks by governments on the structure of human rights law. This is a trend that portends an increasingly troubled future for the most vulnerable peoples of the world, such as religious minorities, indigenous people, migrants, refugees, asylum seekers, women and girls, members of the LGBT community, and other discrete and historically marginalized groups. The United Nations, which has been the primary institutional apparatus for investigating and reporting on human rights abuses, has become desperately overburdened. International human rights courts have unmanageable caseloads and have therefore proved slow to issue determinations.

These concerns and more have led some scholars to predict the end of the human rights era as a whole; to see human rights as an aspirational experiment whose time has passed.<sup>5</sup> Some critics of the human rights system point to the proliferation of rights as partially to blame and argue for the list of basic human rights to be more constrained.<sup>6</sup> They point out that states, given finite resources, must abrogate some rights in order to accommodate others (for instance, choosing between providing an education to girls and training state authorities not to torture or use other forms of brutality).

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<sup>5</sup> Eric Posner, *The Twilight of Human Rights* (Oxford: Oxford University Press, 2014)

<sup>6</sup> What Dominic Raab has called the “contagion of rights,” cf. *The Assault on Liberty: What Went Wrong With Rights* (London: Fourth Estate Press, 2009); see also, Tom Campbell, et al. *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001); and *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011)



While these challenges are both real and substantial, it would seem that rumors of the demise of human rights has been at least somewhat exaggerated. Wherever one marks the formal inception of the notion of basic human rights—the Magna Carta (1215), Bartolome de las Casas’ argument before the Spanish Council of Valladolid (1550), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), the U.S. Constitution and Bill of Rights (1791), the Slavery Abolition Movement of the 19<sup>th</sup> C., the League of Nations in the early 20<sup>th</sup> C., the convening of the United Nations Commission on Human Rights (which eventually produced the Universal Declaration of Human Rights on December 10, 1948), or the creation of U.N review bodies and Courts of Human Rights around the world that enforce human rights agreements—what seems clear is that the notion of human rights is a dialectic bell that cannot be unring. Arguments for progress on human rights protections and the inveterate demand for their recognition will certainly continue. So long as there is a dialogue to be had over the legitimacy of a state’s power over individuals, human rights will have a role to play in that dialogue; and so long as states wield power over individuals, there will be questions about the legitimacy of that power.

The only real question is what sorts of approaches to human rights can best ensure that those questions are settled in a manner that improves the likelihood that the human rights of individuals and groups will be observed and, when they are not observed, that victims of rights violations will be afforded a remedy. According to the approach offered here, legal institutional means can provide the best means toward that end. Human rights must be seen as legal rights with corresponding legal obligations in order to be fully realized as effective claim rights for individual victims, and these means must be available to everyone in order for them to be considered human *rights*.

With that said, there are two elements of our understanding of “legal human rights” and the practice thereof, which stand in some tension. Addressing the ways that these two elements come together in the legal practice serves as the ambition of this work. The first element is that human rights are thought to be *universally applicable*, particularly in terms of how governments must treat their citizens. The second is that such rights, as legal rights, are supposed to be *effectively claimable*.

On one hand, human rights in the existing practice, such as those rights found enshrined in the Universal Declaration of Human Rights (UDHR) and the ensuing treaties, which set out civil, political, cultural, and economic rights as well as the rights of children, women, ethnic groups, and religions, have been taken to create a worldwide set of *rights that belong to all human persons, everywhere*. In other words, although these instruments allow for some reasonable limitations on the duties they implicate, their rights-granting agenda is intended as a *universal* one. “Human” rights are understood to belong to all humans wherever they are situated.

On the other hand, the general social purpose of a system of legal rights, I suggest, is to enable individuals to make claims on the basis of those rights and to have those claims heard and definitively settled by an authoritative decision-making legal body. So if an international human rights system is to function according to its purpose—creating a world-wide set of rights that belong to every person in the world—through a system of legal rights, then it cannot simply serve to state moral truths about independently justifiable natural rights; it must also become functionally effective at settling human rights claims. Since legal rights necessarily demand opportunities for settlement, the international practice must come to provide the opportunity for

authoritative settlement for all human rights-holders in order for the practice to be properly considered as both a *legal* practice and a practice of *human rights*.

As indicated earlier, this is not to say that no human rights—in a distinct moral and political sense—can exist absent the conditions. It is only to say that, if these rights are going to be taken to be legal rights then, at a minimum, there must be the possibility of having one's rights claim heard and determined by an authority vested with the power to do so. This is not a patently unrealistic expectation; as we will see below, this sort of thing is already happening. The present and emerging human rights system already establishes genuine, binding, legal rights, insofar as thousands of claims under the numerous conventions on human rights have been subject to authoritative adjudication and settlement, and many more are adjudicated every year. Nonetheless, the demand for universality in the human rights regime has yet to be realized. It is still not the case that all of the rights recognized as “human rights” in the existing practice are available to all the people around the world.

Progress in this regard has historically been thwarted by, among other things, a particular jurisprudential approach to the law, founded in legal positivism, that holds that legal human rights can be established only (or at least nearly exclusively) when states join human rights treaties. Accordingly, such legal human rights are thought to extend only to citizens of those states who are signatories, or those who fall victim to the actions of signatories. But this is to say that they are not *human* rights in the way that the language of the practice intends, and that the populations most vulnerable to human rights abuses, by their own governments or by foreign states, have no legal human rights protections against such abuse.<sup>7</sup>

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<sup>7</sup> There is an alternative view that legal human rights can be established through customary law, such as those recognized as *jus cogens* norms. This view will be discussed more extensively below in Chapter One.

Consider two cases drawn from recent events. In the first case, a young man [of approximately 13 years of age] is alleged to have violated the honor of his female neighbor in a manner that is forbidden by local custom. The matter is brought before the local tribal council and the boy is found guilty of this violation, and a punishment is determined: his sister [a 20-year-old young woman] is ordered to have her honor taken away by gang-rape. The punishment is carried out against this woman; she is raped successively by seven men of her village in the field outside her house. Clearly this is a graphic and tragic case to utilize as an example, but then again the vast majority of human rights cases are graphic, tragic, and emotionally gripping. What makes this case of value to our inquiry is the question of when or if she had a legal human right not to be violated in this way and on what grounds we might establish that right. Are there crimes so egregious, as in this case, as to automatically grant the victim with a legal human rights claim? Does it matter whether this “punishment” waged (against her brother) was one arguably issued under “color of authority”? Does it matter that the state has done little or nothing to undermine or override that authority? Does it matter that this case is only one example of a widespread pattern of the raping and killing of women and girls as punishment for “honor crimes” that the state has failed to address? Or does it matter only whether her country has joined a relevant human rights treaty? While this woman has clearly suffered numerous violations of human rights recognized under the UDHR, it is not clear what grounds would be sufficient to establish her *legal* human rights claim against violations like this, such that she can demand that her claims be heard and properly adjudicated?<sup>8</sup>

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<sup>8</sup> The case of Mukhtār Māṭ gained international attention in 2005. Although most women who suffer such abuses are expected to commit suicide as a result of their dishonor, she chose to bring her case to court. However, a lower court in Pakistan acquitted all the men involved in her rape and after nearly a decade of appeals, she has never received the justice that she deserves. Her case is emblematic of numerous (perhaps hundreds of) others across India and Pakistan.

In the second case, a woman in the midst of a separation from her violent husband had a restraining order against him that permitted him to see his three daughters (ages seven, nine, and ten) only under restricted conditions. When her daughters went she suspected that he has taken them. She called the local police expressing her concerns; they refused to respond. After she confirmed that her husband had their children in violation of the restraining order, she repeatedly called the police department, but they still did not take action to apprehend him. After the wife told her husband that she had called the police and that he must turn the girls into the police station, the husband drove there and fired a weapon into the station, whereupon he was killed by the police. The slain bodies of their three children were later discovered in his truck. The mother filed legal claims alleging that the police had failed to legally enforce her restraining order and that the state routinely and systematically fails to protect women from their domestic abusers. She lost her claims. After exhausting her remedies in her home country, she appealed her case to the Inter-American Court of Human Rights [IACHR]. In that case, the Court found that human rights violations had taken place. Arguing that because the international and regional systems has pronounced the strong link between discrimination, violence and due diligence, a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law. The state in this case had failed to provide the claimant with sufficient protections and attendant remedies. Therefore, the Court concluded that her human rights, as recognized under the American Convention of Human Rights, had been violated.<sup>9</sup>

The women in both of these cases suffered human rights violations. Indeed, both suffered similar violations due to their states' failure to protect them. They suffered similarly in the way

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<sup>9</sup> *Jessica Gonzalez et al. v. United States*, Report No. 52/07, Case 1490-05, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007), §§ 110-112, see also, 160-170.

that cases like theirs frequently fall through the cracks of human rights protections because the events happen in a grey area between the public and the private realms of the law. Where these cases differ is in the distinct advantage that the one victim has over the other in her ability to have her case heard and authoritatively determined. The determinative factor is that the first woman, Mukhtār Māṭī, suffered her abuse in Pakistan, a nation which had yet to ratify international human rights treaties, while the second woman, Jessica Gonzalez, resides in the United States, a nation which has submitted to a regional human rights treaty that grants the IACHR with jurisdiction over her claims.<sup>10</sup>

This is roughly the state of affairs as we find it today in terms of the legal nature of human rights. The hallmarks of human rights law as “law” are generally identified through the positive formal consent of state signatories to human rights treaties and the formal acceptance of a court’s jurisdiction to enforce those treaties. The question for our purposes is why this should be the case. Why are the primary criteria for establishing legal human rights dependent on the formal consent of the parties (or would-be violators) to be bound by them? And isn’t there something fundamentally inadequate about taking this as the criteria for this sort of law—or really any kind of law at all? Law, legal rights, and legal practices are generally understood to come about differently than this. They are evidenced by the emergence of an institutional system in service to a set of moral commitments, usually taking the form of a set of basic rights not unlike those found in the International Bill of Rights. But evidence of the formal or official consent of each party to be so bound by these rights is generally not required for legal

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<sup>10</sup> On 17 April 2008, Pakistan moved to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR), and signed both the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). However, they have not ratified all other human rights treaties, their optional protocols, the Rome Statute of the International Criminal Court, nor have they given full effect to international human rights treaties in policy and practice.

obligations to take root in such a system. In other words, evidence of formal consent may be sufficient for legal obligations to obtain, but it is not necessary. So why should we take formal consent to be the primary criteria for the existence of law in the present legal practice? I will argue that this is the wrong way to approach human rights law, in part because it is an impoverished way to think about law and legal rights more generally.

Of course, one might reasonably counter that international human rights law and the practice it generates is simply not like any other legal practice, that it is in many regards *sui generis*. This seems certainly to be true. Particularly in scope, the aspirations of this practice are without compare. But if we are going to call this practice a legal practice then it is reasonable to expect that it will share some of the distinguishing characteristics and nuanced features of what we have come to appreciate from the law. I will argue that most of the difficulty that we have in recognizing this practice as a legal practice is that it is still emerging. It is still in that space between what ought to be and what will be; a space that every legal system had to pass through in order to become what it is; a space between moral commitments and legal obligations, between the abstract and the concrete; between the theoretical and the practical; between natural rights principles and positive legal rights; and between fervent moral demands and the legal claims of right that can force them to be heard. This space is what I will call the “constitutional space.” It is where the shift takes place from among the many moral and political maneuverings over basic human rights to the ability to make actual legal demands on the basis of those rights; the shift from what is not-yet-law to what is law.

There is nothing here that says the practice of human rights *will* emerge successfully as a legal practice. It may ultimately prove insufficient, incomplete, and woefully inadequate or it may cease to exist altogether. Rather what is argued is that if such a legal practice does exist we

can mark its success or failure by noting, (1) whether the rights it affords are legal rights in respect of the ability of parties to claim them and have them authoritatively settled, and (2) whether the legal rights afforded are available universally to all people wherever they find themselves. The present system, where the legal obligations for human rights is determined primarily on the basis of formal consent to human rights treaties, only minimally and sporadically satisfies the first criteria, and thus it clearly fails the second. If a successful system of legal human rights is the aim, something more will be needed. This work explores some of the principles of our understanding about what law is and how legal rights come to be, in order to show how this thinking can be of some service.

Toward this end, Chapter One will discuss the necessary conditions for having a legal right and how our ordinary understanding of the ways that legal rights come about might extend to human rights. Chapter Two will lay out a theory of adjudicability for legal rights and demonstrate how these conditions of adjudicability can both clarify and further the present and emerging practice of legal human rights. Chapter Three will talk about the obstacles to the universal application of legal human rights. And Chapter Four will conclude with a defense of why it is worthwhile to pursue this thinking toward



## CHAPTER ONE

### Toward an Understanding of Legal Human Rights

The aim of this chapter is to lay the foundation for a comprehensive account of legal rights and to determine how this understanding might be extended to legal human rights. In order to build such an account, I will start by examining a minimal definition of a legal right; that is, I will offer what I take to be the necessary condition for such a right to obtain. I will then defend this view against some other approaches to international law and legal human rights to show how these views are problematic. I will then examine the policy reasons in support of extending such an understanding to the practice of international human rights. The following discussion will show that if we aim for a coherent, complete, and effective practice of international legal human rights then the account of legal rights defined here demonstrates both sufficient evidence to conclude that a practice of legal human rights is emerging, at least minimally, and the ways in which this practice might emerge more successfully.

#### 1.1 The Adjudicability Condition for Legal Rights

According to the view presented here, in order for human rights to satisfy the conditions of a legal right, and thus confer legal obligations upon states and other actors, human rights claims must be “settle-able” by the determination of an authoritative decision-maker; in short, they must be *adjudicable*. We will call this the *adjudicability condition*. The possibility of having these claims heard on their merits and definitively determined according to the law is what makes human rights more than mere moral or natural claims of right, or what we might call mere “manifesto rights.” This notion of adjudicability serves to relocate the claim of right out of the realms of the moral and political and into the realm of the legal. It will be argued that just as the

creation of constitutional norms in the domestic sphere serves to shift the nature of the discussion from a political or moral argument into a legal argument, the emerging norms of the legal practice of human rights can and frequently do have the same result.

The *adjudicability condition* has two parts. First, it must be possible to bring a claim on the basis of the right in question before a decision-making body that is authorized to settle that claim. The authority of such a body arises from social acceptance, which depends in part on the ongoing demonstration of that body's legitimacy. Legitimacy develops from the procedural implementation and recognition of a sustained practice of a commitment to fairness, consistency, transparency, predictability, and impartiality.

Second, in order for a functionally effective settlement of legal rights against state practices to be possible, it must also be the case that the legal right to be interpreted is granted to the individual by virtue of a *superior law*. The law—or in some cases the constitutional norm—that confers the legal right must be one against which the practice in question is subordinate. Only in this way can the adjudication of the right in question authoritatively *settle* the claim of its alleged violation.

In short, the view here is that if we wish to say that there exists an international legal practice of human rights, then individuals must be able to assert their legal claim to those rights in a functionally effective manner with an opportunity for a determinative judgment on whether the remediation for alleged rights violations is appropriate. The two elements of the condition are mutually dependent. In order to be functionally effective, particularly against state practices, it must be possible to assert these legal human rights claims before a decision-making body that is vested with the legitimate authority to issue a definitive determination on the merits of that claim. And in order for a definitive determination on the merits of a legal claim of human rights

to be possible against the practices of a state, there must be a recognized superior law against which the state practice can be measured.

This is, of course, not the state of the practice of human rights as we find it today. The legal rights-granting scheme does not grant rights in this way; while a large number of individuals in the world do have legal human rights in this manner, many persons possess only a pale shadow of these rights. They may in some sense have the rights that philosophers and politicians argue they *ought* to have, but they cannot effectively lay claim to these rights themselves because the legal practice as it is presently conceived puts them out of reach.

## 1.2 On Practice-Sensitive Methodology

Much will be said in this work about the nature of practices and of legal practices in particular. The effort here is to follow in the recent tradition of “political constructivism” which most agree found its origins several decades ago in Ronald Dworkin’s 1973 article, “The Original Position.”<sup>11</sup> In this article, Dworkin defends a *constructive model* of John Rawls’s reflective equilibrium over a *natural model*. Reflective equilibrium refers to a strategy for justifying political principles often associated with political constructivism. It is best thought of as a coherence account of doxastic justification; a certain belief—say that a particular course of action is just—is tested against a wider set of beliefs in order to determine if it coheres. If it does not, the belief is subject to revision and refinement; indeed all beliefs are subject to such revision. Only once coherence among beliefs has been established can one be justified in holding them. In *A Theory of Justice*, Rawls finds that “a conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the

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<sup>11</sup> Michael Buckley, “Political Constructivism.” *The Internet Encyclopedia of Philosophy*  
<http://www.iep.utm.edu/poli-con>

mutual support of many considerations, of everything fitting together into one coherent view.”<sup>13</sup> Norm Daniels suggests that wide reflective equilibrium attempts to produce a tripartite coherent account of (1) our set of considered moral judgments (which Rawls describes as those judgments reached under conditions where our sense of justice is likely to operate without distortion<sup>14</sup>), (2) a set of moral principles, and (3) a set of relevant background theories.<sup>15</sup>– The goal is to find the right kind of deliberation, “pruning and adjusting as we go,” in order to get us closer to a real and substantive justification for the principles of justice.<sup>16</sup>–

Ronald Dworkin’s 1973 *constructive* model of reflective equilibrium captures the primary feature of political constructivism that has endured until now, namely, that political principles are mind-dependent and result from some interpretive work on our part. The benefit of this approach is that it allows for a certain agnosticism regarding the detectability of moral facts. It treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed. Dworkin writes that it is “as if a sculptor set himself to carve the animal that best fit a pile of bones he happened to find together.” This “constructive” model does not assume (as the natural, or moral realist, model might), that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way. And, Dworkin further points out, that it “does not assume that the animal it matches to the bones actually exists. It makes the different, and in some ways more complex, assumption that men and women have a responsibility to fit the particular

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<sup>13</sup> John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, Cambridge MA, 1999), p. 19.

<sup>14</sup> *Ibid*, 42. (hereinafter, *TJ*)

<sup>15</sup> Norman Daniels, “Wide Reflective Equilibrium and Theory Acceptance in Ethics,” *The Journal of Philosophy* (1979), p. 258.

<sup>16</sup> *TJ* at 18. Through the application of this procedure and through the mechanism of the “original position,” Rawls arrives at the following formulation for social justice: “the soundest principles of justice for a society are those that free and rational persons concerned to further their own interests would accept in an initial position of equality, with equal knowledge of facts that are salient to the specific issue of social cooperation and equal ignorance or facts that are irrelevant to it. *TJ* at p.10.

judgments on which they act into a coherent program of action, or, at least, that officials who exercise power over other men have that sort of responsibility.”<sup>17</sup> This constructive understanding has important implications for judgments, particularly in the law. Dworkin writes:

...it demands that decisions taken in the name of justice must never outstrip an official's ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions. It demands that we act on principle rather than on faith. Its engine is a doctrine of responsibility that requires men to integrate their intuitions and subordinate some of these, when necessary, to that responsibility. It presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice.<sup>18</sup>

While the natural model looks to the more personal standpoint of individuals regarding theories of justice, the constructive model looks to the public standpoint, to group considerations of justice; it is a theory of community, which is particularly important in understanding the judgments and justifications necessary for adjudication.

This view has been further taken up in the more recent and refined iteration offered by Aaron James to describe numerous forms of social practices, from constitutional democracies to global free trade. James describes political constructivism as a “methodology of substantive justification,” the central principles of which can be worked out, “in steps which are themselves manifestly reasonable, from rudimentary and highly plausible ideas arising from within a society’s own essentially social kind of practical reason.”<sup>19</sup> As with all approaches from political constructivism, moral principles, on this view, are justified ultimately by moral reasoning—but

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<sup>17</sup> Ronald Dworkin, “The Original Position,” 40 *University of Chicago Law Review* 500 (1973), pp. 510-511.

<sup>18</sup> *Id.*, p. 512.

<sup>19</sup> Aaron James, “Political Constructivism.” J. Mandel and D.A. Reidy (ed.s), *A Companion to Rawls* (Hoboken, N.J.: John Wiley & Sons), pp. 251-2.

for and from an independently identified and interpreted social practice.<sup>20</sup> The aim is to “justify principles that tell us how existing versions of the practice would have to be reformed if they are to be justifiable.”<sup>21</sup> James finds that the fundamental elements from which principles are constructed are contained within the practice itself. These elements include the aim of the practice, its participants, and the circumstances favorable to its continuation over time. Provided the description of the practice is accurate and generally acceptable, the argument in favor of a particular set of principles should be authoritative to that practice. As I understand the “constructive method” from James, it works through the following three main stages (in whatever order aids in the search for reflective equilibrium): *Individuation*, *Framing*, *Characterization*, and *Substantive Argument*.

At the first stage, we individuate a candidate social practice. Using sociology, we single out an object of social interpretation, at first in relatively uncontroversial terms, with reference to various interpretive “data points” or “source materials” that any further conception of the social activity should take into account and explain (or “explain away”). At the second stage of the method, we work up a general characterization of the practice in light of its distinctive structure and (presumed legitimate) purposes. Here social interpretation can be “constructive,” as long as any use of moral terms comports with canons of interpretation (e.g., consistency, coherence, explanatory power, simplicity, etc.).<sup>22</sup> At the third stage of the method, we engage in substantive moral reasoning about what principles of conduct apply, as framed and guided by the specified framing conception. Such reasoning and the resulting principles are “practice sensitive” in the sense that our interpretation of the practice shapes our substantive evaluation at each stage, and

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<sup>20</sup> Aaron James, “Constructing Justice for Existing Practice: Rawls and the Status Quo,” 33 *Philosophy and Public Affairs* 281 (2005); *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012), Ch. 1; and “Why Practices?” *Raisons Politiques* 51 (August, 2013).

<sup>21</sup> James, *Fairness in Practice*, p. 29.

<sup>22</sup> James, “Constructing Justice for Existing Practice,” *supra* note 20, at 305.

that the whole set of interpretive and moral considerations is seen as *sufficient* to justify basic, normally conclusive regulative principles of conduct. Absent further argument, no further principles are assumed to apply (although they may well apply, given further argument).<sup>23</sup>

As will become clear, particularly in Chapter Three, this approach from practice-sensitivity will prove instrumental to the development of the work here. In many ways, an approach from political constructivism is uniquely suited to understanding the legal practice of human rights as it is situated between two converging social practices: the existing practice of human rights (its aims, its participants, and the conditions favorable to its continuation) and the adjudicative practice of law, particularly in light of its demands for public accountability. Thus, human rights practice can be seen as both a legal and moral practice.

### 1.3 Why Focus on the Legal Practice Rather than the Political Practice of Human Rights?

Because so much of the theoretical philosophical debate surrounding human rights has been aptly focused elsewhere, it seems reasonable to ask why the legal features of human rights should be so important to the concept of human rights. The main reason is that, as James Nickel has indicated, to speak of human rights as a *practice* really is to speak of a “legal practice.” Presumably Nickel means in part that understanding the practice of human rights requires more than just an exploration of the philosophy of what it is to have a natural right.<sup>24</sup> To the extent that this is what he and others who focus on the practice of human rights mean, I agree. Human rights practice is in the doing, and the doing is distinct from the philosophical investigation of natural rights and its foundations. This is not to say that an exploration of the meaning of what it is to

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<sup>23</sup> James, “Authority and Territory: A Practice Account” C. Finkelstein and S. Lloyd (ed.s) *Sovereignty and the New Executive Authority* (Oxford: Oxford University Press) *forthcoming*; see also, T.M. Scanlon, *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998).

<sup>24</sup> Nickel, *supra* note 2, at 7.

have a human right, *qua human*, amounts to a fruitless or even irrelevant endeavor. Rather it is to bring the practice of those human rights into greater relief. The assertion here is that understanding the legal nature and qualities of this practice can best accomplish this goal.

Of course, other political philosophers, such as John Rawls and Charles Beitz, have argued that the practice of human rights is best seen as a *political* practice—that, for instance, the function of human rights is to provide international standards regarding the proper way for governments to treat their citizens and the citizens of other states and to specify when the intervention of outside states is warranted. A benefit of the political conception of human rights is that it looks only to the practice itself for the determination of those international standards, allowing for a certain amount of agnosticism about the truth-value of independent moral claims.

In the *Law of Peoples*, Rawls, for example, sought a functional conception of the role of human rights in international relations. Human rights on his view are a “special set of urgent rights” the violation of which is condemned by principles and shared norms found in an overlapping consensus of both reasonable liberal peoples and decent peoples alike—the kind of norms necessary for any “common good idea of justice,”—and that can lead to a mutually respectful peace.<sup>25</sup> Each society might arrive at these shared principles for their own reasons, but the concern for Rawls is to “appeal to a duty of civility to offer other people’s public reasons appropriate to the Society of People for their actions,” particularly as a justification for outside coercion and military intervention.<sup>26</sup> Given this approach to delineating the legitimacy of global coercive power, Rawls, by most accounts has offered only a limited set of the most fundamental human entitlements. This list excludes some important rights and fundamental freedoms,

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<sup>25</sup> Rawls, *Law of Peoples* (Cambridge: Harvard University Press, 2001), pp. 71 & 78-81. (Hereinafter LP).

<sup>26</sup> Rawls, *LP*, p. 59.



including most notably rights to political participation, to free speech and association, and to equal treatment under the law.

However, Rawls approach leaves off a significant number of the rights enumerated in the Universal Declaration and in the ensuing international conventions. This is by design, as Rawls' aim was to offer a platform through his political constructivism that could extend the concept of the Law of Peoples (which includes human rights) in such a way as to avoid the criticism of Western ethnocentrism. Through a principle of reciprocity, he notably welcomes the idea that "decent hierarchical societies" could be tolerated. He writes, "The principle [of reciprocity] asks of other societies [both liberal and decent] only what they can reasonably endorse once they are prepared to stand in a relation of fair equality with all other societies." In this way he adds, "They cannot argue that being in a relation of equality with other peoples is a western idea. In what other relation can a people and their regime reasonably expect to stand?"<sup>27</sup>

Numerous commentators have taken issue with this approach to human rights, finding it both insufficiently argued as to the criteria for including and excluding particular rights as well as unduly restrictive of human rights more generally. Johannes Morsink in particular has raised a particularly central challenge. He points out that while a principle of reciprocal relations may be crucial in some areas of public international law, it is not central to the basic entry of human rights into international law. He offers as contrasting examples, on the one hand, a bilateral treaty on the use of certain fishing grounds. In such a case, if one government were to break the treaty, then the other is likely to no longer honor the agreed-upon limits. Reciprocity, Morsink adds, is the binding agent for many such agreements in international law. But, on the other hand, it is not true of human rights law. We do not, for instance, take the 1948 Genocide Convention to mean that if a dictator in nation B commits crimes of genocide, then the government of nation A will

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<sup>27</sup> Rawls, *LP*, p. 122.

no longer have to respect the lives of certain groups of individuals living within their own country. And the same is true, he adds, “for the bulk of the two hundred human rights instruments now extant. The individual human person (and not just the state) has gained a standing in international law precisely because questions of international reciprocity were downplayed or filtered out at this crucial moment in history [with the founding of the Universal Declaration].”<sup>28</sup>

More recently, Charles Beitz has offered an alternative account of contemporary human rights as a political practice, which attends to the practical inferences that can be drawn by “competent participants in the practice from what they regard as valid claims of human rights.” What these competent participants can tell us about human rights comes from what serves to guide actions in the existing and emerging discursive practice.<sup>29</sup> According to his “practical” conception, the doctrine and practice of human rights are taken as we find them presently in political life itself, with no commitments to a prior or underlying layer of fundamental rights (what he calls the “naturalist” concerns), and no resort to principles and doctrines common to all political-moral codes (which he refers to as a product of “agreement”). The focus is, rather, on the functional role of human rights in the political discourse as we presently find it, looking to the “linguistic commitments one would undertake if one were to participate in good faith in the ... practice.” Beitz recommends that for these salient features of the practice we could look to, for instance, the major international texts and monitoring mechanisms, observations of critical discourse involving justification and appraisal, evidence of the history and expression of the public culture of international human rights, and prominent examples of justified political action

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<sup>28</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), p. 131.

<sup>29</sup> Charles Beitz, *supra* note 1, at 103-104.

to defend or protect human rights.<sup>30</sup> In this sense, Beitz's salience account does not, by itself, identify any particular set of human rights. It takes the function of human rights in international practice as basic and holds that this function is grounded in the aims that are constitutive of the practice—and we can look to the current practice to identify those aims. Thus, this account appears to avoid the abbreviated nature of the list that Rawls' account provides by taking in more of the existing practice and its justifications. However, given the practice as it stands today it may be that Beitz's account still proves unduly conservative, since it might rule out (as revisionistic) any aims of human rights that look to greater inclusivity, but nonetheless differ from the existing practice.

Again, the approach offered here is not an attempt to subvert many of these political considerations. It is, rather, an effort to further their practical analysis and address some of their shortcomings. An examination of the legal practice is an examination of the political practice, but seen through a different functional lens. It focuses our attention not only on what actions are taken to be urgent and necessary as a matter of political statecraft, but also on the implications of a practice that recognizes the existence of international human rights in its strongest sense—as a “claim right” held by and for the primary benefit of the rights-holder. To understand how a human right can be effectively realizable—how its claim can best be heard and its merits can be authoritatively determined-- is to understand this right as a legal right held by individual persons and groups. This focus moves the recognizable features of human rights in the practice away from questions of the justification of global coercive power and other political concerns regarding state sovereignty toward questions of legal claims and legal argumentation.

Frequently, when theorists have asserted human rights norms as legal norms or claim that human rights are legal rights (of a kind that states are obligated to recognize) from within the

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<sup>30</sup> *Id.* at 107.

political practice, very little discussion has been directed toward what it is for these norms and rights to be properly “legal.” The recent work of Allen Buchanan is a notable exception in this regard. In his book, *The Heart of Human Rights*, Buchanan offers a moral assessment of what he takes to be at the heart of the human rights practice, which is the legal norms and institutions that create, interpret, and implement them. The key question he seeks to answer is whether the system of international legal human rights is morally justifiable given the functions it is designed to serve and the claims of authority made on its behalf.<sup>31</sup> Through a thorough and detailed analysis of the functionality of the international legal human rights system and its legitimacy, Buchanan arrives at the conclusion that the practice as it exists is morally justified, though not in the manner that human rights are ordinarily morally justified. Buchanan rejects what he calls the “Mirroring View,” the idea that international human rights law is justified only insofar as it identifies legal rights that have the same scope as antecedent moral rights.<sup>32</sup> In other words, that the moral justification of the legal right must mirror an antecedent moral right. This is a mistaken view, he believes, because some moral rights may have no clear analog in international human rights laws and, conversely, international human rights law can create obligations for states that have no clear corresponding moral right (i.e., duties of states to prioritize the creation of a functioning health care system, or the delivery of other primary social goods, are likely not grounded in any individual rights-holder).

The scope of legal duties in the human rights practice, in other words, is broader than what philosophers could construct based solely on the moral demands of human rights. As Buchanan points out, it is therefore a mistake to assume that international legal human rights are

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<sup>31</sup> Buchanan, *supra* note 2, at.1.

<sup>32</sup> *Id.* at 14-16.

merely the legal embodiment of moral human rights.<sup>33</sup> And it is by rejecting the Mirroring View, he argues, that we open the possibility of understanding more fairly the characteristics of the international legal system; that is, we can begin to look at what functions the system fulfills, and then morally assess the propriety of those functions, the system's efficiency in performing them, and the means by which it does so.<sup>34</sup> So we are encouraged by Buchanan, much as we are in Beitz's account, to look to the practice to understand the scope of human rights beyond the naturalist concerns; but in this case the focus of the practice is not found in wider political discourse, it is grounded rather in the international legal practice.<sup>35</sup>

Buchanan's view is therefore clearly instructive for the account provided here. I am inclined to agree with his approach to the moral justification of the functional aims and legitimacy of the international human rights legal system, the basis of which he terms as "justificatory pluralism"; that is, by looking to reasons that morally justify the practice beyond the Mirroring View.<sup>36</sup> But this work challenges Buchanan's view in the following ways. It says that before we can look to the moral justification for the existing legal practice of human rights, we have to first address the question of what makes this practice a *legal* practice in the first

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<sup>33</sup> *Id.* at 17.

<sup>34</sup> *Id.* at 21-22.

<sup>35</sup> Buchanan defines what he calls "the Practice" of human rights as "including the following and more: the processes by which human rights declarations and treaties are drafted and ratified, the processes by which human rights norms enter international customary law, the activities of international organizations that monitor compliance with the treaties, the actions of international and regional courts when they make reference to human rights in their decisions, the work of human rights nongovernmental organizations (NGOs), the efforts of individual citizens, various civil society groups, and "whistle blowing" government officials to hold their states accountable for their human rights obligations under international law, the recourse to international legal human rights law by judges in domestic courts, the creation or amendment of domestic constitutions to reflect international legal human rights obligations, efforts by legislatures to bring domestic law into compliance with human rights treaty obligations, policies that make a state's membership in multilateral organizations or access to loans and credits conditional on human rights performance, the imposition of sanctions on states by the UN Security Council in response to human rights violations, the appeal to massive violations of basic human rights as justification for military interventions, and the recourse of human rights norms by domestic, regional, and international organizations in formulating their policies, goals, and missions." The international legal human rights practice is central to this larger practice and focuses on UN-based human rights law and the institutions that support it. *Id.* at 5 This is, incidentally, the picture of the practice of human rights and international legal human rights that I am adopting here.

<sup>36</sup> In keeping with the rejection of the Mirroring View, the understanding of legal rights here will likely be more expansive than those grounded solely in antecedent moral rights.

place. The argument here is that adjudicability is the proper standard for the recognition of legal human rights in the practice; that human rights are only legal rights when individuals can effectively and legitimately lay claim to them and have those claims authoritatively determined. This standard for legal human rights claims is only partially satisfied by the existing and emerging legal practice of human rights as we find it today. So, if this is correct, then Buchanan's claim that the international human rights legal system is presently morally justified comes into jeopardy. The functional aims and legitimacy of the legal system of human rights, I argue, cannot be morally justified by subverting its own foundational principles based in the "inherent dignity and the equal and inalienable rights of all members of the human family," and "the right to recognition everywhere as a person before the law."<sup>37</sup> To be morally justified on Buchanan's theory of functionality and justificatory pluralism, the practice of international human rights law must become consistent with itself.

#### 1.4 On International Law Skepticism More Generally

Of course, the entire enterprise of "international law" (and any attendant rights) has long been the subject of skepticism about its nature as real and genuine law. So it comes as no surprise that international human rights laws are particularly open to such doubts.<sup>38</sup> Skeptics ask whether international human rights instruments have all or any of the features required for a norm to qualify as binding and authoritative law against states. The general hallmarks of a legal

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<sup>37</sup> UDHR Preamble and Article 6.

<sup>38</sup> See, Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 *Harvard Law Review* 815–876 (1997); "UN human rights standards and US Law: The current Illegitimacy of International Human Rights," 66 *Fordham Law Review* 319–369 (1997); and "Treaties, human rights, and conditional consent," 149 *University of Pennsylvania Law Review* 339–468 (2000); John McGinnis and Ilya Somin, "Should International Law Be Part of Our Law?" 59 *Stanford Law Review* 1175 (2007); Eric Posner, *The Perils of Global Legalism* (Chicago: University of Chicago Press, 2009); and Julian Ku and John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (New York: Oxford University Press, 2012).

system, the products of which are *law* and *legal right*, can seem to be nowhere in sight; there is no international legislature or system of parliament to create the laws, no fully recognized high court with international compulsory jurisdiction, and no executive or global sovereign vested with the powers of legal enforcement. As some skeptics have suggested, what seems to be "international law" can appear to be little more than an expression of political power; a means for the strong to reify their advantage over the weak in the form of treaties or customs. They point out that even if laws exist that are intended to equalize or constrain the expression of political power, they are frequently violated with apparent impunity, bringing their law-like status into question.

Nonetheless, some international laws, for instance in matters of financial affairs and trade agreements, have developed stronger means of adjudication, constraint, and enforcement, leading to an increased sense of legal regulations and obligation.<sup>39</sup> States are incentivized to comply with such laws because the costs incurred from a judgment against them can work strongly against their interests (e.g., fines, sanctions, exclusions, etc.). However, this is less likely to be the case in international human rights law where the likelihood of an enforceable judgement is low, the costs of noncompliance come primarily in the form of "naming and shaming,"<sup>40</sup> and indeed the costs of compliance may work against the satisfaction of other state interests. There are signs this may be changing, but these changes have been slow in coming. As Oona Hathaway has pointed

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<sup>39</sup> One might look, for instance, to the ever-increasing body of international administrative law generated by state-sponsored organizations such as the World Trade Organization, the International Monetary Fund, and the International Labor Organization.

<sup>40</sup> Evidence that the popular strategy of "naming and shaming" is effective in enforcing international human rights norms and laws is largely anecdotal. Analysis of the relationship between global naming and shaming efforts and governments' human rights practices for 145 countries from 1975 to 2000 has shown that governments put in the spotlight for abuses by NGOs, the media, and international organizations continue or even ramp up some violations afterward, while reducing others. One explanation is that governments' capacities for human rights improvements vary across types of violations, another is that governments are strategically using some violations to offset other improvements they make in response to international pressure to stop violations. See, Emile Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization*, 62(4) (2008), pp. 689–716.

out, finding that human rights law, and human rights treaties in particular, plays an important constraining role on state behavior “would provide powerful evidence for the view, embraced by many scholars and practitioners of international law, that state action is critically shaped by the persuasive power of legitimate legal obligation.”<sup>41</sup>

Because the persuasive power of a state’s legal obligation in a regime of human rights is directly correlated with the legitimacy of that obligation, establishing that legitimacy will be of foremost concern. By offering a practice-based interpretivist account of what is it for a state’s obligation (and an individual’s legal claim of right) to be legitimately legal within the present and emerging practice of human rights, this account aims to look beyond the talk of the political constraints afforded by international human rights law by addressing the legal rights claim itself. It therefore captures two things that are missing from other accounts: the necessity of superior norms for the existing legal practice and the successful demand for adjudication of legal claims. Satisfaction of the adjudicability condition indicates the existence of a practice with the requisite institutional means for providing a forum not only for decision-making but which can also serve as a repository of relevant legal reasoning and shared interpretations of the emerging norms. Of course, the necessity of these conditions seems evident for an account of legal rights and obligations. Indeed, it is difficult to imagine a legitimate legal system that fails to make individual legal rights cognizable in this way. And yet, that is frequently what is offered when the legitimacy of human rights law, or even international law more generally, is debated, as though the entire concept of law and its demands can take on a wholly new and different form when on the international stage; a form that lacks most or all of the features of law found in the domestic context.

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<sup>41</sup> Oona Hathaway, “Do Human Rights Treaties Make a Difference?” 111 *Yale Law Journal* 1935 (2002), p. 1938.



The problem with allowing such a diminution of the concept of legal rights and obligations, particularly in the practice of international human rights, is that it keeps the obligations of states firmly entrenched in a moral or political dialogue over their meaning. Recognizing a standard for the adjudicability of legal rights, on the other hand, by design, legitimizes claims made in light of the legal practice. The goal in this sense is to see legal reasons as *autonomous*. Understanding the practice of human rights in this way allows us to offer them as autonomous legal reasons because when the human rights instruments are seen as superior law subject to adjudication, their practice becomes a legal practice. On the other hand, human rights norms that remain subject to politics will never instantiate legal rights that give rise to legal obligations.<sup>42</sup>

Will this account fully satisfy the international law skeptics? Maybe and maybe not. What it does is to clarify the inquiry. If we utilize the adjudicability standard, then we can clearly see that there does exist some international human rights law that satisfies this standard—and we know this because there are cases where these legal human rights have been and continue to be adjudicated. Therefore, absolute skepticism on this matter is ruled out. I believe that this approach provides a distinct benefit over other theories that aim to answer the international law skeptic, particularly those theories that offer more amorphous and ambiguous standards for recognizing international law and legal human rights—for instance, theories that say that international law exists if we are willing to think of international law as something entirely new

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<sup>42</sup> Indeed, in an essay attached to the most recent report from Human Rights Watch (2015), Executive Director Kenneth Roth writes: *Many governments have responded to the turmoil by downplaying or abandoning human rights. Governments directly affected by the ferment are often eager for an excuse to suppress popular pressure for democratic change. Other influential governments are frequently more comfortable falling back on familiar relationships with autocrats than contending with the uncertainty of popular rule. Some of these governments continue to raise human rights concerns, but many appear to have concluded that today's serious security threats must take precedence over human rights. In this difficult moment, they seem to argue, human rights must be put on the back burner, a luxury for less trying times. "Tyranny's False Comfort: Why Rights Aren't Wrong in Tough Times," Human Rights Watch: World Report (2015), p. 1.*

or as identifiable only by a loose set of law-like criteria. This account takes a different approach, it states the necessary conditions for recognizing a legal right in a legal practice and aims to show how human rights have satisfied those conditions. However, as previously noted, we might still retain some skepticism about calling this an international legal practice of *human* rights if all human individuals have yet to gain access to them.

### 1.5 Why Adjudicability is Necessary for Recognition of Legal Rights and Not Enforceability

The purpose of this work is to explore the extent to which the practice of international legal human rights satisfies the adjudicability condition and thus gives rise to the legitimate legal obligation of states to honor human rights claims. However, one might reasonably question: Why adjudicability? Why not claim rather that *enforceability* is the key condition for establishing human rights in an international practice of legal rights and obligations? Won't the establishment of such a practice be pointless if a condition of enforceability isn't met?

The demand for an enforcement condition arises largely from the skeptical position provided above; it is argued that human rights are not legal rights unless they are enforceable. As it stands international law is insufficient to make them practicably unenforceable, and therefore they are not legal rights. It should be clear at the outset that the account offered here will not fully answer all the skeptics' concerns regarding the necessity of enforceability for legal obligations.<sup>43</sup> Enforceability is certainly an important feature of legal rights and obligations. But, first, as a matter of legal theory, it is a rarefied view that holds that the existence of legal rights and obligations is dependent upon the extent of their effective enforceability.<sup>44</sup> In other words,

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<sup>43</sup> See, e.g., Eric A. Posner and John C. Yoo, "A Theory of International Adjudication." 93 *California Law Review* 1-72 (2005).

<sup>44</sup> Certainly for those who believe that human rights are natural or inherent rights that one has *qua human*, the contingent ability to enforce those rights has no bearing on whether one possesses the rights in the first place. Rather

few modern theorists (since the time of John Austin) have held that enforceability is a necessary condition for law.<sup>45</sup> According to most legal theories, the law and the legal rights that arise from it can remain valid even if they become effectively unenforceable and, indeed, its established validity alone can be seen as giving rise to a prima facie duty of fidelity and legal obligation.<sup>46</sup> In this way, the necessity of enforceability, if necessary at all, can be seen as a secondary consideration at best. To put it another way, we cannot even ask the enforceability question without first positing the legitimacy of the law to be enforced. So the further question of whether the law is enforceable (or indeed whether it ought to be enforced) is dependent on features that demonstrate the valid existence of the law and the obligations that follow from it; features that are independent of enforceability.

Furthermore, enforceability is also not a sufficient condition for valid laws and legal obligations. If enforcement power alone could satisfy the demands of legal validity (absent the other considerations), then our understanding of law would be more akin to what H.L.A. Hart has called “the gunman situation writ large.”<sup>47</sup> On such a view, the legitimacy of a legal demand depends solely on the credibility of the threat of punishment for one’s disobedience. Not only is this a widely disfavored view of legal validity, it is quite often the precise vision of “might

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the question here bears more on whether states can have a valid legal obligation to recognize those rights as legal rights absent enforcement power.

<sup>45</sup> Only Austinians (in the tradition of John Austin’s *The Province of Jurisprudence Determined* (1832), who think that law is the command of a sovereign backed by the credible threat of punishment, would hold this view. (Which is no one these days.) Holmesian realists working from “The Bad Man Theory” of law (from *The Common Law*, 1881) might say that the ability to recognize a law is dependent on the material consequences that arise from breaking it. But this happens, for Holmes, only in the context of a judge in a court who is vested with the authority to issue that punishment. This is perhaps the view that is nascent in the burgeoning New Legal Realism movement which has been extended to questions of international law. See, e.g., Greg Shaffer’s “New Legal Realism” *Leiden Journal of International Law*, (Symposium on New Legal Realism), Vol. 28, No. 2, pp 189-210, 2015. The views of realists, in the new and traditional forms, are not at odds with the view presented here.

<sup>46</sup> H.L.A. Hart, Ronald Dworkin, and Lon Fuller all have theories of legal validity that are not dependent on enforceability. See, H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 1961, 1994); Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986); and Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

<sup>47</sup> Hart, *The Concept of Law*, pp. 6 & 19-24.

makes right” legality that the international human rights regime is designed to delegitimize. Thus, as a matter of legal theory, regarding the concept of valid and legitimate legal obligations, enforceability (or the lack thereof) should be seen as neither a necessary nor a sufficient condition for valid legal obligations.

Of course, the challenge posed by the international law skeptic is likely aiming at something different, something other than the theoretical concern regarding what it is to be a valid law or legal obligation. If the skeptic’s challenge is that the absence of effective enforcement in international human rights legal practice undermines the likelihood of *actual* compliance by state actors in the current practice of human rights, then this seems certainly to be true—as practical matter. Nonetheless, this challenge does not pose a problem for the account offered here. Not because practical considerations are not central to the account, but because *as a matter of practical concern* calls for effective enforcement and demands for compliance can only be made subject to the satisfaction of the primary claims regarding the validity of the legal rights and obligations. To make enforceability a practical demand for establishing the legitimacy of legal human rights claims is to put the cart before the horse in a way that dangerously undermines the entire system. It may be, as Hathaway indicates, that the strength of the legitimacy of the legal obligations will induce a certain level of compliance on its own, but the reverse will never be true. Forceful and effective demands for compliance cannot serve as evidence of the legitimacy of such demands; and so the ability to enforce compliance alone will not give rise to a legal duty to comply. Without establishing the legitimacy of the legal obligations, enforcement efforts (even if well-meaning) will serve to keep the human rights practice mired in the sort of politics that gave rise to the skeptical challenges in the first place. And so, we can leave questions of effective enforcement as a problem for another day—a later

day, one that can come only after the legitimate legal rights and obligations under human rights law have been properly settled by addressing the necessary condition of adjudication.

Finally, one might reasonably grant the above—that adjudicability is necessarily prior to legitimate enforceability—and then ask what it is that is necessarily prior to adjudicability? Adjudicability does not just arrive *ex nihilo*, so what needs to be established such that the adjudicability condition can obtain? A partial answer is that, while adjudicability does not arrive on its own, because the condition contains two mutually dependent parts—the authoritative determination part and the superior law part—it is in some sense self-referential. A superior law, by virtue of its superiority, contains within it a demand for application and determination, and a judicial or even quasi-judicial body will be useless against state actions without a superior law to put into force—at which time enforceability becomes relevant. But this hasn't really answered the question unless we can say where the superior law comes from and how the institutional bodies authorized to apply that law can come to be. We will turn next to one possible, though ultimately inadequate, answer to the first question; that the natural law can provide a superior law for interpretation and determination by authoritative bodies in human rights cases.

### 1.6 Why a Natural Law Understanding of Human Rights Legal Practice is Insufficient

When it comes to the matter of understanding human rights norms and their practice, the focus of philosophers on the theoretical level has largely been centered on establishing the moral foundations of these norms. The goal has been to show how it is that all human beings are morally entitled to a set of basic rights, whether established by virtue of one's human personhood, basic autonomy, capabilities, essential dignity, or simply by virtue of the demand

for access to the goods one needs in order to live a minimally decent life.<sup>48</sup> In this pursuit, very little philosophical attention has been brought to the question of how to make human rights claims—grounded on natural right claims—effective as legal rights claims. There is clearly an assumption by natural law theorists that once the moral grounding of the natural right has been established, the law becomes compelled to recognize basic human rights. But the precise manner by which this should come about, as a matter of law, is a lacuna that few theorists feel compelled to address.

With the preceding in mind, two challenges for the natural law approach to human rights become readily apparent: first, there is the challenge of sufficiently settling the moral grounds for a set (whether broad, narrow, or exemplary) of natural rights; and, second, there is the challenge of demonstrating how the natural law thesis can find expression through legal implementation. For the time being, let us set aside the first challenge by assuming that as a matter of overlapping consensus on fundamental moral precepts there is at least a narrow set of core and non-derogable natural rights claims that can give rise to legal human rights claims.<sup>49</sup> For instance, we might admit that there is widespread agreement regarding the rights of persons to life and liberty and to the ownership of the fruits of one's labor, the further expression of which could be found in the human rights claims to be free from summary execution, torture, arbitrary detention, and slavery. How does the natural law theorist proceed from this acknowledgement of natural rights to a legal demand for such rights?

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<sup>48</sup> See, e.g., Maurice Cranston, "What are Human Rights?" (London, UK: Bodley Head, 1973); James Griffin, *On Human Rights* (New York: Oxford University Press, 2009); Peter Jones, *Rights*, St. (Martin's Press, 1994); Rex Martin, *A System of Rights* (Clarendon, 1993); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); and Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy and Public Affairs* 315.

<sup>49</sup> This assumption avoids for the moment the inordinate difficulty of proscribing a precise boundary for what is and is not properly grounded as a natural right.

The standard thesis of natural law jurisprudence is that *lex iniusta non est lex*—an unjust law is not a law. This is taken by natural law theorists to simply be a natural truth expressed about legality; that for a law to be considered “Law,” it must be just; that it must comply with some minimal moral conditions. This view has a longstanding heritage. Typically, its genealogy can be seen as dating to the time of Augustine, in the 4<sup>th</sup> Century B.C.E., and carrying on through the traditions of Aquinas, Grotius, and Blackstone.<sup>50</sup> Underlying the *lex iniusta* thesis are further precepts that imply to varying degrees a universal moral order that is accessible by human reason against which all human laws can be measured. Those “laws” that fail to comport with the moral demands of the natural law (according to the rule of reason) fail to have the nature and character of law. In other words, in terms of human rights law, natural law theorists posit that human rights violations are violations of rights that individuals have naturally and which no state may legally abrogate; state actions that abrogate human rights cannot be legal actions; they are rather illegal impositions of force; in Thomistic terms, they are not law but “perversions of law.”<sup>51</sup>

Legal scholar, Robin West, has pointed out however that this may not be the only natural law approach; rather she finds that the tradition of the *lex iniusta* notion contains an ambiguity, one that bears exploring here. On the one hand, the thesis seems to say that whatever a law may be (in the positive sense), if it fails to comply with the requirements of justice, then it is not “Law,” and that as a consequence not only do citizens not have a moral duty to obey it, but a

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<sup>50</sup> Blackstone writes, “This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original” *Commentaries on the Law of England*, (Chicago: The University of Chicago Press, 1979), p. 41.

<sup>51</sup> Relying on Augustine, St. Thomas Aquinas writes “[E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law” *Summa Theologica* I-II, Q.95, A.II. Much more recently, John Finnis has asserted something similar, though less conclusive, regarding the nature of unjust laws, holding that a morally unjust law imposes legal obligation, but no moral obligation. See, *Natural Law and Natural Rights*, (Oxford: Clarendon Press, 1980), pp. 270-276.

judge has no duty to apply it. Call this the *revolutionary* approach. On the other hand, West points out, there is a possible reading of “an unjust law is not a law” whereby “because unjust laws are not laws, then all laws that actually exist are therefore just.” So that “every law that *is* a law by positive criteria is, therefore, by virtue of its legalism, a moral and just pronouncement, as well as a legal one.”<sup>52</sup> Whatever the sovereign commands—or whatever law is in the positive sense—is *therefore* “just.” Call this the *reactionary* approach, where the sovereign establishes what is just as well as what is law. West has referred to the sovereign in such cases as “a sort of moral as well as legal ‘Humpty Dumpty’” since he has the power both to say what is law and (by this virtue) to determine what is just.<sup>53</sup> The effect of the reactionary approach is a tendency to laud, rather than to criticize existing law by equating the law that is with the demands of justice, thus making the Natural Law movement a home for profoundly conservative and even fringe-conservative claims.<sup>54</sup>

We might want to assume that when it comes to natural law theorizing in human rights law this ambiguity weighs in favor of the “revolutionary” rather than the “reactionary” approach. But the ambiguity bears keeping in mind, particularly where there is a tendency to say of state actions that are morally questionable that the laws of that state are not unjust because they are the laws of that state, and if an unjust law is not a law, and these laws are laws, then they cannot be unjust (and here perhaps we might add “for them” in light of the concerns of pluralism surrounding human rights impositions).

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<sup>52</sup> Robin West, *Normative Jurisprudence* (Cambridge: Cambridge University Press, 2011), p. 19

<sup>53</sup> Robin West, “Natural Law Ambiguities,” *25 Connecticut Law Review* 831(1993), p. 834. Referring to Lewis Carroll’s character of Humpty Dumpty who had the power to dictate linguistic usage (“When *I* use a word, Humpty Dumpty said in rather a scornful tone, ‘it means what I choose it to mean—neither more nor less’”)

<sup>54</sup> West, *Normative Jurisprudence*, p. 15. See, e.g., Charles Rice, “The Problem of Unjust Laws,” (1981). *Notre Dame Scholarly Works*. Paper 75. [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/law_faculty_scholarship)



But for now let's assume the revolutionary approach is the more apt choice. What can be said about the legal nature of immoral and unjust state actions? If the thesis *lex iniusta non est lex* holds, then these state actions are not law; they are perversions of law; they are illegitimate or extra-legal impositions of power. However, for individuals who are subject to such state actions there is still the question of what practical recourse exists for their resistance in that system. The lacuna remains—how does the natural law thesis fill the gap between an unjust law and the individual rights claim necessary for an international legal human rights practice? Certainly, natural law theories in the tradition of Martin Luther King, Jr., can provide solid grounds for individuals to commit acts in *disobedience* to the “law.”<sup>55</sup> But this sort of revolutionary resistance does not seem elemental to the legal human rights practice; rather, if natural law is to prove serviceable in this practice what is called for is the ability to make an effective legal claim to an adjudicative body vested with the authority to hear such a claim and to recognize the natural right as a superior law over the state action in question. However, taking human rights to be legal rights in this manner requires natural law judges of the revolutionary as opposed to the reactionary persuasion. For if the judge in question is of the latter persuasion, they might hold that what the law is in their particular jurisdiction is what is just for that jurisdiction. But even if the judge is of the revolutionary persuasion, if they are moved to find the natural right argument compelling, their concomitant natural duty of fidelity of law will compel them to choose between two conflicting moral duties, with no guarantee that the human rights claim will win out. On this

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<sup>55</sup> See, e.g., Martin Luther King, *Letter from Birmingham Jail*, “I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for the law.” [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf), p. 9. See also, John Rawls, “[Civil Disobedience] expresses disobedience to the law within the limits of fidelity to law, although it is at the other edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one’s conduct. The fidelity to law helps to establish to the majority that the act is indeed politically conscientious an sincere, and that it is intended to address the public’s sense of justice.” *TJ*, p. 322.

account of natural law, satisfaction of the adjudicability condition for legal human rights seem less than assured.

An alternative approach to the modern iteration of natural law theory is sometimes said to be found in the international acceptance of *jus cogens* norms, a set of peremptory norms and non-derogable duties that, according to customary law, no state can justifiably circumvent. What this means is that while the subject matter of positive law in both international and domestic forums can be seen as quite free and broad-ranging—for instance, the subject of treaties is relatively open to negotiation, and domestic governments are free to fashion laws for their citizenry as they see fit—the scheme of *jus cogens* norms provides an overarching limitation on this freedom. This is a limit beyond which no agreement and no state policy could be said to be legal. States for instance may not employ the means of slavery, torture, genocide, or apartheid under any circumstances that would be deemed to be legitimate. The grounds for such norms are frequently understood to derive from the dictates of human reason, which require recognition of the inherent dignity of all human beings, the preservation of certain natural rights to life, liberty, and property, and the demands on legitimate governments to honor the aforesaid concerns.

Of course, most will agree that the *legal* nature of *jus cogens* norms is derived from elsewhere, primarily from customary law, the recognition of which has been further formalized by Article 38(1)(b)&(c) of the Statute of the International Court of Justice, which cites as binding “international custom, as evidence of a general practice accepted as law” and “general principles of law recognized by civilized nations.”<sup>56</sup> This appears to shore up the claim that there is an overriding superior law that is subject to adjudication. What works in favor of taking this body of

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<sup>56</sup> This notion of *jus cogens* also finds positive law expression in Article 53 of the Vienna Convention, which provides “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

*jus cogens* norms as a plausible example of the classical natural law theory at work in the world today is the acceptance of the norms' non-derogability; no state can claim to be exempt from them regardless of whether or not it consented or participated in the development of the customary prohibition. Of course, this also means that though it is claimed that customary law is the legal basis of *jus cogens* norms, when holding noncompliant (and possibly nonconsensual) actors accountable, there is an inherent presumption that the customary norms will remain on the side of what is morally right and just. It is presumed that the custom could not shift to be otherwise. In which case, it could be argued that the authority for *jus cogens* comes not from the evidence of custom, *per se*, which is contingent, but rather from the natural law principles themselves—principles that presumably natural law theorists will argue cannot be abrogated even by customary law.

Take for instance the 19<sup>th</sup> Century case of *The Antelope*, 23 U.S. 66 (1825), where a ship was discovered off the coast of Florida, then a part of Spain, and determined to have been engaged in the international slave trade. As recently as 1820, the capture of "negroes or mulattoes" for the purpose of enslaving them, and the importation of slaves into the United States, had been defined as "piracy." The question for the U.S. Supreme Court was whether the cargo of the ship, for which numerous libels had been filed claiming ownership or salvage rights, and which was composed of captured African people, should be recognized as property whose ownership needed to be determined or as human persons who should be restored as such. Chief Justice Marshall found that while the natural law indicated that the moral demand was to recognize the Africans as people, the demand on him to make a legal determination was something altogether different. He found that because most civilized nations had engaged in the international slave trade—in other words, as a matter of custom—he could not now claim that

such behavior was illegal and enforce such a determination against the sovereign nations of Spain and Portugal.<sup>57</sup> So the majority of the 280 captured Africans were denied their humanity and divided among the several claimants.

Of course, if a cargo ship full of kidnapped persons bound for enslavement were to be discovered today, the result would be different. *Jus cogens* norms prevent the recognition of property rights in other persons as a matter of international customary law. The question is whether this weighs in favor of viewing the legal authority of *jus cogens* norms as a product of the evidence of custom or as a product of the natural law. Since the custom could be (and has been) otherwise, it seems as though it is the classic natural law principles that truly undergird that legal authority, thus, preventing any other customary alternative from developing (or resurfacing).

If one prefers to hold that it is the law of custom along that is authoritative here, then there are further questions that will need to be addressed. For instance, when does custom become custom, and how does this designation avoid relying on evidence of a “tipping point” or a “nose-counting” exercise to determine its legality? Is it a tally of individual instances of demonstrated behavior or of those who merely *claim* adherence to the rule? If the tally were to show that the majority of states practice institutionalized gender inequality, could this be recognized as customary law in the manner that Marshall indicates in *The Antelope*? The answers, at least for those who wish to realize the goals of an international human rights legal

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<sup>57</sup> Marshall wrote: “That the course of opinion on the slave trade should be unsettled ought to excite no surprise. The Christian and civilized nations of the world with whom we have most intercourse have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations, the right to carry on which was claimed by each and allowed by each.” 23 U.S. 66, 115.

practice, should be no. It is not clear, however, how the legal authority of customary law is sufficient to support that claim. Thus, *jus cogens* norms seem to be authoritative only when they work in the direction dictated by natural law principles (of the revolutionary sort), which is not to say that taken *together* they are not a powerful device for offering a superior law over and against state practices. We will return to the value of *jus cogens* norms later in a different context, as indicative of the constitutional norms of the existing practice. The point here is merely to be cognizant of how this form of customary law is dependent upon the successful establishment of natural law principles, and how the natural law must, in turn, find expression through some other legal medium.

With that said, there are a number of reasons why the classical natural law approach *alone* proves too anemic to account for the existing and emerging legal practice of human rights. First, as we've seen, the structure of a natural law understanding of human rights says, as a matter of axiomatic truth, that human persons have a set of natural rights that state actions may not abrogate. State actions that do so are illegitimate. This approach, understood in its best light, would require us to focus our attention on the proper set of natural rights that could serve this function. To date, *jus cogens* norms have provided a very limited set of binding restrictions on state action. Though recent theorists have made valiant efforts with regard to clarifying the moral grounds of international human rights (see, e.g., Griffin, Teson, and Tasioulas), the list of recognizable rights is dependent in this regard. In some cases, say James Griffin's efforts to offer a "satisfactorily determinate" (deflationary) account of the scope of human rights on the normative basis of what it is for humans to exist with dignity, this can lead to a fairly small set of

recognized human rights.<sup>58</sup> So two problems are evident: (1) making legal human rights dependent on the implications of their moral foundations requires adequately establishing those moral foundations before moving forward, and (2) even if this ambiguity could be overcome, and the body of *jus cogens* norms could be expanded to meet this list of morally established human rights, that list would likely be more proscribed and deflationary than the catalogue of human rights found in the practice today. A theory, dependent upon the achievements of moral philosophers, that ultimately works to afford *less* human rights than is presently proposed by the current practice of human rights is, on its face, a less desirable option.

Furthermore, as we have seen, Allen Buchanan has pointed out, this sort of argument seems to structurally assume a “Mirroring View” between that set of rights and any attendant obligations of states; that for every obligation by a state, there must be an established individual right from which the obligation emanates. This may prove an unwarranted restriction in some cases if we require that any and all human rights obligations of states be grounded on (or mirror) a recognized right of individuals. Indeed, the desired scope of duties and obligations of states in the practice of human rights may well be broader than the set of natural rights that can be established.<sup>59</sup>

Second, the classical natural law gives inadequate guidance on what the law *is* such that it gives rise to a legal right; it tells us that morality (however founded) is a necessary condition for law, and that those actions that fail to satisfy this condition are not law. But this tells us only about what is *not* law, rather than what law is. Unless one wishes to argue that legal norms are coextensive with moral norms—such that establishing moral norms suffices to establish legal

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<sup>58</sup> James Griffin, *On Human Rights* (New York: Oxford University Press, 2009) pp. 32 & 92. Griffin writes: “It is a great mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right.” p. 199.

<sup>59</sup> Buchanan, *The Heart of Human Rights*, *supra* note 2, at 14-16.

norms—then further guidance will be necessary to know how the legal is distinct from the moral. It might be that the category of proper legal norms is entirely circumscribed by the category of moral norms (without being coextensive with them), such that all legal norms are moral norms. But if it is the case (as seems likely), that not all moral norms are legal norms then we will need to know more in order to establish the legality of human rights as distinct from their morality.

Lastly, the stark reality is that unjust and even abhorrent state actions are regularly enforced against individuals *in the name of the law*. The response of the revolutionary natural lawyer says that in such cases the state has failed to make proper law; that for moral reasons those laws are not legitimate laws. As far as this goes, I see no theoretical reason to disagree with such a claim. Certainly the legitimacy of a law is significantly undermined when the state's purpose is to work an evil against its own citizens or others. On moral grounds, we should not recognize such actions as properly legal actions. But there is no reason to think that this is as far as it goes. We can endeavor to go further by establishing legal grounds that can make human rights functionally effective in the form of legal claims of individuals against such state actions. There must be recognition that the law of human rights creates legal obligations for states such that actions that violate those laws are not only illegal but also that the violators of human rights can and will be held legally accountable for perpetrating them.<sup>60</sup> To do so, we must look to more than just the moral prohibitions of such actions. Since a legal obligation is constructed upon more than mere morality, it is these additional features of human rights practice that should demand our attention. Absent such a showing, the natural law view of human rights appears to be

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<sup>60</sup> In recent decades there has been evidence of a growing willingness to criminally prosecute heads of state for human rights violations, including the prosecutions of Uruguayan President, Juan Maria Bordaberry, General Augusto Pinochet of Chile, and sitting heads of state, Slobodan Milošević, Charles Taylor, and Omar al-Bashir. For an in depth treatment of such prosecutions. See, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton & Co., 2011)

merely a powerful rhetorical device in international public discourse that can offer little toward determining how to make human rights legally effective against violators of human rights.

An approach based on the adjudicability of human rights law can offer a better account. The human rights that states are legally obligated to obey are the rights that can be adjudicated within the practice. The value of natural law principles and *jus cogens* norms need not be denied on such a view. To the extent that they are subsumed by the norms of the practice, they are accounted for in the condition of adjudicability. It is just that each alone is insufficient to satisfy that condition.

### 1.7 Positivist Accounts of International Legal Human Rights

Typically, when the legal nature of human rights has been explored by philosophers, the accounts offered are founded upon one or the other of the two predominant jurisprudential theories; they are established either through the recognition of positive legal instruments or by established principles in the natural law tradition. For the reasons detailed above, the natural law approach has proven inadequate at both satisfying the adjudicability condition and circumscribing the essential features of the existing practice of international legal human rights. It is important to reiterate that it is only this practice that this work seeks to examine and justify.

With this taken as our aim, we can recognize the obvious benefits to an approach from legal positivism in that, unlike the natural law approach, it focuses solely and entirely on the legal practice in question. For instance, in taking up H.L.A. Hart's formulation, which calls for a sociological description of that practice, we can ask what morally neutral criteria exist for identifying legal validity in any given legal system.<sup>61</sup> In the practice of international human rights law, such criteria for legal validity have primarily taken the form of a consent-based theory. This

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<sup>61</sup> Hart, *The Concept of Law*, *supra* note 46, at 11.



view grants a fruitful starting point for our purposes since at the outset it seeks to answer the more basic ontological question of whether there even exists such a thing as international human rights law at all. The answer clearly comes in the affirmative when we recognize that real and sustained legal obligations have been created by the self-limiting consent of sovereign states, and that this consent can be taken as a basic ground for recognizing an international legal practice of human rights.<sup>62</sup> This standard for recognition is, of course, most evidently satisfied in treaty practice where the consent of signatories is a necessary condition for legal obligations to obtain under the treaty provisions. But it also might conceivably be satisfied by evidence of customary law as indicated under Article 38 of the Statute of the International Court of Justice<sup>63</sup>

The primary benefit of this positivistic account of international law and legal practice is its clear intelligibility. If you want to know whether a state is bound by international law, you need only ask if it has in some way, affirmatively or tacitly, consented to be so bound. But the limitations of this view in the context of the universal goals of international *human* rights law should be equally evident; states that withhold consent from such laws have no recognizable legal obligations under them. Furthermore, we might ask whether, given the practice as we find it, affirmative consent is merely a sufficient condition for the existence of law (say, in the form of treaty ratification) rather than a necessary one. When we consider the legally binding nature of *jus cogens* customary norms against states *regardless* of consent, it would seem consent-based views, while sufficient in some regard, cannot serve to capture all of the ways in which human rights legal norms have become authoritative in the existing practice.

We might further see that a view of human rights law that invites the conclusion that the

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<sup>62</sup> See, Samantha Besson, “Whose Constitution(s)? International Law, Constitutionalism, and Democracy,” J. Dunoff and J. Trachtman (ed.s) *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University Press, 2008).

<sup>63</sup> As noted earlier, Article 38(1)(b) & (c) cites “international custom, as evidence of a general practice accepted as law” and “general principles of law recognized by civilized nations.”

obligation to abide by the law holds only so long as (and to the extent that) consent holds is essentially a skeptical position that says human rights lack legal authority *unless* consent can be shown. This is, of course, a rarefied sense of legal obligation and legal authority—where the law binds actors only if they have *agreed* to be bound—and it can prove to be a pernicious limitation in the area of human rights laws where, in the case of atrocities against human persons, perpetrators can offer as a defense to liability that they never legally consented to avoid it. It is also difficult to see how this view of law and legal obligations could prove sufficiently stable. This is particularly true when we consider that the international legal practice in question seeks to bind state actors whose governmental regimes, and the bodies they represent, are constantly changing.<sup>64</sup> If we were to take evidence of consent as the sole rule of recognition for legal obligations in the international system, would this not imply a present and persistent demand to revisit and reconfirm the presence of consent in light of the changing membership and leadership of the states who are legally bound? And under what circumstances could a withdrawal of consent prove effective? These are some of the questions that plague the positivist account, which offers consent as a necessary and sufficient condition for any and all legal obligations of states in international human rights law.

Furthermore, even if these concerns were surmountable, and consent could be taken as the secondary rule that grants legal authority to the substantive content of any and all binding human rights norms, there would still exist the problem of how to settle significant disagreements over the *meaning* of that agreed upon content. Where consent is offered as the sole rule of recognition for legal validity, it is not clear how such disputes could be settled. It could be that we are forced to say that there is no properly sound interpretation of the language

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<sup>64</sup> Ronald Dworkin offers many of these same objections in his posthumously published work “A Philosophy For International Law,” *Philosophy and Public Affairs* 41:2-30 (2013).

of treaties, or even the principles derived from customary laws. Rather than the meaning of the law is only what each individual state has taken themselves to be consenting to, thus making some disagreements indissoluble if (and perhaps when) different parties take themselves to be consenting to different understandings of the same legal instrument. Such an outcome seems to unrealistically contort our ordinary understanding of legal authority and legal obligations; indeed, it is worth wondering what, if anything, such a practice would have in common with what we call a legal practice. While consent-based theories offer an affirmative account of the existence of human rights laws, if we want to talk about the legal practice of those laws we will need to look further. Thus, consent-based theories can at best be seen as marking a possible beginning, but not the end, of our inquiry into the emerging practice of international legal human rights.

On my view, a practice-based conception of law that includes an adjudicability condition can provide an account of international human rights law that overcomes many of these challenges. Adjudicability is a necessary condition for settled law. Consent, as we have seen, may prove sufficient for law-making. There are numerous examples of this: treaties, customary law, even laws passed by majoritarian vote are all based on actual or tacit agreement of some form. But consent alone is not enough because, whether due to the vagaries of the language, the instability (or the disingenuous nature) of certain compromises, or the law of unintended consequences, disagreements will inevitably arise over the law's meaning, and these disagreements cannot be simply left to politics to sort them out. In an important range of cases, including human rights cases, such disagreements must be resolved in a legitimately authoritative way, thus making law which, in turn, shapes future legal arguments and determinations of legal rights claims.

## 1.8 In Defense of Adjudicability

We might then think of adjudicability as a necessary condition for something to be called a legal practice and for the rights within that practice to be called legal rights. Laws may be created by consent but their settled meaning and the rights that are afforded by that meaning must be determined from within the practice of those laws. It is *theoretically* possible, on an argument from sufficiency, that so long as the law's meaning is satisfactorily settled by consent, and all the rights afforded under that law are recognized and not abridged, then the legal rights and obligations under that law could obtain absent adjudication.

But this is only to say that there could be “law” with no effective need for a practice of law—if all the legal rights afforded by the law are uniformly honored and the meaning of the law’s content is never in question, then the laws are, in effect, *adjudicable* but the rights never need effective adjudication. Of course, in the world as we know it, this theoretical possibility rarely, if ever, obtains in modern society. In any case, once a question arises about a rights violation, or once the agreed upon meaning of a legal right comes into conflict with the application of other legal norms of the legal practice (as it frequently will), then in order to *remain* law, it must be subject to authoritative judicial interpretation. In such cases, there must be a neutral arbiter to hear legal claims, to interpret the law, and to settle its meaning. The goal here is to offer a philosophical theory of international human rights law that takes this demand seriously.

A further goal is to show how authoritative decision-making can foster a sort of reflective equilibrium between the natural law principles inherent in human rights norms and the positive law instruments that are taken to instantiate them; bringing them together in a way that overcomes the shortcomings of each view. I believe that this view captures more of the existing

practice of human rights law than mere consent-based theories can capture, and with a stronger theory of legitimacy than either consent-based or natural law views can provide. The sense of legitimacy here arises from having both the properly neutral procedures necessary for a fair settling of claims and from placing legal reasons front and center in a way that both demands justification for legal determinations and opens those justifications up to further scrutiny and consideration.

These institutional commitments to procedural fairness and transparency in adjudication can further serve to assuage some of the concerns inherent in a universal human rights legal practice with regard to recognizing cultural and religious pluralism and the necessary respect for the equal right of states to self-determination. Because the focus is on individual rights-holders bringing claims against their own states or foreign states on terms that are responsive to that particular state's practices, and because this approach takes legal reasons as autonomous in an on-going process of interpretation, the adjudicative practice permits for the weighing of all sides of the argument. This provides an element of subsidiarity not available in the sweeping judgment of state practices that are typically found in the political or moral approaches. In other words, when it comes to knowing whether a legal human right exists, the right questions are not what level of atrocity in human rights violations can warrant outside intervention, or what counts as a violation of the set of rights that human beings may morally demand *qua* human. The right question is whether, given certain widely accepted and formalized legal principles of international human rights, a state can offer reasonable grounds to defend its actions against the claims of a particular victim of those actions. In this sense, no single view need be foreclosed at the outset; rather, all are open to consideration on their merits in light of other commitments within the human rights practice.

As Karen Alter has pointed out, “international judges, like their domestic counterparts, wield neither the sword nor the purse; they only have the power to speak the law.”<sup>65</sup> It is this practice of “speaking law” that can bring clarity to the law’s demands given the reality of a reasonable pluralism of values in the world. The interpretive practice of the law’s meaning can set forth a more elastic understanding of human rights law in determining what behavior is in compliance with the law and what behavior is a violation subject to remediation. And the ongoing nature of an impartial and transparent judicial process allows for revision and correction and expansion in a way that does not necessarily suffer the defects of formalism, which have been waged against both positivistic accounts and natural law theories of law (in the “made law” versus “found law” debate).<sup>66</sup> It says merely that given the social purposes of the legal regime of human rights, an argument must be made in the language of the law to justify state actions. Ultimately, the outcome rides on the strength of such arguments.

The necessary role of courts, judges, and other adjudicative bodies in any assertion of legal rights seems largely self-evident. Implicit in the notion of having a legal right is the opportunity to have one’s rights demands fairly heard. This is particularly important in questions of human rights laws. The opportunity for a fair hearing on the merits of the human rights claims of an individual (or group of individuals) plays an essential role in leveling the playing field—a role that no other institution can play. Only an established judicial process can serve to equalize the parties to an action such that the rights and interests of a single individual can be maintained over and against the vast power and influence of the state. Nowhere is this demand for equal

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<sup>65</sup> Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014), p. 4.

<sup>66</sup> H.L.A. Hart famously claimed that when it came to formalism it was really Blackstone’s methodology of finding the law that was the more formalistic view. “Positivism and the Separation of Law and Morals” 71 *Harvard Law Review*, 593-629 (Feb., 1958), p. 610.

regard greater than in the practice of human rights law, and nowhere is the absence of a recognized central role for judicial authority in international legal human rights practice more glaringly suspicious.

In sum, unlike the natural law approach, the requirement of an adjudicability condition for legal human rights does not depend exclusively on the strength of underlying moral arguments. And unlike either the demand for consent or the demand for an enforcement condition, the demand to establish the adjudicability condition needn't entail a skeptical position. It says legal rights and obligations require adjudicability and then offers an account for how this condition is already being met in the existing practice of international human rights in a way that makes their legal nature manifest.

With that said, the following chapter seeks to demonstrate how the adjudicability condition can clarify and further the existing and emerging practice a more inclusive and effective practice.

## CHAPTER TWO

### Applying the Adjudicability Condition

According to the view presented here, in order for human rights to satisfy the conditions of a legal right, and thus confer legal obligations upon states and other actors, human rights claims must be “settle-able” by the determination of an authoritative decision-maker. The goal has been to relocate this claim of right out of the realm of moral and political contestation and into a realm where legal reasons become autonomous and can be argued toward a determinative outcome. The *adjudicability condition* has two parts. First, it must be possible to bring a claim on the basis of the right in question before a decision-making body that is authorized to settle that claim. Second, in order for a functionally effective settlement of legal rights against state practices to be possible, it must also be the case that the legal right to be interpreted is granted to the individual by virtue of a superior law against which the practice in question is subordinate. Only in this way can the adjudication of the right in question authoritatively *settle* the claim of its alleged violation.

In this chapter I will demonstrate how this standard helps to clarify and further the present and emerging practice of legal human rights. I will offer two accounts of how the adjudicability condition serves to fill in the gaps in our understanding of the legal nature of human rights. The first shows the effectiveness of the adjudicability standard for recognizing the existence of legal human rights in the practice of human rights as it stands today. The second uses the standard to show how an alternative jurisprudential account of the emerging legal practice can improve the likelihood that the practice will reach its proper and necessary functional aims.



## 2.1 The Modest Account

The *Modest Account of Adjudicability* in the present practice of human rights is fairly straightforward. It says that international human rights are legal rights for those who claim that a state signatory of one of the relevant international human rights treaties has violated the terms of that treaty. The argument for the conclusion that the adjudicability standard has been satisfied is fairly obvious—because signatories take the provisions of these treaties to be superior and binding law over and against their own sovereign state actions and because they have submitted to the jurisdiction of courts or other review bodies who have been designated as authoritative over the subject matter of those treaties, both the superior law and adjudicability elements of the adjudication condition for legal rights have been satisfied. In other words, if assertions of legal rights against state practices require a superior law and an authoritative decision-maker vested with the power to settle rights claims under those superior laws, then the features of the existing legal practice of international human rights already serve to satisfy those requirements. Nonetheless it worth discussing how and to what extent this has come about.

Since the end of World War II, and in particular since the end of the Cold War, the field of international relations has become ever increasingly judicialized. To date, there are more than two dozen international courts that have collectively issued over 37,000 binding legal rulings in individual contentious cases. As Karen Alter has pointed out, 21 of today's 24 permanent international courts (ICs) now possess compulsory jurisdiction in certain areas.<sup>67</sup>

Included among these ICs, are three regional Courts of Human Rights, each vested with the authority to hear the claims brought by individual complainants. They are the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court on Human

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<sup>67</sup> Alter, *supra* note 65, at 84-85.

& Peoples' Rights. The Inter-American Court has been in operation in San Jose, Costa Rica, since 1979 and has been exercising contentious jurisdiction since 1986 when the Inter-American Commission on Human Rights (IACHR) submitted the first contentious case of *Velasquez Rodriguez v. Honduras*. The Court issued a judgment on the merits in that case in 1988, and the caseload of the Court has rapidly expanded over the following decades, adjudicating cases on a significant range of rights protected by the American Convention on Human Rights and ancillary agreements, including cases ranging from extrajudicial execution and forced disappearance cases, to labor, land, and freedom of expression rights. Of the 23 signatories to the American Convention, 20 states have submitted to the jurisdiction of the Inter-American Court of Human Rights.<sup>68</sup>

The European Court of Human Rights is the longest operating of the regional human rights judicial bodies. Based in Strasbourg, France, the Court began operating in 1959 and has delivered more than 10,000 judgments regarding alleged violations of the European Convention on Human Rights. Citizens from the participating countries with human rights complaints who have been unsuccessful in finding a remedy in their national courts may petition the European Court of Human Rights. Complaints by governments about human rights violations in another participating country are also permitted, but are rarely made. If the Court agrees to hear a complaint, it investigates and adjudicates it. Before issuing a judgment, the Court attempts to mediate the dispute. If conciliation fails, the Court will issue a judgment with supporting judicial opinions and impose a remedy.<sup>69</sup>

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<sup>68</sup> These states include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. The Inter American Court <http://www.ijrcenter.org/regional/inter-american-system/>

<sup>69</sup> For a concise treatment of the roles of each human rights body, *see*, James Nickel, "Human Rights," *Stanford Encyclopedia of Philosophy*.

The African Court on Human & Peoples' Rights is the youngest of the regional courts. Seated in Arusha, Tanzania, the Court heard its first case in 2009, and issued its first determination on the merits in 2013 (holding that the government of Tanzania had violated its citizens' right to participate freely in the government). It has since taken up over two dozen cases. To date, 27 African states have submitted to the jurisdiction of the Court and 7 of those states have submitted to jurisdiction in cases that can be brought directly by individuals and Non-Governmental Agencies.<sup>70</sup>

In addition to the regional courts vested with the power to hear human rights cases, there is also the International Criminal Court (ICC). Located in The Hague, the ICC is the court of last resort for prosecution of genocide, war crimes, and crimes against humanity. The Rome Statute, its founding treaty, was entered into force on July 1, 2002. As of June 2015, the ICC had 122 states parties, had opened criminal investigations into the practices of eight countries, and had issued three verdicts.<sup>71</sup> Under the doctrine of complementarity, the Court has jurisdiction only when a country is unwilling or unable to make a good faith effort to prosecute and convict violators. A person alleged to have committed a crime under the ICC Statute, whose country is unwilling or unable to prosecute him or her, falls under the jurisdiction of the ICC if (1) the country of which the accused is a citizen is a party to the Statute, or has authorized the jurisdiction of the court in the matter; or (2) the country in whose territory the accused allegedly committed the crime is a party to the Statute, or has authorized the jurisdiction of the court in the

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<sup>70</sup> These states include: Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda, and Tanzania.

<sup>71</sup> The ICC <https://www.hrw.org/topic/international-justice/international-criminal-court>. The states against whom investigations have opened include: Uganda, The Democratic Republic of the Congo, the Central African Republic, Sudan (Darfur), Kenya, Cote d'Ivoire, Libya, and Mali.

matter, or (3) the crime the accused allegedly committed is referred to the Court by the U.N. Security Council.<sup>72</sup>

Aside from the determinations of the regional human rights courts, a significant number of individual human rights complaints are also heard by the United Nations Committees vested with authority to oversee compliance with specific treaties. These include most predominantly The UN Human Rights Committee (HRC), which is responsible for overseeing implementation of the International Covenant on Civil and Political Rights (as of June 2014, 168 States are party to the ICCPR);<sup>73</sup> and the UN Committee on Economic, Social and Cultural Rights (CESCR) which oversees implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (As of June 2014, 168 States are party to the ICCPR).<sup>74</sup> Together these two treaties represent the most comprehensive statement of human rights found in the practice today. Embodying the rights found in the Universal Declaration of Human Rights, these treaties became effective in 1976 and have now been ratified by more than 80 percent of the world's countries. The Committees vested with overseeing compliance with the treaties (the HRC and the CESCR) may receive the complaints of individuals who allege a violation of their human rights by any states who have signed the First Optional Protocols of the ICCPR and ICESCR.<sup>75</sup> The HRC has published an extensive list of its decisions offering a wealth of jurisprudence organized by subject matter, procedural issue, and determination of its opinions.<sup>76</sup> The First Option Protocol to the ICESCR entered into force on May 5, 2013, authorizing the CESCR to accept individual complaints under certain conditions.

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<sup>72</sup> Nickel, *supra* note 2, at 35.

<sup>73</sup> <http://www.ijrcenter.org/un-treaty-bodies/human-rights-committee/>

<sup>74</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-on-economic-social-and-cultural-rights/>

<sup>75</sup> 155 Countries have signed the First Optional Protocol of the ICCPR, however, only 14 Countries have signed the First Optional Protocol of the ICESCR.

<sup>76</sup> A table of HRC jurisprudence can be found here.

<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx> A table of CESCR jurisprudence can be found here.

In all there are nine treaty bodies that under certain limited circumstances may warrant the hearing of individual complaints. In addition to the HRC and the CESCR, there are also the UN Committees designated to hear complaints on more specific issues of treaty obligations such as:

- (1) The Committee on the Elimination of Racial Discrimination (CERD), which oversees implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). As of June 2014, 177 States are party to the ICERD.<sup>77</sup>
- (2) The Committee on Enforced Disappearances (CED), which oversees implementation of the International Convention for the Protection of All Persons from Enforced Disappearances. As of June 2014, 42 States are parties to the Convention.<sup>78</sup>
- (3) The Committee on the Elimination of Discrimination against Women, which oversees implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). As of June 2014, 188 States are party to the CEDAW.<sup>79</sup>
- (4) The Committee on the Rights of Persons with Disabilities (CRPD), which oversees implementation of the Convention on the Rights of Persons with Disabilities. As of September 2014, 151 States are party to the Convention on the Rights of Persons with Disabilities.<sup>80</sup>
- (5) The Committee Against Torture (CAT), which oversees implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As of January 2014, 154 States are party to the Convention against Torture.<sup>81</sup>

For two other treaty bodies the individual complaint mechanisms have not yet entered into force, as each requires 10 states to assent to the competence of the committee. These are the Convention on the Rights of the Child (CRC) and its Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography and the International Convention on the Protection of the Rights of All Migrant Workers and

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<sup>77</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-racial-discrimination/>

<sup>78</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-on-enforced-disappearances/>

<sup>79</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-discrimination-against-women/>

<sup>80</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-on-the-rights-of-persons-with-disabilities/>

<sup>81</sup> <http://www.ijrcenter.org/un-treaty-bodies/committee-against-torture/>

Members of Their Families.<sup>82</sup> Each of these committees has a process of review for individual complaints, thus offering a burgeoning body of jurisprudence on the meaning and intent of human rights laws.

To be certain, the proliferation of UN committees as a judicial mechanism for rights complaints has proved cumbersome, and some might hasten to add that this system is at best one of only a quasi-judicial nature. However, as Philip Alston has pointed out, if the system is in difficulty, this is due in large part to its success in attracting the participation and involvement of states and of other bodies. Participation in human rights treaties has grown exponentially while the availability of resources to monitor their achievement has failed to keep pace.<sup>83</sup> What is relevant for our purposes under the Modest Account is that within the practice, even beyond the jurisdiction of regional courts of human rights, there exists further opportunity for individuals to bring their rights claims to an authoritative body vested with power to make a determination regarding the nature of a state's action in light of a superior and governing norm of human rights, and that through these determinations the legal practice is galvanized by the furtherance of its jurisprudence.

It is also worth noting that domestic courts play an important role in satisfying the adjudicability condition. There has been not only a significant uptick in the number of legal rationales offered that arise from the demands to comply with international laws as part of a state's recognition of the rule of law, but also in response to such demands numerous states have created new or re-formalized constitutions that now include human rights provisions.<sup>84</sup>

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<sup>82</sup> Currently, the CRC has nine such declarations of assent. For more information on the status and procedures of individual complaints to UN Committees see:

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#proceduregenerale>

<sup>83</sup> See, Philip Alston, "Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective," P. Alston and J. Crawford (ed.s.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge Univ. Press, 2000) pp. 3-4, & 502.

<sup>84</sup> For instance, states such as: Romania (1991), Slovenia (1991), Congo (1992), Lithuania (1992), Albania (1993),

Additionally, while human rights are generally thought to be distinct from civil rights, which are rights established by the law of a particular state and applied by that state in its own jurisdiction, Article 56 of the UN Charter obligates member states to take joint and separate action to promote observance of human rights. The most basic method for the expression of this obligation is to create a method of enforcement through law at the national level. The Genocide Convention, for instance, mandates that member countries make genocide a crime within its own legal system. As a result, in many if not in most of the legal jurisdictions of the world, human rights have become legal rights in accord with the adjudicability condition, and there is abundant evidence that this trend will continue.

However, it is not the case that the existing practice satisfies the universal aim of the human rights practice in terms of adjudicability. As we saw in the divergent outcomes between the cases of Mukhtār Mā'ī and Jessica Gonzalez, the rights afforded by the existing system, which is presupposed as a legal system of “human” rights, in fact protects only the rights of a certain but incomplete set of individuals. To the extent that this practice is a legal practice, and the regular and widespread satisfaction of the adjudicability standard for human rights claims indicates that it *is* a legal practice, this practice is fundamentally failing its own functional aims. Because the protections of human rights and the availability of adjudicability privileges some and not others, the system of legal human rights violates its own dictates. For instance, Article 2 of the UDHR provides:

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Russian Federation (1993), Moldova (1994), Tunisia (1995), Cameroon (1996), and Poland (1997); *See* Nickel, *supra* note 2. *See also*, Oona Hathaway, “The Promise and Limits of the International Law of Torture,” in O. Hathaway and H. Koh (ed.s.), *Foundations of International Law and Politics* (New York: Foundation Press, 2005).

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

It seems clear that the reliance upon a consent-based understanding of what it is for international human rights law to be properly binding on states has given rise to this ad hoc and inadequate system of legal human rights. This poses two questions: first, on what grounds have we taken this to be the right understanding of legal rights and legal obligations for this practice?; and, second, if this understanding has served to impede the emergence of the practice toward its proper functional aims of universal human rights, what other accounts might better serve the practice? As to the first question, the answer seems to be that our understanding of law and legal obligations has relied too heavily on the jurisprudential tenets of legal positivism; the reason that we understand legal rights and obligations in this way is that, as a matter of description, this is the way the present practice is; this is the practice as we find it, and so this is how legal rights and obligations are recognized and made adjudicable in that practice. The answer to the second question will obviously require us to look beyond the merely descriptive assertions that legal human rights are what they are because that is what they are.

However, the goal in what follows is not simply to offer an idealistic normative account of what the practice ought to be or how it ought to develop; rather, it is to venture an alternative account that is in keeping with the conditions we already accept as necessary for legal rights and obligations to exist (adjudicability), in light of our understanding of how legal systems generally arise in the positive sense, and apply that to the present practice of human legal rights. Once suitably established we can then ask whether the hallmarks of the present practice are better



accommodated by this account. In recognition of the emerging nature of the practice of legal human rights, the account I have in mind is one based on constitutional norms and the concept of constitutionality. But before we move to that account, more must be said about the prescriptive-normative divide that will need to be navigated to get there.

## 2.2 The Space Between

What follows can be characterized in common philosophical parlance as *both* a descriptive and prescriptive enterprise. I have thus far attempted to highlight the features and extensive nature of the existing legal practice of human rights in light of the adjudicability condition and how, given the practice's shared aims, it can still be found wanting. The question that now presents itself is how can this practice be improved to best serve its own purpose. There is therefore, a temptation to frame this inquiry in terms of "what is" and "what ought to be." However, I am not convinced that this classic distinction in legal philosophy will prove fruitful or even possible here. To be sure, clearly setting out one's descriptive claims from one's prescriptive claims is a common practice we have come to expect in works of philosophy of law. But with this expectation of separation also comes an implied presumption that the more successful analytical legal argument is the one that relies on what the law is as opposed to what the law ought to be. As we will see, when it comes to the legal nature of the rights found in the emerging human rights practice, there is good reason to be circumspect about assertions of a stark categorical divide. Furthermore, even if this division can be successfully accomplished, it is not clear that an argument from legal "is-ness" will always clearly outweigh other relevant normative demands for justice in the international legal human rights system.

With these concerns in mind it follows that there are two common assumptions that should be treated with skepticism: (1) that it is possible in the domain of legal human rights to clearly set the “positive” law apart from the imperative normative demands of the practice, and (2) that a claim about the legality of human rights will run out when the evidence of the positive law runs out. To claim the latter is to make the ordinary lawyer’s argument—and perhaps an *unimaginative* lawyer’s argument at that. It does not hold nearly as well for the international lawyer working in the still burgeoning and forming field of international human rights law—and I would argue, these assumptions should rarely, if ever, hold for philosophers of law.

As Robin West’s recent work has shown, normative engagement is a central function of philosophy of law and jurisprudential scholarship. She charges that all three major jurisprudential traditions—natural law, legal positivism, and critical legal theory—have abandoned normative inquiry and “quite explicitly turned their backs on questions regarding the requirements of justice or the nature of the legal good.”<sup>85</sup> I agree that this abandonment has left a gap in jurisprudential inquiry, and part of being mindful of this gap is simply asking the next question about what more the law can do to better serve the interests of justice. But even if we do not ask the further question, separating the normative inquiry from the initial question of “what the law is” may not be so easily accomplished. For instance, when we ask whether a legal right or obligation exists, particularly in the realm of human rights and the demands of the Rule of Law, often what we are really asking (as lawyers and philosophers of law) is whether there is “good law” to that effect. But what does that mean? Judges, lawyers, and philosophers of law frequently make this sort of judgement without having to articulate and justify the epistemic criteria for their evaluation—and these evaluations are themselves open to normative evaluation. As West shows us, to answer the question of whether there is good law on the subject requires us

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<sup>85</sup> Robin West, *Normative Jurisprudence* (Cambridge: Cambridge University Press, 2011), pp. 2-3.

to know “the nature of the ‘good’ that a good law exhibits and that a bad law lacks.” These, she claims, are the defining questions of jurisprudence and, as we will see, they are central to the inquiry here. Answering them will likely give us occasional cause to blur our ordinary descriptive-prescriptive distinctions—or simply to recognize that they were already blurred to begin with.

### 2.3 The Maximal Account of Adjudicability

As we have seen, when talking of human rights laws there is a tendency to think of them in one sense as merely codifications of what we already know to be normative prohibitions; a sort of more explicit reminder through legal praxis of what we know to be impermissible. This is the approach that those in the natural law tradition would encourage.<sup>86</sup> On the other hand, there is the view of human rights laws that is in keeping with the legal positive tradition, one which serves to limit them to only those rules that can be identified through a socially descriptive, morally neutral process—say by treaty ratification—whereby the content of the law itself is undetermined until the question of its pedigree is settled.<sup>87</sup>

Neither of these approaches to human rights law has proved satisfying. The former lacks sufficient institutional gravitas, and the latter lacks sufficient normative force for motivating a widespread sense of legal obligation. Fortunately, despite a long habit of philosophical discourse juxtaposing these two main approaches, there is no real reason to think that they are mutually exclusive. The fact that in the normative domain there are demands for prohibitions against certain types of immoral actions does not preclude the prescriptions of the descriptive domain that say in order for a law to be law it must satisfy a set of secondary norms or rules of

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<sup>86</sup> See, John Tasioulas, “Towards a Philosophy of Human Rights,” *Current Legal Problems* (2012).

<sup>87</sup> See, John Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

recognition. There is no contradiction between these views. And we might further say that it is only when the two approaches merge that the law gains its fullest force and legitimacy. In other words, it seems clear that the *right* sort of law made the *right* kind of way can compel compliance far better than the *wrong* sort of law made the *right* kind of way (a normatively insufficient law with the right pedigree), or the *right* sort of law made the *wrong* kind of way (a normatively sufficient law with little or no pedigree at all).

So then the question becomes: what *is* the right sort of human rights law and what is the right way to make it? In light of the inadequacies of the present understanding based in positive consent through treaty ratification, it is worth considering the possibility that: (1) the better conception of human rights law is a constitutional conception, and (2) whether human rights norms can be seen as constitutional norms for the emerging legal practice. Such an account allows for the possibility that the status of legal human rights has remained elusive because they have yet to reach full fruition. Legal human rights remain for the most part in a “constitutional space” between what ought to be and what may be; a space that every legal system had to pass through in order to arrive at what it is. It is where the fundamental shift takes place from the moral and political realm to a point where autonomous legal reasons can hold sway in the determinations of basic human rights claims. A space where the shift takes place from what is not-yet-law to what is law.

The constitutional space is where constitutional norms become salient and where institutions emerge to implement those norms, allowing the concept of “constitutionality”—which will be the subject of the remaining portion of this chapter—to take root. It is, of course, an inexact process; it is impossible to mark its beginning or its precise moment of arrival. It is also a place where the normative and the prescriptive are indistinct. Whatever it is that makes a

Bill of Rights become a *legal* Bill of Rights is what makes emergence from this space possible. Of course the demonstrable existence of legal systems around the world, and in particular democratic constitutional systems, shows that such emergence is possible. Once sufficiently established, constitutional norms become recognized as legal norms. Indeed, they are *superior* legal norms of the sort that create a demand for adjudicability. The question is whether human rights norms—for instance, those found in an International Bill of Rights—could potentially be seen as constitutional norms that give rise to an international legal system of human rights in the same way.

To extend this understanding to the practice of legal human rights requires a recognition of the jointly sufficient conditions for constitutionality, the satisfaction of which would permit for constitutional norms to be seen as superior law over state actions, which could then serve to render them the appropriate bases for the adjudication of claims by individual rights holders. If the norms found in the human rights instruments, which taken together offer a Bill of Rights, could be seen as superior—or constitutional—legal norms subject to adjudication in this way, then their practice would become, *a fortiori*, a legal practice that properly serves its own aims because only then would human rights claims become adjudicable for all people wherever they are situated. With this in mind, I offer the following account for consideration:

*The Maximal Account for Adjudicability:* Human rights are legal rights for all those who claim that a state action has violated the rights granted to all human persons recognized in the practice of human rights and formalized under human rights treaties, regardless of whether or not the state is a signatory to that treaty. Jurisdiction on this view is universal in the sense that because human right norms are constitutional norms for the international legal practice, they are superior law over all other laws. Claims in light of the superior law can be raised and adjudicated

as a legal claim of right in any court of law or other forum available for the authoritative adjudication of disputes.

The argument for this conclusion is obviously more complicated (and far more ambitious) than what the Modest Account has provided: first, it requires us to address the meaning of constitutional norms constitutionality in order to determine whether and to what extent human rights norms in the existing practice can be understood in this way; second, it requires an explication of how legal claims could be sufficiently addressed to and determined by an adjudicative body vested with the authority to hear such claims. This is no small task. However, in taking the universal aims of the human rights legal practice to be a centrally important purpose of the practice, the hope is that by exploring the elements of constitutionality more fully and considering the extent to which the established interpretive practice of human rights law can satisfy them, we will not only have clarified this practice as it stands today and but also helped to chart a better course forward.

#### 2.4 Defining Constitutional Norms

When trying to define constitutions and constitutionalism, there is no obvious starting place. We might for instance ask: What does a constitution look like? Is it a thing or a process? What is its purpose and function? Where does it come from? Who does it serve? We could ask all these questions, but we won't find easy answers because, as we will see, paradoxes abound and the dangers of infinite regress lurk in the shadows. There is also no simple set of necessary and sufficient conditions for constitutions. We will have to be satisfied with a list of features and functions that historically have been taken to demonstrate constitutionalism—all the while understanding that no constitution need satisfy all of those conditions. As Daniel Walker puts it,

this may very well be a matter of finding what can be “more-or-less” taken as constitutional, as opposed to an “all-or-nothing” determination.<sup>88</sup>

So what is a constitution in the sense that appropriately placed judges might take it as a basis for settling legal claims in a specific case? To start we might ask what it is that people ordinarily picture when they think of a constitution. In all likelihood what they picture is an official-looking document, one that contains declarative and authoritative language that sets forth how a particular organization will be governed, and what sorts of commitments and principles it intends to adopt.

This is a good place to start. But does a constitution really have to be a *written* text? John Gardner has contended that it does not. Indeed, Gardner thinks that written constitutions are not the normal case; that constitutions can never be legislated into being; and he doubts whether they can ever be fully contained in canonical formulations.<sup>89</sup> So what does Gardner think a constitution is then? He offers, in keeping with H.L.A. Hart, that a constitution is simply the set of rules without which there would be no legal system.

A constitution is a conceptual necessity of every legal system. In every legal system there are rules that specify the major institutions and officials of government, and determine which of them is to do what, and how they are to interact, and how their membership or succession is to be determined and so forth. Without some such rules...there is no legal system.<sup>90</sup>

On this view, if a legal system exists, then necessarily a constitution exists. However, this constitution need not necessarily be found in a single master text with “Constitution” printed at the top. It is whatever ultimate rules exist to regulate institutions of inherent power, where inherent power (in the domestic sphere) is understood as the power that each branch has that

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<sup>88</sup> Daniel Walker, “Constitutionalism Beyond the State,” 56 *Political Studies*, 519-543 (2008), p. 523.

<sup>89</sup> John Gardner, “Can There Be a Written Constitution,” *Oxford Legal Studies Research Paper* No. 17 (2009), p.16

<sup>90</sup> *Id.* at 1; *see also*, Hart, *The Concept of Law*, *supra* note 46.

cannot be repealed by another institutional branch. Some theorists have referred to this understanding of constitutionalism, as “small ‘c’ constitutionalism.” It says that a constitution is the ensemble of secondary rules that organize law-making institutions and processes in a legal order.<sup>91</sup>

This is as close to a necessary condition for constitutions as we will find. It provides a functionally descriptive understanding of constitutions. It is true of all constitutions that they function as the secondary rules for organizing law-making institutions, and it is also true that if a legal system exists then constitutional norms will be found there. But this can at best be thought of as a threshold test since a constitution is also much more. For one thing, it is also a “law.” Indeed, it is generally seen as a *supreme* law, a law against which all subsequent rules of that social organization will be measured.

In this respect, constitutions as supreme law, as the legal norm that overrides all other laws, also sets in motion a process for administering a new standard—the standard of what counts as constitutional and unconstitutional for that system. It further can be said to create a political order, complete with a designation of powers to specific branches of the institution, the practice of which, if constitutionally compliant, can be said to be a legitimate exercise of political power.<sup>92</sup>

Now we can see how other features of constitutions become salient in order for the legitimacy of that political order to be stably maintained. Constitutions should be pervasive and perpetual in the sense that they do not require continuous consent.<sup>93</sup> Constitutions should be resistant to change. That is, while some changes are possible, the ultimate rule of recognition will

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<sup>91</sup> Besson, *supra* note 62, at 385.

<sup>92</sup> *Ibid.*

<sup>93</sup> Michael Doyle, “The UN Charter – A Global Constitution” J. Dunoff and J Trachtman (ed.s) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge Univ. Press, 2009), p. 114.



be *irrevocable* on penalty of destroying the legal system that depends upon it for its existence.<sup>94</sup>

There should also be formal procedures developed, through the implementation of judicial review, for determining constitutional compliance. And, finally, there should be evidence that the members of the social organization, those governed by the legal system, accept the rights and obligations of that system and thereby submit to its authority.

Let us grant for the moment that the above understanding of what can still be thought of as small “c” constitutions, is at least provisionally correct. In sum, constitutions are widely accepted norms, including rules of recognition, that set forth the criteria and processes for the creation and maintenance of legitimate and stable legal systems. We can now ask some further questions, such as: How do they come to be? And if constitutions are supreme laws, how do they actually become supreme and hence authoritative?

Herein lies a potential paradox. But first a point of clarification is necessary. Thus far I have referred to constitutions as ultimate rules of recognition for social organizations. Such organizations could, presumably, be of any sort that comes together and makes rules for its governance and membership. For instance, organizations ranging from trade unions, to universities, and even to book clubs, could all have constitutions in the sense that we have so far described. But of course, the sorts of constitutions we will be most interested in are of a much grander scale. The constitutions of legal institutions such as nation-states and even, as I will suggest, the constitution of the legal system of human rights, will have a far more vast and diverse membership. So while considering how constitutions can come about, and on what grounds they can be deemed as authoritative it would seem prudent to utilize a more limited scope. Presumably, the constitutions of democratic nation-states can provide the best example. For one thing, we have reason to think that they exist in the sense that (at least some) nation-

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<sup>94</sup> See, Gardner, *supra* note 89.

states have legitimate and authoritative legal systems constituted by them. And of the nation-states generally considered to exist, the ones taken to be most legitimate in terms of widespread acceptance are those of constitutional democracies. So in order to reason analogously to constitutional norms for the system of human rights, we must first determine how it is that the constitutions of democratic nation-states come to be and gain supreme authority.

There is both a paradox and a problem of infinite regress surrounding supremacy and authority question in such constitutional cases. First the regress problem: if the constitution is a supreme law that grants authority and recognition to other laws (the “primary rules,” on Hart’s view), then what is it that makes the constitution (the “secondary rule”) supreme and authoritative? If there are rules and norms that the constitution must satisfy, say, tertiary rules, in order for them to become supreme and authoritative over primary rules, then they are no longer supreme and we would need to ask what grants authority to that (tertiary) rule? And so on and so forth for the authority-granting nature of the tertiary rules and beyond. This leads us to ask whether there is ever a legal norm that has no other legal norm to which it is subject; whether there is ultimately *any* legal norm that is constitutionally superior and authoritative in the sense that no other norm is constitutional for it. In searching for an answer to what makes norms ultimately and constitutionally authoritative, in the sense of “first principles,” some theorists—Hart and Kelsen most notably—have offered that this authority comes about as a matter of custom or basic (*grund*) norms.<sup>95</sup> That is to say that the rights sorts of authorities, or law-applying officials, simply come to treat them as authoritative and so they are, in large part, because they are constitutive of the kind of practice that is in question.

Now, we might be tempted to say that the Kelsen-Hart solution is unsatisfactory, since it

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<sup>95</sup> Hans Kelsen. *General Theory of Law and State* (New York: Russell & Russell, 1945/1961), pp. 110-111; and Hart, *supra* note 46, at 105-107.

seems to simply skirt the issue of finding first principles, and that what is needed for the authoritative creation of a constitution in a democratic nation-state is something else, perhaps it is a type of democratic action. However, even in this case it is not clear that such an alternative can avoid the regress problem, since it is not clear what makes democratic action properly authoritative absent a superior law that directs it. This approach further introduces a paradox. In order for democratic action to serve to make a constitution authoritative—and avoid the regress problem—there must be a properly constituted and distinct legal community whose membership could make democratic action authoritative (and even possible), which requires constitutional norms of membership for proper democratic action.

To avoid these problems, we could take it as *a priori* that democratic actions just are authoritative. For example, there might be instances where people agree spontaneously and collectively to participate in a democratic process (perhaps accepting the process from an "internal point of view" in Hart's terms), and so thereby agree to be bound by the determination of the majority. This could, on the face of it, grant a form of authority for majoritarian pronouncements. But is this how constitutions are typically made?

In order for constitutional authority to be established democratically *sua sponte*, there would have to be a distinct body of members, a recognizable group of individuals, whose assent to the majoritarian process is in evidence. Without being too divisive here, we could reasonably ask how that might come about in the case of our example of nation-states. As Hannah Arendt insightfully recognized in addressing the American and French Revolutions, there is a "vicious circle" present at such foundational moments. Those who get together to *constitute* a new government, to lay down "the fundamental law, the law of the land or the constitution which, from then on, is supposed to incarnate 'higher law' from which all laws ultimately derive their

authority” are themselves unconstitutional in that they have no authority to do what they have set out to achieve. According to Arendt, “the trouble was—to quote Rousseau once more—that to put the law above man and thus to establish the validity of man-made laws, *il faudrait des dieux*, ‘one actually would need gods’”<sup>96</sup>

It would, of course, be far easier in the case of smaller social organizations where all founding members could participate in an initial democratic and creative action, and joining members could demonstrate their assent merely by joining. But can it be required that everyone who is a member united under the constitution of a nation-state has a democratic say in its initial creation? Or at least to have been invited into the deliberations even if they decline the opportunity? The answer, at least in the historical tradition of constitutions for democratic nation-states, is clearly, no. So, unless we want to admit that there are no authoritative constitutions in democratic nation-states, we had better not say that an all-inclusive democratic action is necessary to bring them about and make them authoritative.

Indeed, typically, constitutions of the sort we have recognized as authoritative for democratic nation-states have been made by delegations; they are usually crafted by a diverse committee of representatives who work together, sometimes laboriously, debating the principles and limitations of good governance and the basic set of rights that all citizens ought to be entitled to possess such that they can delimit the powers of the state. In short, because constitution-makers cannot bring every member to the table, they seek out the sorts of legal principles and rights that are either already widely accepted as a matter of custom, or that represent principles that no reasonable person could reject. This is how they come into being. What makes them authoritative is the actual or tacit acceptance by the members of the community (primarily judges and other officials). It is the evidence of a peoples’ willingness to be so bound, presumably

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<sup>96</sup> Hannah Arendt, *On Revolution* (New York: Penguin Press, 2006), p 176.

because the crafters got it right—or *at least right enough*—that grants the constitution’s authority. We can now think of this sort of authority as arising from a type of big “C” constitutionalism.” Big “C” constitutionalism can be thought of as small “c” constitutionalism but with more elaborate substantive and procedural demands that are explicitly crafted in order to set out such things as a clear and definite separation of powers, the inclusion of democratic principles, the promise of fair and equal future participation, the guarantee of due process of law, and an array of other sorts of fundamental rights protections.

Moreover, the constitutions of nation-states frequently arise out of historical moments of conflict and crisis driven by excesses of state power that result in oppression, persecution, degradation, and disenfranchisement. They are written in a responsive spirit that combines revolutionary commitments to the rights of individuals over and against the exercise of state power and the resolve to formally institutionalize those commitments. Big “C” constitutionalism then contains a specific substantive content that is primarily designed to constrain tyranny. It says, in effect, “never again,” and offers a path forward with the necessary institutional restraints. It is in the wake of such historic moments of clarity that the willingness of individuals to accept the big “C” constitutional provisions as authoritative is most strongly in evidence.

Samantha Besson views the differences between big “C” and small “c” constitutions, in terms of “thick” and “thin” constitutionalism. Traces of constitutional law can exist in a thin (small “c”) and nonpolitical sense, according to Besson, without talk of *constitutionalism* at all—although the reverse is not true. Thick constitutionalism or big “C” constitutionalism, contains the thin conception of a constitution as the collection of secondary norms that provides the institutional terms of a legal system, but which also includes further formal and material elements. In this way, a constitution needs to enact specific provisions for its stability, resilience, and

supremacy—such as a definition and delegation of governmental powers, procedural protections against easy revisions by ulterior legislation over which it has priority, and a process for determination of compliance. But it must also contain sufficient rights protections for citizens against the exertions of state political power.<sup>97</sup>

So what makes such constitutional norms authoritative such that we can avoid the concerns about regress? Is it enough that the features we have been describing obtain? In some sense this is enough. If the legal framework, process, and order that it constitutes do in fact obtain, then the constitution is authoritative for that framework, process, and order. Actions of the constituted legal institution will be either constitutional or unconstitutional on the terms that it sets forth, a process for that determination is inherent in that determination, and a political order will be created with its legitimacy dependent on that determination. But the inquiry might not be fully settled there; in keeping with our earlier predicament this still seems to say only that constitutions are constitutional in the supreme and authoritative sense when they are taken as constitutional by the law-making institutions that are bound by them. This, however, still doesn't explain *how* they get this way.

To be effective, the substantive and procedural constitutional standards need to be at least *initially taken up*; they need to be made effective in a practice that instantiates them and perpetuates them. For this to happen, a constitution (or constitutional norms more generally) requires widespread acceptance of the rights standards and institutional parameters that they set forth. As we have seen, explicit unanimous or majoritarian participation in the creation of a constitution is not required to achieve such acceptance. A representative committee or delegation can carefully craft a document that aims at the sorts of principles and protections that can gain

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<sup>97</sup> Besson, *supra* note 62.

widespread acceptance. But how does acceptance—or a willingness to be bound by the supreme law of the constitution—come about? And *whose* acceptance is most relevant?

Big "C" constitutional norms for the most part do not bind the actions of individual citizens; they are designed to protect them. So when I say that what makes constitutions authoritative is dependent on acceptance of participants' willingness to see the constitution as binding and genuine law, I do not mean that they are to see themselves bound by the law in the usual sense—that is, in the sense of the law being authoritative *over* them. But the law of the constitution does bind them in quite a different way. Their acceptance of the constitutional norms binds them together. Constitutions constitute *us* as a people, in a collective "we," who have consented, either explicitly or tacitly, to be joined together in a legal and political framework based upon the terms constitutionally set forth.

This distinction is important, since acceptance of constitutional norms as authoritative does not give direct obligations to individuals, the terms upon which they might be widely accepted are far less stringent. Laws that obligate individuals to conform to a specific rule of conduct invite far more objections and considerations of countervailing concerns, they require a more delicate balancing of interests. But acceptance of constitutional legal norms requires only consideration of whether those norms are right and necessary for the establishment of the sort of stable, perpetual, and just legal institution that could generate "uptake"; that is, they need to be the right sorts of legal and political norms which many different individuals can jointly accept.

Constitutions then, to be sufficiently established, can be seen as serving a specific function in that they determine the legitimacy of state action; they provide the necessary constraints on expressions of political power. Constitutional norms are supreme, unifying, perpetual (in that they do not need constant consent), irrevocable (on penalty of dismantling the

legal system on which it is based), sufficiently stable, and widely accepted. Constitutional norms are secondary norms that set forth a process for the determination of legitimate state action, and create a legal and political order with the necessary protections of individual rights. But acceptance, where the most robust sense of big “C” constitutionalism is concerned, requires formal enactment of the right sorts of constitutional terms that individuals could (and would likely) freely accept. It is not enough that legal officials accept them, there must be a general will toward acceptance expressed by members of the community constituted by those norms. In this regard I agree with Lon Fuller that, “to be effective a written constitution must be accepted, at least provisionally, not just as law but as good law.”<sup>98</sup> Basic social rights, procedural and due process protections, limitations on government force and power, these are the sorts of examples of good laws that can engender the “willing convergence of effort we give to moral principles in which we have an active belief.”<sup>99</sup>

Once a constitution is cognizable in this way, courts play an important role in ensuring that its conditions are met. Constitutions by their nature require legal interpretation; they set forth a process of law-application that requires ongoing determinations about what counts as constitutional and what does not. In this regard, judicial interpretation is essential to determining constitutional meaning. Questions of constitutionality will arise and need to be settled, and each new decision will bring the constitutional norms into more complete relief. In this sense, constitutional norms are not fixed in the past but rather emerge through practice.

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<sup>98</sup> Lon Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” 71 *Harvard Law Review* 630 (1958), p. 642.

<sup>99</sup> *Ibid.* Also, for a very insightful understanding of how acceptance of basic fundamental rights came about in Western culture, see, Lynn Hunt, *Inventing Human Rights: A History*. (New York: Norton & Co, 2007). Hunt details the extraordinary unlikelihood of human rights development: pointing out that recognition of the basic autonomy and well-being of other human beings was not a obvious tenet of societies built on slavery, colonialism, and natural subservience. She argues that a new capacity for empathy (perhaps due to the growing popularity of the novel) began to develop in this time period, which made the equal possession of human rights seem “self-evident,” despite all social and cultural evidence to the contrary.



This is in part what I take to be Gardner's point when he says that the written constitution is not only nonessential but is canonically impossible. Of course, others take a different view, particularly in the United States legal tradition. They argue that this sort of interpretive practice not only violates the separation of powers, but it also makes the constitution itself a "dead letter" whenever constitutional legal practice moves the norms beyond their original form. My view says differently; it says that the adjudicative practice is essential to the settled meaning of constitutional norms. Because the initial drafting of constitutional norms is necessarily under-inclusive and non-democratic, and because constitutions require widespread acceptance in order to make them authoritative, they need to offer the right sorts of broad commitments and fundamental rights protections that people will not only want to be joined under, but also will remain so joined. Judicial interpretive practice can best respond to the ever-evolving demand of individual concerns while remaining true to the foundational commitments of constitutional norms that brought them together in the first place.

## 2.5 A Brief History of Human Rights Laws

In light of the above understanding of how constitutional norms can take authoritative form in a manner that can provide a superior law against which state actions can be measured, it is necessary to consider in what way human rights norms have arisen and whether or not they are good candidates for constitutional understanding. When the United Nations was created in 1945, its Charter established the goals of protecting future generations from a return to the "scourge of war" that had "brought untold sorrow to mankind" by reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," and by establishing conditions under which justice and respect for

the obligations arising from treaties and other sources of international law can be maintained.”<sup>100</sup>

Upon its creation, the U.N. established a committee, called the Commission on Human Rights, whose task it was to write an international bill of rights that would define the fundamental rights that belonged to every member of the human family no matter where in the world they resided. That commission, chaired by Eleanor Roosevelt, consisted of 18 members taken from various nations and representing a wide range of political perspectives.<sup>101</sup> The commission spent over two years drafting what would ultimately be called the Universal Declaration of Human Rights.

The Declaration’s Preamble recognizes “the inherent dignity” and “equal and inalienable rights” of all people and asks Member States to pledge themselves to “the promotion of universal respect for and observance of human rights and fundamental freedoms.” The Declaration goes on, in the form of Articles 1-30, to set forth a list of basic rights and freedoms, falling into four broad categories: (1) *Basic rights of individuals*—including the right to life, liberty, and security of person; the right to equal treatment under the law; the right to be free from slavery; the right to be free from torture and degrading treatment; and the right to be recognized as a person before the law, the right to be free from arbitrary arrest and detention, and the right to due process before the law. (2) *Civil and political rights*—including the right of freedom of movement; the right to seek asylum; the right to a nationality; the right to own property. (3) *Political and Spiritual Freedoms*—including freedoms of thought and conscience; freedom of opinion and expression; and the right to peacefully assemble. (4) *Social, Economic, and Cultural Rights*—

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<sup>100</sup> United Nations Charter, Preamble, 1945.

<sup>101</sup> Nations represented included: Australia, Belgium, the Byelorussian Soviet Socialist Republic, Chile, the Republic of China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, the United Kingdom, the United States, the Union of Soviet Socialist Republics, Uruguay, and Yugoslavia. For a detailed history of the creation of the UDHR, see, Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: Univ. of Penn Press, 1999).

including the right to work; the right to equal pay for equal work; the right to a reasonable standard of living, rest, and leisure; and right to a free education.

The General Assembly of the U.N. adopted the Universal Declaration of Human Rights (UDHR) on December 10, 1948. Due in large part to growing tensions in the political climate of the Cold War, what had been designed at the outset as an International Bill of Rights became, rather, a declaration of aspirational goals for the world community whose legal effect was immediately brought into question. While the UN had tasked the commission to arrive at a full and complete definition of the “fundamental freedoms” and “human rights” cited in the Charter—which was binding on all Member States—the declaration itself did not institute any enforcement provisions for the rights and obligations that it set forth. Thus, as Lynn Hunt, has pointed out, in the decades that followed the UDHR’s adoption, the importance of defending human rights “took shape in fits and starts,” it “initiated a process rather than representing its culmination.”<sup>102</sup>

Nonetheless, the UDHR set forth a process that once set in motion has made slow but steady progress in keeping with the aspirations of its authors.<sup>103</sup> While the provisions of the UDHR are not, per se, legal provisions, they have eventually been widely accepted and adopted enough to be granted with the imprimatur of customary law. And its legal effectiveness doesn’t end there. As we have seen, numerous treaties aimed at the enforcement and adjudication of the rights set forth in the UDHR have followed, the two most important of which are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Both were submitted for approval in 1953, however, the Covenants did not receive sufficient ratification until 1973. Between these two Covenants, most

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<sup>102</sup> See, Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton & Co, 2007), p. 207

<sup>103</sup> See, Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

of the obligations outlined in the UDHR have been enshrined in the form of treaty laws, which have been ratified by about 75 percent of the world's countries.<sup>104</sup> These treaties further establish legal obligations among ratifying countries to implement international rights within their own national legal and political systems.

A proliferation of further human rights treaties then followed suit, including the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). As we have seen, each of these Conventions sets forth a separate monitoring commission for the investigation of treaty violations. The Human Rights Council and the Office of the High Commissioner for Human Rights also serve to address human rights. According to Ann Bayefsky, "Every U.N. member state is a party to one or more of the six major human rights treaties. Eighty percent of states have ratified four or more"<sup>105</sup>

In 2002, the Rome Treaty created the International Criminal Court at the Hague, which was authorized to prosecute genocide, crimes against humanity, and war crimes at the international level. Regional Court systems have also been developed, including the European Court of Human Rights, The Inter-American Court of Human Rights, and the African Court of Human and People's Rights, each with their own regionally negotiated human rights instruments styled upon the UDHR, narrowing the scope of those rights or supplementing them, but largely adopting the basic individual rights set out in the UDHR. However, the most expansive progress in making international human rights law legally effective has come from the incorporation of

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<sup>104</sup> James Nickel, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Spring 2014)

<sup>105</sup> Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, NY: Transnational, 2001), p.18.

these norms into the legal systems of individual countries, either by the formulation of new and revised constitutions, or the creation of domestic human rights acts and human rights commissions.<sup>106</sup>

## 2.6 Moving from the Modest to the Maximal Accounts for Adjudicability

Given the above evidence of abundant treaties, covenants, courts, and commissions tasked with the legal protection of human rights, it seems at least initially plausible that there exists an emerging international legal system based upon human rights norms. Whatever one thinks of this system—and adjectives like truncated, inefficient, ineffective, bloated, cumbersome, and disorderly might come to mind—there is nonetheless an identifiable human rights legal practice at work in the world today. So in going back to our earlier understanding of the sufficient conditions for constitutions and constitutionalism, we can turn to our first criteria, the threshold test for the mere existence of constitutional norms; that is, wherever we find a legal practice we will find that an ensemble of secondary constitutional norms necessarily exist. There exists a human rights legal practice, thus by necessity constitutional norms exist; these are, in Gardner’s words, “norms that place constitutional limits on what various states and political institutions, including courts, can do.”<sup>107</sup>

However, this may seem like a bit of a cheat on the way to constitutionalism; it says in essence that there are constitutional norms here because there exists a legal practice for which the norms are constitutional; which put another way seems to say there is constitutionality because there is constitutionality. So we need to explore further the criteria set forth for a thin, (small “c”) conception of constitutional norms. And in this case, the norms found in the UDHR

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<sup>106</sup> Nickels, *supra* note 2. *See also*, Oona Hathaway, *supra* note 41.

<sup>107</sup> Gardner, *supra* note 22, at 5.

in conjunction with the U.N. Charter can be seen as satisfying this criteria. The norms are *supreme* (they are not inferior to other norms); they are proving *pervasive* and *stable*; they are *irrevocable* on penalty of dismantling the human rights legal structure that exists by virtue of those norms; and they set forth a standard, and thus a process, for a determination of what is constitutional and unconstitutional; that is, they set forth a standard for what counts as the legitimate exercise of state political power and what is not.<sup>108</sup>

Thus, the Modest Account's demonstration of small "c" constitutionalism appears easily discerned. For instance, for the signatories of the human right treaties, there are identifiable rules of recognition for an international legal regime (as well as other regional and national regimes offering human rights protections). These instruments work to explicitly establish a legal practice with second order rules that determine measurable restraints on state actions. These constitutional norms also determine the contours of the legal system, i.e., by setting forth the jurisdiction of the ICC and other courts, and setting forth their rules of procedure. For signatories of human rights treaties and conventions, human rights law is supreme law and state actions are subject to review by authoritative decision-making bodies. The rights of individuals against state signatories are thus taken to be more than mere moral rights; they are legal rights subject to adjudication. Furthermore, the political process is at one remove, the parties are deemed equal before the law, and due process protections and rules of evidence are implemented to ensure fair and just outcomes.

What makes the Modest Account, on small-c constitutional grounds, possible is that the elements that make up a legal system are readily discoverable. We are merely describing what is there already, and recognizing the secondary rules that make its existence possible. But given this description, we can further ask what gives rise to the authority of these constitutional norms?

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The answer to this point has been “consent.” States explicitly grant authority to these norms by ratifying the human rights treaties and submitting to the jurisdiction of authoritative bodies, which are charged with hearing claims by parties regarding the abrogation of rights under these same treaties. But the central question of this work has been why we should allow the inquiry to end here, particularly when this understanding of the practice has been shown to be inadequate by the standards of the practice itself; when victims of human rights violations by non-signatory states are still prevented from legal recourse for those violations. Why not take evidence of state consent to be the beginning rather than the end of our understanding of the legal nature of human rights norms? Why not take the impetus of the small “c” constitutionalism of the Modest Account as evidence that the practice is emerging toward the more robust constitutionalism of the Maximal Account?

To see how the Maximal Account could be supported, that is, how the emerging practice of legal human rights might create legitimate legal obligations for states that have not explicitly consented to treaty obligations, we must rely on considerations of thick (big “C”) constitutionalism. To begin with we can readily see that the UDHR is a negotiated declaration of rights codified and adopted in customary and more formal legal instrumentation. The declaration was created by a committee with worldwide representation, the members of which dedicated years to the consideration of and deliberation over a full set of human rights that could gain universal acceptance. Obviously, the depth of the rights protections found in the UDHR is significant and demanding, so the substantive content of rights protections satisfies an important demand of thick constitutionalism.

The norms found in the UDHR do include some further formal and material elements through the various rights protections (i.e., demands for equal protection under the law, and due

process and trial rights), but there is no inherent designation for the division of governmental powers. Constitutional human rights norms apply to states, and confine state action, but they have not as of yet established the full institutional framework of a system of government per se. There is no provision for appropriate checks and balances, and no definition of the inherent powers that must be reserved to specific branches of that government. And the cumbersome, overlapping, and somewhat ad hoc nature of the international legal practice of human rights bears this problem out.

The institutional intentions in the creation of UDHR, in furtherance of the UN Charter's mandate, was likely something entirely different from what actually resulted. It is unlikely that the proliferation of legal instrumentation in the form of various treaties was the desired outcome of what was crafted to be an international bill of rights. Had the impetus to protect human rights, which was so deeply and profoundly held in light of the atrocities committed during the Second World War, not fallen prey to the political machinations of the international climate in the latter part of the 20<sup>th</sup> Century, then the framework of human rights legal practice might have proved more unified and effective. Nonetheless, it should also be recognized that constitutional human rights norms were never intended to serve to unify the world into a single system of governance. Does this make them any less effective as constitutional norms? Likely, yes. But here I must refer back to my earlier admonition that constitutionalism can be seen as a "more-or-less" determination as opposed to one that is "all-or-nothing." Human rights norms, therefore, can be seen as less constitutional than domestic, state-constituting norms and yet still sufficiently satisfy the demands of constitutionalism.

It might further be noted that while the intentions of the Commission on Human Rights in 1948 were not to unify the world into a single system of governance, it *was* intended to unify the



world into a global regime of rights recognition and protection. As Mary Ann Glendon has discussed, in a chapter titled “The Declaration of Interdependence,” in her excellent book on the history of the UDHR, Eleanor Roosevelt, in her speech urging the adoption of the Declaration, “expressed the hope that it would take its place in the pantheon occupied by the Magna Carta, the French Declaration of the Rights of Man and Citizen of 1789, and the America Bill of Rights.”

Glendon writes:

Potentially the document she had nurtured into being would touch even more lives than those earlier milestones on humanity’s long struggle for freedom, for it aspired to affect every man and woman on earth...The Universal Declaration harvested the wisdom of these and other declarations, but it reflected the growing modern conviction that fundamental freedoms included “freedom from want” and that these freedoms must not be conditioned on membership in a particular nation, class, race, or gender.<sup>109</sup>

In keeping with Roosevelt’s aspirations, what these human rights norms have in their favor is a wide—and ever widening—acceptance in an international legal practice that makes them constitutionally authoritative. The early and determined efforts of the Human Rights Commission in 1948 to establish a cross-cultural set of basic human rights and freedoms have proven largely successful. The international state system certainly exists, centered on the governance provisions of the United Nations, and human rights practice have proven central to that governance. No state today may freely abrogate these demands without becoming the subject of political outcry and investigations by various international, regional, and national human rights commissions and watchdog groups into the claims that its actions are illegitimate and illegal. Human rights norms, as further evidenced by the numerous covenants and treaties that have been positively enacted by states, are today widely taken to be universal and inalienable. In this sense, constitutional human rights do constitute a collective subject, a “we, the people,” that includes, as the framers intended, the entire family of humankind. No state may

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<sup>109</sup> Mary Ann Glendon, *A World Made New* (New York: Random House, 2001), p. 173.

rightly claim that its treatment of any single citizen or group of citizens is exempted from human rights protections, and no treaty among states may abrogate the most central of these protections. And so, given this level of uptake, one might argue that the human rights norms are supreme and authoritatively constitutional in one very important sense of what it is to be constitutional, they are supreme and authoritative in the international legal *values* they dictate—that is, in the thick sense of constitutionalism. They are also clearly supreme and authoritative as legal constitutional norms on the Modest Account, in the thin sense of constitutionalism. However, whether these norms have sufficiently emerged from the “constitutional space”; from what ought to be legally cognizable according to the practice’s own founding principles to what legal rights have become effectively claimable; from the moral norms and values regarding the extent and reach of state power to actual legal limitation on all such power, remains an open question. I have argued that this is the direction dictated by the practice itself; that understanding these human rights norms as constitutional norms can better accommodate the aims of the practice than the existing understanding of law by consent; how, rather, as with all constitutions, widespread acceptance of the norms as constitutional is what pushes the practice toward its fruition as a legal practice. Progress in this regard is on-going and, I have contended, can be measured in terms of adjudicability.

If human rights norms can be seen as fundamentally constitutional in these ways, or will emerge in the manner that I have described, and thus become supreme and authoritative for the international legal practice, then (as with the constitutions of nation-states) judicial interpretation will be essential to making these norms effective for the practice, and for satisfying the adjudicability standard. To say that human rights norms are universal and inalienable is one thing, but to make human rights claims actionable for all humans is quite another. Without

judicial determination of those claims, without making the constitutional norms do the work they were intended to do, human rights norms will remain a mere set of aspirational goals and the rights they afford will be merely “manifesto” rights. In order to fully recognize the constitutionally authoritative nature of human rights norms, there must be an institutional commitment to bind state actors to those norms through a formal adjudication of claims made against them.

### 2.7 Opportunities for Authoritative Decision-Making on the Maximal Account

Presently, human rights violations are for the most part monitored and addressed through regional human rights courts, the various human rights commissions, and the work of UN special rapporteurs who have been vested with the power to investigate and issue findings in formal reports to the body of the UN. This approach satisfies some of the demands for the recognition of the claim rights of individuals; victims are granted a means to have their claims officially recognized, and findings of responsibility for violations offer an opportunity to publicly censure the perpetrators. Similarly, Truth and Reconciliation Commissions, tribunals convened to officially attest to wrongdoing and publicly demand their formal recognition, can be seen as effective in creating a space for victims’ claims to be heard. But many of these avenues for redress fall short in their ability to hold perpetrators legally accountable. If violations of human rights are to be understood as violations of *law*, they should be recognized as such in a formal legal proceeding with all the proper procedural requirements necessary for a full and fair hearing of the case on its merits, followed by the issuing of a reasoned legal opinion by neutral arbiters,

and when warranted should offer a judgment on how violations of human rights must be remediated.<sup>110</sup> These are the commitments we find essential to any concept of legal right.

As discussed, it is also important that human rights norms are taken to be universal and inalienable; that is, they apply, as the framers of the UDHR intended, to every member of the human family. But as Jack Donnelly points out, this does not necessarily mean that human rights are “timeless” and “unchanging.”<sup>111</sup> The meaning of these rights is dependent upon a practice that accepts and interprets them as universal norms. Nonetheless, the notion of the universality within the practice of human rights will be meaningless if the rights do not actually extend to everyone, regardless of what nation state or territory they reside in. These rights must be recognized as residing in each and every individual, and it has been argued here that the most meaningfully effective manner for this recognition—over and against the exercise of state power—is as a legal right.

The previous sections of this chapter have attempted to establish the first element of the adjudication condition for the Maximal Account of human rights as legal rights—the existence of a superior law against which state actions can be measured. But what about the second element: How is the adjudication of the superior law by an authoritative judicial body to come about? To begin to answer this question we can look first to what has already been

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<sup>110</sup> Other indicators of legitimate adjudicative bodies in this regard might include, but are not limited to demonstrations of the: (1) neutrality, special expertise, and acceptability of the members of the tribunal; (2) bipolarity of the dispute; the existence of a claimant (an individual or a state) and a defendant (a state or individual acting under color of authority); (3) transparency of proceedings; (4) guidelines for justiciable claims; (5) willing submission to jurisdiction or a demonstration of jurisdictional grounds (6) clear rules of evidentiary findings and other elements procedural due process; (7) statement of applicable laws and the grounds for their applicability; (8) utilization of principles of legal reasoning, including the demands of consistency with previous rulings on the same matter (*stare decisis*); (9) broad promulgation of decisions; and (10) possibility for review or appeal.

<sup>111</sup> See, Jack Donnelly, *Universal Human Rights: In Theory and in Practice* (Ithaca: Cornell Univ. Press, 2013). Incidentally, this understanding of universal human rights can answer the challenge put forth by Jeremy Waldron regarding whether Cro-Magnon man had human rights 10,000 years ago—the answer is clearly, no. See, Waldron, “Human Rights: A Critique of the Raz/Rawls Approach” *NYU School of Law Public Law Research Paper* No. 13-32 (June 2013).

demonstrated—in abundant cases across the globe one authoritative judicial body or another is already adjudicating human rights laws. In international, regional and domestic courts, judges are contributing reasoned legal opinions and judgments to the ongoing legal practice of human rights. These courts are interpreting the meaning of the rights found in the practice and issuing determinations of liability, and in some cases sentencing criminal violators. It is also the case that domestic regimes are hearing thousands of civil cases on political and welfare rights that amount to protections under basic human rights laws. In all the countries that have adopted the idea of a written constitution, a set of rights and liberties has been established along with a mechanism for their protection facilitated by an independent judiciary.<sup>112</sup> But, of course, it is not the case that all claims of individual human rights violations can be heard and determined today, and it is worth giving serious consideration to the question of why that is. Why should it not be the case that any court, wherever it is situated, is granted the jurisdiction to hear claims regarding violations of human rights laws?

Recent developments in the understanding of both transjudicialism and supranational jurisdiction have offered a helpful means for analysis. Both approaches aim at facilitating the ability for a cross pollination in legal reasoning around human rights law. Supranational jurisdiction considers the nature of overlapping legal jurisdictions where a domestic constitutional regime is also subject to jurisdiction in a supranational court system—and thereby subject to a system of superior norms. This is most evident in Europe where there is explicit multidimensionality to the framework of constitutional rights protections, particularly in the case of human rights.<sup>113</sup> Given the growing internalization of the human rights standards and

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<sup>112</sup> Lech Garlicki, “Cooperation of Courts: The Role of Supranational Jurisdictions in Europe,” *International Journal of Constitutional Law* (2008), p. 509

<sup>113</sup> In the European system there is a growing phenomenon of parallel constitutional protections afforded by national constitutional systems and the supranational courts of which there are two-- the European Courts of Human Rights

principles on the national, regional, and international levels, these standards and principles have developed in a cooperative tension between the national constitutional courts and the regional and global supranational courts. The body of human rights law that has developed is therefore largely a product of judge-made law. Transjudicialism refers to this development in the cross-fertilization of legal reasoning, from supranational to domestic courts, and between different domestic courts and as they look to one another to seek common answers to common problems.

Anne Marie Slaughter's attempt over the years to give both structure and force to the meaning of international law by focusing on the role of adjudication in domestic courts captures the essence of transjudicialism. Central to this understanding is the assumption that judges in domestic regimes have become more likely to build a transnational community of law. She finds that "by communicating with one another in a form of collective deliberation about common legal questions, these tribunals can reinforce each other's legitimacy and independence from political interference. They can also promote a global conception of the rule of law, acknowledging its multiple historically and culturally contingent manifestations, but affirming a core of common meaning."<sup>114</sup>

An understanding of the many facets of "transnational law" is at the heart of the inquiry into human rights legal practices, though the emergence of transnational law is of course not

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and the court of the European Union (The European Court of Justice). This of course also takes place under the umbrella of the global system overseen by the United Nations, and the determinations by the International Court of Justice at The Hague. *Id.* at 511.

<sup>114</sup> Anne-Marie Slaughter, *A New World Order*, (Princeton: Princeton University Press, 2004), p. 75. *See also*, Laurence R. Heifer and Anne-Marie Slaughter, Towards a Theory of Effective Supranational Adjudication, 107 *Yale Law Journal Law Journal* 273 (1997); Anne-Marie Slaughter, "A Typology of Trans-Judicial Communication," 29 *University of Richmond Law Review* 99 (1994); Slaughter, "International Law in a World of Liberal States", 6 *European Journal of International Law*. 503, 505 (1995); Slaughter, "Judicial Globalization," 40 *Virginia Journal of International Law* 1103 (2000); Slaughter, "A Global Community of Courts," 44 *Harvard International Law Journal*. 191 (2003); Slaughter, "Judicialization and Globalization of the Judiciary," 38 *Texas International Law Journal* (Special 2003); And for further considerations, *see*, Reem Bahdi, "Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts," 34 *George Washington International Law Review* 555 (2002); and Mark Toufayan, "Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age," 31 *Michigan Journal of International Law* 307 (2002).

limited to human rights concerns. The recognition of how transnational law is and has been dynamically developing across and among numerous “traditional” legal disciplines is essential to understanding the emergence of transnational legal human rights. Transnational law, as Carrie Menkel-Meadow has described it, is law that transcends or crosses borders (while perhaps not being formally enacted by states).<sup>115</sup> It is distinct, she finds, from international law in that it embraces newer, more fluid, and dynamic conceptions of lawmaking and legal influence. Whereas international law (inter-state law) is most commonly known through formal treaties or customary practices that bind states, as well as private law deals made across borders that are settled by international litigation in domestic courts or by private and quasi-private arbitration panels, the transnational focus is less conventional, and more experiential and multidisciplinary. “It seeks to trace how laws have influence, if not total power, in places other than those where they are initially enacted.” Harold Koh sees transnational law as a hybrid of international law and domestic law; blending them in a way that encourages the internalization of international law into domestic law.<sup>116</sup> Transnational law, in this sense, is a dynamic gap filler that moves the global legal practice forward. It is also, as Menkel-Meadow has shown, an undeniable reality of the future of law at the domestic level. The notion of a “local” practice of law is shrinking. When one looks at the state of affairs in contract law, tort law, employment law, intellectual property law, environmental law, banking, commercial, or corporate law, constitutional law; or even family law, trusts and estates, or property ownership, they will find a growing multi-national dimensionality to all of these practices. We are now, she writes:

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<sup>115</sup>Carrie Menkel-Meadow, “How and Why to Study Transnational Law” 1 *UC Irvine Law Review* 97 (2011), p. 103

<sup>116</sup> Harold Koh, “Why Transnational Law Matters,” 24 *Penn State International Law Review* Vol 24:4 (2006), pp. 744 & 749. *See also*, Beth Simmons’ understanding of the “International Civil Society” which considers the role of transnationally organized private actors in the legalization and implementation of the human rights regime and how NGOs in particular have come to gain enormous influence on policy issues and outcomes both domestically and internationally, *supra* note 103, at 32

...in an interdependent world of manufacturing, distribution, consumption, and promotion of creative actions, as well as, sometimes sadly, destructive sites of interaction. Even if national legal systems wanted to control and cabin all that happened within their borders it is now true, as the poet W.B. Yeats said, 'the centre cannot hold.'<sup>117</sup>

Vicki Jackson's stunningly exhaustive work, *Constitutional Engagement in a Transnational Era*, confirms much the same view. Through extensive analysis she points to the increasing overlap between the subjects of domestic constitutional law and the subjects of international law, while also cautioning that no single rigid theory—whether descriptive or normative—will suffice given the diverse situations of the nations of the world and their constitutional postures toward the transnational.<sup>118</sup> And this diversity of postures need not be lamented, rather it can be welcomed in an approach that is designed to appreciate the *process* of engagement and convergence; a process of inquiry and learning from other systems, deliberations, and reasoned public justification in response. She adds that domestic constitutions “will continue to be important foundations of state-centered public law; indeed, they may contribute to the development of more constitutionalized forms of international law, and they are likely to assume greater importance as expressions of national identity, even as they are being continuously informed by developments in international law and in other countries’ constitutional systems.”<sup>119</sup> Thus, one should expect to see more engagement and of greater variety.

In this regard, there is also abundant evidence of the globalization of domestic judicial reasoning that can be found in the frequent citing and referencing of international law. As Michael Kirby, Justice of the High Court of Australia, has pointed out, "once we saw issues and

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<sup>117</sup> Menkel-Meadow, *supra* note 115, at 100.

<sup>118</sup> Vicki Jackson, *Constitutional Engagement in a Transnational Era*, (Oxford: Oxford University Press, 2010), p. 273.

<sup>119</sup> *Id.* at 280



problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world's eye."<sup>120</sup> Reem Bahdi has analyzed the justifications and rationales that judges have invoked when using international law in their opinions and found five interdependent and yet discrete reasons, including: (1) concern for the rule of law, (2) desire to promote universal values, (3) reliance on international law to help uncover values inherent within the domestic regime, (4) willingness to invoke the logic of judges in other jurisdictions, and (5) concern to avoid negative assessments from the international community.<sup>121</sup> Bahdi offers extensive examples from courts around the world for each form of rationale. Some of these cases take the form of insisting on legal consistency with the state's international commitments in treaty ratification, however, in some cases treaty ratification proves irrelevant where reliance on universal norms is evident in the widespread acceptance of those norms internationally. For instance, in the following:

The New Zealand Court of Appeals, in *Tavita v. Minister of Immigration*, referred to the state's obligation not to separate children from their parents as a universal human right. The court did not indicate why the child's right not to be separated from a parent constituted a universal norm; instead, it substituted reference to the Convention on the Rights of the Child in the place of detailed analysis.

The Namibian High Court also looks to international law for guidance on the meaning of dignity and equality of persons. The court invokes the Universal Declaration of Human Rights and the African Charter of Human and People's Rights for guidance in determining how a society emerging from apartheid should promote the dignity and equality of all its citizens. The court does not explain, however, why the Universal Declaration or the African Charter embodied universal values

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<sup>120</sup> Michael Kirby, *Through The World's Eye*, (Sydney, NSW: Federation Press, 2000); cited in Bahdi, *supra* note 114, at 556.

<sup>121</sup> *Id.* at 556-557.

By looking to international norms to determine evidence of universal rights, judges are doing the work of the practice of human rights—not by questioning what it is to have a human right *qua* human, but rather by looking to what the practice takes to be a universal human right. Even in the United States, which has historically proved resistant to arguments on the basis of international law, the weight of international acceptance of a particular human rights norm has occasionally proven persuasive. Take for instance the case of *Roper v. Simmons*, which tested the constitutionality of capital punishment for juvenile offenders under the Eighth Amendment. There, the U.S. Supreme Court held that under the “evolving standard of decency,” the punishment was unconstitutional and cited as persuasive evidence that between 1990 and the time of the case (2005) only seven other countries in the world had executed juvenile offenders (Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, and the Democratic Republic of Congo) and that since 1990 all of those nations had abolished or denounced the practice, leaving the United States alone in the world in this regard. In his majority opinion, Justice Kennedy further noted that only the United States and Somalia had not ratified Article 37 of the United Nation Convention on the Rights of the Child, which expressly prohibits capital punishment for crimes committed by juveniles.<sup>122</sup>

While the Court in *Roper* recognizes that the weight of international law is not controlling over their decisions, Kennedy points out that “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>123</sup>

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<sup>122</sup> *Roper v. Simmons* 543 U.S. 551 (2005), §IV.

<sup>123</sup> Justice Sandra Day O’Connor apparently thought similarly, once stating: “The impressions we create in this world are important and can leave their mark ... [T]here is talk today about the “internationalization of legal relations”. We are already seeing this in American courts, and should see it increasingly in the future. This does not

It is this globalization of the judiciary, recognized as a network of domestic, regional, and international, that has produced the growing body of jurisprudence on human rights law, thus demonstrating how the practice of human rights is founded in the productive tension in judicial reasoning at both the supranational and national levels. Adjudicative processes, as John Rawls has pointed out, are the repositories of public reason because of their reason-giving and interpretive functions. Judicial decisions must be supported by legal reasons. Those reasons can then become open to further interpretation as to their warrant, but the state of the law in an emerging practice is entirely a matter of public reasons.<sup>124</sup> Interpretive practice, transjudicially, allows for the convergence of these norms, while permitting for argumentation regarding the proper consideration of particular regional, social, and cultural concerns, all the while ensuring the reach of human rights laws can become properly universal.

It seems relatively uncontroversial to claim that law has a necessarily adjudicative function and that legal claims of right must include the ability to settle those claims if they are to be meaningfully effective. I have attempted to show how the practice of international law of human rights should be viewed no differently. First, there is little question that this legal practice exists, and that as such there are identifiable constitutional norms that serve to establish this practice. They are found primarily in the UDHR, the treaties on human rights, the optional protocols to those treaties, and the regional conventions on human rights that determine the procedures for the exercise of human rights in regional courts. Second, there are also thick, big "C" constitutional norms at work in this practice that afford fundamental protections to

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mean, of course, that our courts can or should abandon their character as domestic institutions. But conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts—what is sometimes called "transjudicialism." *Remarks at the Southern Center for International Studies*, Sandra Day O'Connor, October 28, 2003.

<sup>124</sup> John Rawls, *PL*, at 131-140. Rawls, sees a supreme court as an "exemplar of public reason," because it is "one of the institutional devices to protect higher law." In this sense the Court serves to prevent the higher law from being eroded by what he calls "transient majorities." *See also*, 233-234.

individuals against improper expressions of state power. There is, in this sense, widespread acceptance of a collective “we” under the law, and that we share in these rights, which are inalienable and universal. Lastly, there exists a network of courts through the world—international, regional, national, and local—that are vested with the authority to hear legal claims of all sorts. What these courts lack, it is argued, is subject matter jurisdiction over the human rights of all individuals. But if human rights laws can be seen as properly constitutional over the state system, that is, if human rights can be taken as universal legal rights within the international legal practice, then all courts and tribunals wherever situated can obtain such jurisdiction.

On the Modest Account laid out above, the availability of proper adjudication of claims is assured and the reach of supranational jurisdiction is expected to expand as more states join the assorted U.N. Conventions on Human Rights, and submit to the jurisdictions of regional human rights courts. The satisfaction of the Modest Account is also evident in the determinations of domestic courts tasked with interpreting treaty provisions ratified by those states. On the Maximal Account, however, the aims of universality have traditionally been thwarted by a dependence on a legal theory that takes as its only rule of recognition the explicit ratification of treaty provisions. I have attempted to show why this understanding of human rights law is in error; that there is no reason to think that the meaning of “what the law is” in human rights practice must be bound in this restrictive way. The recognition of constitutional human rights norms as superior law in the practice, and the recognition of how courts can and do take human rights norms as binding or persuasive in their decision-making can offer a better path.

Finally, even in its most restricted sense, the adjudication condition on the Maximal Account can be said to be satisfied if we accept the following: (1) all persons (at least ostensibly) reside in a state, (2) states’ actions are bound by the superior constitutional norms of the legal

human rights system, and (3) that all states have judicial institutions—however functionally ineffective or recalcitrant—that are *capable* of hearing human rights claims. That is, even if one raises their legal claim to specific human rights before any court only to have them summarily dismissed, they are nonetheless in some sense making a *legal* claim of right.

So to the extent that the primary concerns over human rights violations are those where state actors are the perpetrators, given that the judiciary acts in an official state capacity (and perhaps given a modicum of judicial discretion), and if human rights are understood as legal rights, then there is always the possibility—however unlikely in some cases—of having one’s human rights legal claims recognized and effectively settled. The evidence of the developing and widespread commitments to human rights law, the recognition of human rights norms as constitutional norms for the practice, and the trend toward transjudicialism, can improve this likelihood. But what matters further here is that in those cases where the judicial body refuses to recognize claims of human rights, under the Maximal Account they would need to offer *legal* reasons for the derogation of those claims, and those legal arguments will then be open to review and scrutiny, as well as to rebuke and refutation, wherever warranted.

Consider our original examples of the cases of Mukhtār Mā’ī, and Jessica Gonzalez. In the *Gonzalez* case, the Inter-American Court of Human Rights held that Gonzalez possessed legal human rights, including among others the right to due process and the right to equal protection under the law. The Court found that these rights were violated when the police failed to take proper measures to implement the restraining order against her husband, a failure that resulted in the death of their three children at his hands, and when the legal system of the United States failed to recognize her claims. Her legal human rights claims were granted a hearing before the IACHR in keeping with the American Convention on Human Rights treaty, which

granted jurisdiction to the regional court over the actions of the United States. In accordance with the Modest Account for Adjudicability, there existed a superior law and an authoritative body available to settle her claims, and a determination was made through extensive legal reasoning on the basis of existing human rights jurisprudence that Gonzalez' legal human rights had been violated by her state system.

The case of Mukhtār Mā'ī, however, clearly falls outside the range of cases afforded by the Modest Account. The question posed in the introduction was whether in this case she had any human rights that could be argued as legal human rights. Her home state of Pakistan had not ratified relevant human rights treaties at the time, so there were no obvious avenues for appeal to UN Review bodies or regional human rights courts. I have offered the Maximal Account of Adjudicability as an alternative understanding of human rights law that, if sufficiently taken up, could offer a means for legal rights to extend in cases like this. If we take human rights norms to be constitutional norms for this legal practice—the existence of which is well in evidence according to the abundance of adjudication taking place under Modest Account—and this practice is taken to constitute a collective “we” of the entire human family such that all human persons have these rights—then each individual person has a legal claim to the rights afforded by the practice.

With that said, it seems unlikely that the simple recognition of the legal human rights of Mukhtār Mā'ī would have saved her from being subjected to multiple rapes as punishment for her brother's “honor” crime. Any tribunal that would issue such an order of punishment has not only failed to recognize an individual's basic human rights, they have fundamentally failed to see the person's humanity. So simply declaring that a person has legal human rights will likely not

prevent such acts from occurring. But in those cases where such acts are conducted under color of authority, it will permit for those acts to be deemed illegal violations of human rights.

Unfortunately, because this case fell outside the bounds of the present legal human rights practice, when the matter was brought before the Pakistani courts, the question was not whether Mukhtār Māṭ's human rights had been violated, but whether the several perpetrators could be successfully convicted of rape. One of the fundamental failures of the human rights legal practice in this case, and others like it, is that it allows for legal proceedings to be misdirected away from the systemic denial of basic human rights. Had legal human rights claims been afforded to her in those court proceedings, a legal determination would need to have been issued by the court on the merit of her claims, and that determination would in turn have been open to review by the appellate courts in Pakistan. These courts are authoritative bodies capable of issuing such a determination. When courts issue determinations, they do so in the form of legal arguments on the basis of autonomous legal reasons. So in this sense, at least one of the prongs of the adjudicability condition could be seen as satisfied.

There is, of course, no guarantee that any court will issue *well-reasoned* opinions on the basis of legal human rights. (One need only look to *Dred Scott v. Sanford* in the United States to see how an opinion might be wrongly held despite the availability of fundamental legal rights.) Nonetheless, the determination on the merits of the case along with its reasoning will be made open for review and evaluation. If such a determination denies an individual's human rights claim on the basis of what is itself a denial of human rights (for instance, in Mukhtār Māṭ's case, if her claims had been rejected by the court on the grounds that women are not equal under the law), then this state action will also be open to review and evaluation in terms of its legal grounds and measured against the body of human rights jurisprudence that is evolving and

emerging. And while we said at the outset that having legal human rights would not have saved Mukhtār Mā'ī, the judicial determination that such acts are illegal violations of human rights subject to criminal penalties and/or compensation for the victim may well save someone else.<sup>125</sup>

One of the benefits of the Maximal Account is that the practice of human rights law can be encouraged to converge jurisprudentially in way that is dynamic and ongoing. It recognizes that the law of human rights is a product of a process of interpretation, and that it is open to argumentation in light of various cultural and pluralistic concerns, and it is open to arguments regarding resource limitations and other relevant defenses and counter demands. What it is *not* open to is the derogation of basic human rights without sufficient justification, and it does not free states from the demand to demonstrate such a justification. Another benefit of this approach is that while it demonstrates a strong commitment to subsidiarity (which is itself beneficial), it also recognizes that, ultimately, human rights claims of action reside with the individual. Cultural defenses for the abrogation of human rights on the grounds of a collective will to action can therefore be seriously undermined by the claims of groups and individuals under that same regime who claim that the will is not collective *for them*. Because this approach works from the bottom up, beginning with the basic rights of the individual, making arguments that challenge the justifications for the policies instituted over them, this approach can help to avoid charges against the human rights legal practice that it is culturally imperialistic. Rather, the legal practice

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<sup>125</sup> Slaughter has offered a metric of effectiveness of courts that is derived from the power to compel a party to a dispute to defend against a complaint and to comply with the resulting judgment, but she also points out that “the effects of this power are felt *ex ante* as well as *ex post*”; that parties who are in a similar position to the actual litigants will be likely to comply with a court’s judgment “in the shadow” of prospective litigation. The power to compel an appearance before the Court of course arises from the ability of courts to harness the coercive power of the state, but supplementing and surrounding this coercion is the “power of legitimacy: an ability to command acceptance and support from the community so as to render force unnecessary.” Slaughter, “Toward a Theory of Effective Supranational Adjudication,” 107 *Yale Law Journal* 283 (1997), p. 283.



of human rights can be seen for what it is—a practice whose functional aim is to interpret and implement the basic constitutional principles of human rights that gave rise to it in the first place.

As indicated, the Maximal Account for adjudicability can at least be partially satisfied by the ability of legitimate judicial bodies in almost every corner of the world to issue authoritative determinations on the merits of human rights claims, *if* human rights law can be taken to be superior law. Toward this end, I have tried to show how a constitutional understanding of the legal practice of human rights could offer a familiar framework for how legal systems emerge toward this end; that is, from a series of normative commitments that becomes concretized in a legal practice that recognizes the constitutional norms of that practice as superior law. This superior law grants autonomous legal reasons, which are distinct from moral and political reasons, and can be utilized to determine the meaning and extent of the legal rights afforded by that practice.

I have also tried to show how the formation of the human rights legal system is sufficiently analogous to the formation of other constitutional legal systems to give good reason to think that it is still emerging from the constitutional space from which all such systems emerge. It remains true that there is nothing here to say that this legal practice will emerge successfully. I have simply offered some clarity on what success would look like and a means for measuring its progress. The human rights legal practice will continue to prove inadequate so long as it fails to satisfy its own principles by not being functionally effective at extending legal human rights to all human rights holders in accordance with the adjudicability condition. In other words, rights holders must be able to make legal demands on the basis of human rights, and the legal practice cannot privilege some rights holders over others in this regard. When the adjudicability condition is satisfied in the Maximal rather than the Modest sense, the benchmark

will have been achieved in terms of functionality and universality, and the human rights practice will be a successful legal practice that is in keeping with its own aims and principles.

The distance that still needs to be covered to achieve this end is the distance between the Modest and Maximal Accounts. This distance, and the injustice it poses, is what must be bridged in order to extend legal human rights protections in cases like that of Mukhtār Māʿī. I have indicated some ways that the adjudicability condition can be satisfied; for instance, through the universal recognition of the human rights norms as constitutional norms for the practice as superior law and the availability of judicial bodies for authoritative determinations of legal human rights claims. There are of course, numerous challenges to the Maximal Account and to the likelihood of achieving this level of adjudicability. But the primary obstacle is in overcoming objections to the universal jurisdiction of human rights law, which is to say that a move from the Modest to the Maximal account—which is a move away from the consent-based account of international human rights law toward something else—will be vociferously objected to by states who do not wish to be bound in this way. The next chapter will focus more specifically on the specious merits of the consent-based system, and deal with some of the other likely defenses against universal jurisdiction. It is to this challenges that we now turn.<sup>126</sup>

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<sup>126</sup> Presumably, the natural law theorist will have no challenge to the satisfaction of the adjudication condition in the way it has been presented in the Maximal Account. Their argument has always been that natural rights are legal rights which states are bound to respect. This account merely grants a positive legal schema for the assurance of those rights. It is in many ways a practice-based implementation of *jus cogens* norms writ large.

## CHAPTER THREE

### Toward a Universal Practice of Legal Human Rights

Presently, in the popular understanding of the practice of international human rights the recognition of an adjudicable legal human right and the binding legal obligation of states rests almost entirely on the question of treaty ratification. In the majority of instances, a state is said to be bound if and only to the extent that it has ratified the relevant treaty provisions. We have called this the “consent-based” theory of obligation. This understanding of the limits of human rights legal practice has posed a serious, even self-defeating, impediment to achieving the aims of the practice in protecting the human rights of all persons in need of protection from the violative actions of states. That is, the consent-based theory of the human rights legal practice prevents it from realizing its central universal directive.

This chapter will explore the motivations that generate a defensive or protective attitude of consent-based theories. Some of this theoretical attention will be a product of intuition, since very often defenses of this sort are often not explicitly offered because it is merely taken for granted that because this is the system as it is, it is thereby the only system justified. To the extent that there is an implicit claim in such an approach that is derived from positivist legal philosophy, this will be the first consideration to be addressed.

An alternative, more explicit, defense of consent-based theory has been offered on the basis of a principle of state sovereignty—and the attendant rights of states to non-interference and self-determination. Therefore, the final part of this chapter will be dedicated to this concern and will offer an alternative understanding of the role of state sovereignty in the emerging international order of the state practice. But first we will explore the normative demands that motivate the need to abandon consent-based theory, so that there can be no question that in order

for the practice of legal human rights to emerge properly and justly from what I have deemed its constitutional space, something more robust and adequate will be necessary.

### 3.1 A Natural Duty of Justice Requires Abandonment of Consent-Based Theories

We have taken consent-based theories to be arguing that the only relevant, binding, and determinative legal norms that exist at the international level are the legal norms to which states have explicitly agreed to be bound. Throughout we have noted several problems with this view, but it is worth revisiting them all. First, as a general matter this is an unorthodox view of legal norms. The binding nature of law typically extends beyond what individual actors agree to have binding over them. To put it another way, it is rarely an adequate defense against a law's imposition that an individual actor never explicitly consented to it. Second, understanding the human rights legal regime as so limited in its scope as to be actionable only against those states that have ratified the relevant treaties undermines the claims of the rights as "human" rights. Third, viewing the human rights legal regime in this way not only makes many human rights violations non-actionable, but it also undermines the binding nature of *jus cogens* norms (customary norms that make certain rights non-derogable, like the rights against slavery and genocide, and the right to be recognized as a person before the law). Fourth, if one accepts the consent-based theory, this indicates either that a current state's government can consent to bind future governments and their people without their consent, or that consent must be reaffirmed whenever there is a regime change. These problems serve to weaken rather than strengthen the relevant, binding, and determinative nature of international human right legal norms. If we understand legal human rights as creating binding and legitimate obligations only when and to

the extent and duration that states have agreed to be bound by them, then the legal practice of human rights becomes unwarrantedly anemic and destabilized.<sup>127</sup>

There has also been an assumption throughout this work that there is a duty to avoid approaches that are less effective at achieving the aims of a given practice in favor of those approaches that can prove more effective. This seems all the more crucial in a case where the practice centers around the adjudicability of human rights claims. Allen Buchanan has termed this the “natural duty of justice.” It is the “moral duty to support institutions that help achieve justice if they exist and to help create them if they do not.”

This duty is a natural duty in the sense that it exists independent of any obligations the institutions impose on us. In this sense, Buchanan argues that international legal human rights are necessary for the justifiability of the international order, or “state system,” which notably suffers from an extreme inequality in state powers across the system; an inequality that permits for the system to be crafted and selectively implemented to further the interests of only the most powerful states, thus allowing them to determine even what customary norms will develop for the practice.<sup>128</sup> This disproportionate distribution of power in the state system, which finds expression in both the consent-based theory and the jurisdictional reach of the customary (*jus cogens*) norms of the practice, is destructive to the aims of the legal practice of human rights, aims which are dedicated to protecting the most vulnerable individuals from such powers. I have contended that one of the central benefits of directing our efforts toward satisfying the adjudicability condition for legal human rights is to equalize the parties to the action before the law. Only trials of rights claims before properly authoritative judicial bodies can satisfy this function because only resort to such venues can effectively limit the power of states to one

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<sup>127</sup> Buchanan, *supra* note 2, at 131.

simple metric: the strength of their legal argument in its interpretation of the law of human rights. If I am correct in this contention, then the natural duty of justice requires the development of this more effective understanding of the authority of human rights law (abandoning the limitations of the consent-based theory) and directing our attention toward the instrumental means for bringing about universal adjudicability.

### 3.2. Addressing the “Positivist” Defense of Consent-Based Theory

As we have seen, the present consent-based model of legal obligation in international human rights practice satisfies the adjudicability condition on the Modest Account. However, I have argued that this is merely one way of satisfying the adjudicability condition. It is true that those states that express their agreement through treaty ratification of human rights instruments have created a legal obligation to comply with them. But it is true not because consent is necessary for that obligation; it is true on my account because consenting in this way can serve to establish the necessary adjudicability condition for legal rights and obligations. Consent to treaty obligations creates a superior law and can subject signatories to the jurisdiction of courts.

The question is whether treaty ratification is the *only* way to create such an obligation, or whether a more robust and universal system of international legal human rights obligations might also be possible. I have argued under the Maximal Account that it is. However, we must investigate a bit further into the nature of legal rights and obligations to understand how and why this account serves the purposes of the human rights legal practice better than the consent-based theory.

H.L.A. Hart, in *The Concept of Law*, maintains that a legal system is a union of primary rules (rules that guide behavior) and secondary rules (which include “rules of recognition” as

well as rules that allow us to change or adjudicate the primary rules).<sup>129</sup> To gain clarity on the difference between these two categories we can think, on the one hand, of “laws” in the primary sense as the rules that guide specific instances of behavior, that tell individual actors how to best conform their activities to the legal norms in force. And, on the other hand, we could think of “the Law,” as the norms that give rise to a legal system; that is, there is a difference between laws and the legal norms that make laws a product of the Law.

It is the latter that is of most interest to us here. As we reflect on the distinctions of constitutional norms described earlier, we can see that these norms set a standard for what counts as laws. However, in discussions of human rights legal norms the distinction can become less clear. Do international human rights laws belong in the former or the latter category? I have argued they belong in the latter, that they are constitutive of the international human rights legal system. However, consent-based theorists of international law seem to want to argue that human rights laws belong in the former category, that indeed, *there is only one* category; that is, there is only the category of primary rules that guide the behavior of state actions, and even then the *only* rules that apply are those that state actors have agreed to be bound by. In this sense, they take the consent to being bound as the only rule of recognition, change, and adjudication for international law.

Such a view seems to want to deny the existence of an international legal system of human rights *per se*, at least in the sense that there is nothing that makes the Law for states other than their own state’s agreement to be bound by them. This is obviously an impoverished view of the meaning of laws and Law. It says that the only Law for recognizing laws that bind state behavior is granting the explicit consent to so be bound. For the reasons described above, this is also an inadequate approach for realizing the universal aims of human rights legal practice.

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<sup>129</sup> Hart, *supra* note 46, at 77-89.

Nonetheless, it is worth further exploring what it is about consent that is so appealing and whether consent alone could be a sufficient condition for Law to obtain.

When we look more closely at jurisprudential theories of law and legal obligations, for instance, Ronald Dworkin's prescriptive view coming from the non-positivist standpoint of his interpretivism, in which he identifies the principles (of justice, fairness, and procedural due process) that provide the best constructive interpretation of the legal practice, and Hart's descriptive view coming from his legal positivist position in which he identifies existing rules of recognition, change, and adjudication that have been accepted as obligatory from an internal point of view, we can gain a more robust understanding the Law. These two theories clearly provide differing accounts of what is sufficient for Law, and hence laws. But to the extent that these views can be said to converge on a shared norm for recognizing legal practices—call it a *legitimizing criteria*, in the meta-legal sense—we can characterize this shared criteria as *social agreement*. Which is to say both of these views can concur that social agreement is sufficient for Law, even if there are different views of what forms this agreement takes and how it can be identified.

Social agreement is at the heart of the legitimating criteria for the Law on most accounts; Dworkin's principles of Law are the sorts of things that participants in the practice (that is practitioners of law—primarily judges and lawyers) are bound to by virtue of their participation, and, hence, have implicitly agreed with toward the end of casting the legal practice in its best possible light. This he takes to be based on a form of implicit associative obligation for members of the practice. “Associative obligations” for Dworkin in the general sense refers to the special responsibilities social practice attaches to membership in a social group which allows for Dworkin's understanding of these obligations does not arise from ‘choice or consent,’ the



associative obligations come by virtue of being a member of that community. However, associative responsibilities are subject to interpretation, and justice will play an interpretive role in deciding what any person's associative responsibilities really are. So on this view social agreement plays a central role by combining the social practice with matters of critical interpretation in order to give rise to the conditions of legitimacy for the Law.<sup>130</sup>

Hart's *pedigree* argument, on the other hand, reflects what rules of recognition have already been granted "internal acceptance" as sufficient for Law. This offers a sort of retrospective analysis of what has already been committed to as a matter of social agreement. The "crucial step," according to Hart, is in the *acknowledgement* of the rule of recognition as "authoritative, i.e., as the *proper* was of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation."<sup>131</sup> Wherever a rule of recognition is accepted, Hart adds, both private individuals and public officials are granted with authoritative criteria for identifying primary rules of obligation. The criteria so provided can take any of a number forms: authoritative texts, legislative enactments, customary practice, past judicial decisions in particular cases. Of course, this points out that there are numerous other examples that demonstrate the role of social agreement as the legitimating criteria of Law; for instance, the modern default to demand a majoritarian creation of laws further reflects the legitimating nature of social agreement. And customary law gains its legal force from the implication that its continued practice indicates agreement and acceptance of an existing legal obligation that is primarily social in nature.

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<sup>130</sup> Dworkin, *Law's Empire*, *supra* note 46, at 196 & 203. The role of obligations in the constructive understanding of practices will be discussed more extensively in the following sections.

<sup>131</sup> Hart, *Concept of Law*, *supra* note 46, at 92. (*emphasis original*)

On the other hand, consent-based theories of international law, and human rights law in particular, appear to do something different altogether. They do have some basis in agreement (say in formalized treaty-making), but this form of agreement is less of a social agreement than it is a unilateral one. Of course, it could be argued that when taken alongside the background principle of *pacta sunt servanda*, the consent-based view has *some* features of a wider social agreement that permits for treaty-making as an enterprise in the first place. However, when the character of the laws and the legal obligations that bind states have become recognizable solely in the terms of what the state has explicitly consented to (and could presumably withdraw its consent from), then the meta theory of legitimating criteria is primarily this and this alone. Consent is the primary and secondary rule combined; it is law by caprice; it is law that is unrecognizable, even on Hartian positivist terms because it satisfies no rule of recognition other than the acknowledgment of its own consent to a primary rule of behavior. It says in effect: law exists when a party consents to bind its behavior to the guideline it consents to bind its behavior to, and nothing more. This, as mentioned previously, is an odd proposal for a legitimating criteria of law. No legal theory supports it, and incidentally no legal theory has been offered to support it because no such demand has been placed on the theory to justify itself in the landscape of legal philosophy. Such as it is, the consent-based view is only implicitly positivist in the sense that it presumes that the law of human rights simply is what it is and that there exist no good grounds to demand more from it.

### 3.3 Why Other Theories of Legitimating Criteria for Law Have Failed

It is worth noting that John Austin's view of law as a series of commands issued by a sovereign and backed by a credible threat of punishment similarly did not incorporate into the

legitimizing criteria for law a necessary element of social agreement. This view has over time proved inadequate; the notion of sovereign enforcement power, taken alone, has proven insufficient for creating laws because, as Hart has described, this amounts to little more than seeing the Law as the “gunman situation writ large.”<sup>132</sup> There might be good reasons to comply when a threat of force is brought to bear against you, but this force alone does not make compliance a legal obligation even when it is the state that demands it. Hart’s distinction between “being obliged” and “being obligated,” while somewhat opaque bears this out; the distinction is instructive in understanding the difference between legitimate legal obligations and illegitimate legal demands (ones that are made by force under the false cover of the Law).<sup>133</sup>

Austin’s theory of law fails because legitimate legal obligations, I take it, arise from widespread social agreement on the content and purposes of the legal practice.<sup>134</sup> Thus, agreement here demands a social agreement under conditions of sufficient freedom. It is perhaps most akin to the notion of social agreement that undergirds the social contract tradition, at least in the sense that Rousseau has in mind (and also perhaps Kant in *The Doctrine of Right*); where the formation of the covenant is designed to improve and further the best possible expression of one’s own natural freedom. Or in Dworkin’s terms, where the Law is understood as the best constructive interpretation of the community’s legal practice, given its principled commitments. But social agreement may also come about under other, less free, conditions. It’s possible that such agreement could come about tacitly, or as a *modus vivendi*, or even as a product of some amount of coercion and duress.

However, there is a direct correlation between the legitimacy of legal obligations and the freedom of social agreement; the more force that is brought to bear, the more illegitimate the

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<sup>132</sup> Hart, *supra* note 46, at 6 & 19.

<sup>133</sup> *Id.* at 6-7 & 80-81.

<sup>134</sup> A more detailed analysis of practice-based justifications follows in the next section

legal demand will become. Of course, consent is evidence of some sort of agreement, but this is not to say that agreement and consent are synonymous. Agreement in the sense of social agreement is more properly seen as multivocal; where consent is best seen as univocal, actors can consent for themselves alone. The question is whether social agreement on international legal practice of human rights and the obligations arising in that practice is limited to a collection of individual acts of consent, or whether the practice and its obligation are something that “we” as a collective subject participating in a shared practice have agreed to accept, at least in part because no individual could reasonably reject them.<sup>135</sup>

The problem with the consent-based view is that making international human rights laws relevant, binding, and determinative legal norms only insofar as a state has formally consented to treaty provisions gives rise to only a weak and temporary sense of legitimate legal obligation. As discussed earlier, successor governments might not sustain consent, so it’s not clear that ratification can bind future regimes. It is also the case that state actors might sign treaties for propaganda purposes with no real intention to abide by them. And even when consent to treaty obligations is sincere and genuine, the terms of the agreement might be open to conflicting interpretations regarding what it is to comply. By taking the role of widespread social agreement out of the legitimating criteria for the Law, the consent-based view fails much in the same way that Austin’s view fails. It says in effect that no legal obligation exists absent a credible threat of punishment; that in the absence of a global sovereign power the only binding legal obligations that exist are those that states explicitly agree to through treaty ratification.

I have attempted to show that this is an impoverished view of the Law and legal systems, one that is not in keeping with our ordinary understanding of how legal obligations arise in the majority of recognized legal systems. And it is also reasonable to question why, given the above

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challenges, consent should be taken as *the* legitimating criteria for the international legal system of human rights when such an approach is clearly not in keeping with the universal aims of that system. A better approach is one that tracks with our appreciation for the legitimating criteria of widespread social agreement in the Law. I have argued that the best candidate in this regard is one that shows how the satisfaction of the adjudicability condition, through an understanding of constitutional norms that gives rise to an international legal system of human rights, can provide a more stable, adequate and just picture.

### 3.4 *Jus Cogens* and the Universality of Human Rights.

I have attempted to show how viewing international human rights laws as relevant, binding, and determinative legal norms on the basis of widespread social agreement on the rules of recognition can take the form of constitutional norms for the legal system of human rights. I have argued that to the extent that the present system fails to satisfy the adjudicability condition, we can explain its inadequacies in terms of its as yet incomplete emergence from the constitutional space. The implication here is that as the extent of social agreement expands the more likely the legal system is to emerge in this way toward the Maximal Account of Adjudicability. The extensive evidence of recognition, acknowledgement, commitment, and acceptance of human rights norms found in the Modest Account demonstrates this trend. Nonetheless the progress is halting and erratic because the availability of adjudicability for individual human rights holders has proven ad hoc and arbitrary. Very often the people who need the protections the most lack any access to them, while some of the people who need them the least have redundant systemic protections for their rights.

This inequality, I have persistently argued, is a fundamental flaw in the system, it works an injustice when justice is the practice's primary aim. It is a practice that takes as a foundational principle that all humans are entitled equally to the rights enumerated by the regime of human rights, and then it systematically favors some rights holders over others in blatant derogation of this principle. If the central promise of the practice of human rights is universality, then the practice of *legal* human rights can be no different.

As we saw earlier in Chapter One, there is already, at least ostensibly, a case to be made for the universality of human rights founded in *jus cogens* norms. *Jus cogens* norms are the set of peremptory norms and non-derogable duties that according to customary law no state can justifiably circumvent. Accordingly, Judge Dugard of the International Court of Justice has argued that,

Peremptory norms are a blend of principle and policy and enjoy hierarchical superiority vis-à-vis other norms of international law. This is so because not only do they affirm high principles of international law, which recognize the most important rights of the international order but they also give legal form to the most fundamental policies or goals of the international community. Since norms of *jus cogens* advance both principle and policy ... they must inevitably play a dominant role in the process of judicial choice.<sup>136</sup>

Unfortunately, despite embodying the requisite universal sentiment of human rights and carrying the import of customary law through a paradigm of non-derogability, *jus cogens* norms have rarely found expression in human rights litigation at the international, regional, or domestic court levels. Indeed, some have argued that even the ICJ has been intentionally avoiding the normative paradigm of *jus cogens* for a while, reserving this legal category primarily for charges

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<sup>136</sup> *Democratic Republic of Congo v. Rwanda., Case Concerning Armed Activities on the Territory of the Congo* JUDGMENT, SEPARATE OPINION OF JUDGE AD HOC DUGARD, at paras 3 – 14.

of genocide.<sup>137</sup> However, despite Dugard's noble defense in the case of *The Democratic Republic of Congo v. Rwanda*, even in genocide cases jurisdictional mandates to the ICJ for peremptory norms remain contentious and are not seen as automatic. As the Court stated:

The same standard [as applies to obligations *erga omnes*] applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.<sup>138</sup>

Thus, while *jus cogens* norms may appear to be peremptory norms which are non-derogable under customary law, serving as a superior law over state actions, absent jurisdiction of courts over claims on their basis, these norms do not adequately satisfy the adjudicability condition. So long as the consent-based views dominates our jurisdictional understanding of the human rights legal practice, universality of adjudicability will remain out of reach.

### 3.5 Clarifying Jurisdictional Questions

Another way to present the obstacles to universal adjudicability at this point can be put thusly: So long as the legitimating criteria of consent predominate, the international and regional human rights courts could be argued to have universal subject matter jurisdiction over many human rights claims (on *jus cogens* justifications), but they will lack jurisdiction over the parties, at least in those cases where states have not provided consent. While, on the other hand, domestic courts that have more readily assured jurisdiction over the parties, will frequently lack subject matter jurisdiction over human rights claims. In order for universal adjudicability of

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<sup>137</sup> See, Andrea Bianchi, "Human Rights and the Magic of Jus Cogens," *The European Journal of International Law* Vol. 19 no. 3, p. 502

<sup>138</sup> *Democratic Republic of Congo v. Rwanda., Case Concerning Armed Activities on the Territory of the Congo.* JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION JUDGEMENT. February 3, 2006, p. 32.

human rights claims to be attained—that is in order for individual’s human rights to become functionally and universally effective as legal claims against state practices—one or both of these jurisdictional frameworks will need to be revised.

It has never been the intention of this work to set out how the legal instrumentation of a system of legal human rights *should be* suitably arranged. Rather, the point here is that there exists an institutional judicial structure, probably appellate in nature, beginning at the domestic level and moving to regional in international courts, that can better accommodate human rights legal claims than the disjointed and ad hoc system that we have today. It is just that this institutional judicial structure has yet to be fully realized. Such a system, were it to come about, could be easily recognized as a legal system, even in the absence of a global government, and even in the absence of an enforcement power. It would be recognizable as a legal system, on this view, for the simple reason that the human legal rights of individuals have become adjudicable.

It has also not been the intention of this work to offer a list, whether exhaustive or exemplary, of the human rights that *should be* deemed adjudicable within the jurisdiction bounds of this practice. Rather, I take it that the dynamic features of a practice-based approach, and more centrally a jurisprudential practice-based approach, allow for the perpetual internal shifting and sorting of priorities in these rights as the body of law develops. “Lawyers,” as Jerome Frank once offered, “are great rationalizers.” They are compelled to reconcile incompatibles; their everyday task is expert practical adjustment, and their life’s work is based upon a logic of probability. The work on international human rights lawyers I think exemplifies Frank’s basic understanding of the legal practice, that it is a matter of developing the art of intuition because the law and its determination is always a matter of uncertainty<sup>139</sup> So as to the question of what human rights are most central to the legal practice, as I conceive of it under the conditions of adjudicability, those

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<sup>139</sup> Jerome Frank, *Law and the Modern Mind*. (New Brunswick: Transaction Publishers, 2009) 33-34



rights are the rights that are most likely to be successfully litigated. Some rights violations are clearly more egregious and demanding of recognition and recompense than others. Not all rights protections are equal in their urgency. Does this, however, rule out the possibility of a legal claim based on Article 24 of the UDHR that grants “the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay?” I see no reason to say that it does. In the right case, in the right jurisdiction, under the right circumstance, at the right time, such a claim might very well be successful.<sup>140</sup>

With that said, the concern in these final pages will be to answer the likely challenges that those who would defend and maintain the existing system might offer in response to the proposal here and to highlight how the obstacles to achieving a universally functional system of legal rights, primarily on the grounds of state sovereignty, suffer serious deficiencies in consistency and fail to properly cohere with the principles of the practice of both legal human rights and the international order of states as we find it today.

### 3.5 Reframing the State System

The argument here has been that the universality of legal human rights can be understood merely as a binding norm of the human rights legal system, from within the practice itself. By

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<sup>140</sup> Of course, on the understanding of transnational practice of law offered here, hewing the practice of the “logic of probability” will take a new approach to law training and legal learning. Carrie Menkel-Meadow has argued for a recognition of this demand for law school curriculum, pointing out that transnational legal study or what her law school calls “international legal analysis,” is a more sophisticated form of the old saw “learning to think like a lawyer.” The new approach requires significantly more nuance than approaches to domestic law. As she points out, the objectives of the transnational or international system are often “broader, deeper, and more ambitious,” while the available enforcement provisions are both weaker (in the sense that there is not final court) and stronger (involving the use of force). There is also a greater variety of laws, legal material and procedures to draw from, and the analytic metrics for learning are not limited to the legal but include the sociological, historical and linguistic. In the end, international legal analysis, Menkel-Meadow suggests, teaches the importance of *pluralism and multi-disciplinarity* in legal analysis. “Why and How to Study ‘Transnational Law’,” 1 *U.C. Irvine Law Review* 97 (2011). 106-107

recognizing that the practice takes these rights as universal we can avoid the need to establish universal human rights on other philosophical grounds. We don't need to argue that human rights are universal in the sense that they have existed universally for all people for all of time, or that they existed pre-institutionally in a state of nature. Rather, the argument is that the practice takes these rights to be *human* rights, and so for it to be consistent with itself the rights it affords must be available to all humans. But one might reasonably object and say that they do not subscribe to the practice; that they are not member participants in the practice, and so this supposed universality does not extend to them. We might, for instance, think of "rogue states" who want to avoid legal obligations and liability under the system and so by denying membership in the practice thereby deny that they are bound by its rules. Of course, the consent-based theory of human rights law facilitates this view. Indeed, the United States, while likely not viewing itself as a rogue state, routinely rejects any possibility of being bound by human rights laws or superior jurisdictions beyond those provisions to which they have explicitly consented.<sup>141</sup> Can a practice be said to be truly universal if the most powerful nation in the world refuses to subscribe to it?

What can be said in answer to this challenge? The answer will lie in a reframing of the international order of the state system more generally. To begin with, we can note that even on the traditional view, where state consent to treaty obligations is seen as the only way to create an obligation that is legally binding; it is the state system itself that makes that legal obligation legitimate. Since only recognized states can participate in the treaty-making practice, it is the state system that makes that legal recognition of treaty provisions possible. The effort in what remains of this chapter will be dedicated to understanding the associative obligations that arise from participation in the state practice.

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<sup>141</sup> Cf., *The Republic of Nicaragua v. The United States of America*, International Court of Justice, I.C.J. 39 (1984)

Since it is already the case that discussions of consent-based obligations arise out of participation in a recognized state practice, we can further recognize that there exist rules and principles to that practice, just as there are to participation in any practice. Take as an example participation in a game. If you take yourself to be participating in the game then you are tacitly agreeing to the rules of the game—otherwise you aren't playing it. For instance, if you run on to the field during a soccer game and begin kicking a ball into whatever goal suits you, you aren't "playing soccer"—and you can't declare yourself the winner. Playing soccer, means you have agreed to abide by the rules of the game.

But there is even more to it than this; there is also an agreement on principles in the background of that practice; there are understood principles about what the rules of participation *can be*; and there are principles that guide the interpretation of the rules. For instance, as with games, there is the principle that the rules must be knowable and known, and that they must be interpreted in a manner that is fair to all the participants. If you have a game where one participant is guaranteed to win every time, or where the interpretation of the rules can arbitrarily favor one side over the other, then it is no longer a game. Without adherence to principles of fairness and equal treatment under the rules, you don't have a game; you have something else instead (a gamble, a fraud, a performance, etc.)

An understanding of the international law of human rights that is based in consent to treaty provisions fails to fully recognize the larger state practice and the principles of understanding that underlie that practice. This practice is a state practice, and participation by states implies tacit agreement to certain rules of participation in the international legal system; these rules must also comport with the demands of background principles of justice, fairness, and equality. The UDHR embodies many of these principle, and the supporting treaties serve as

evidence of the rules of the practice. If a state is going to claim to be a state participating in the state practice (and thus even be capable of signing treaties), then they must recognize the rules of the state system. Human rights norms have become part of these rules and principles for this system; indeed, they are constitutive norms of the system.

Does such a view make the consenting or the withholding of consent to human rights treaty provisions that serve as the constitutional norms for the system merely *pro forma*?

Perhaps, to an extent, but the legitimacy of the legal obligations arising from these rules and principles can come about—as happens with all legal systems—through the evidence of widespread social agreement and recognition of the rules and principles that are constitutive of the practice. We might see how having a majority (roughly 80% or more) of recognized states signing on to human rights treaties can work as a sort of referendum on these binding norms of the practice.

Furthermore, the existence of *jus cogens* norms as customary law, which is already established within the practice, shows how some norms can be taken as non-derogable regardless of consent. Of course, disagreement on how that practice takes shape is to be expected; the demands can be debated, re-interpreted, and reformed in keeping with adjudicative practice of human rights. However, this can happen only from *within* the practice and in keeping with the basic principles that guide that practice. (In other words, states cannot just be kicking soccer balls wherever they want and claiming to be playing the game of state practice)

In sum, the more widespread social agreement there is on the legal principles supporting human rights and acceptance of the rules of recognition in the form of constitutional norms for a legal system of international human rights, the more legitimate the legal obligation is within the practice. This legal practice of human rights is still an emerging practice; the question is whether

social agreement and acceptance of these norms has moved beyond the mere consent-based theorist's views of sufficiency. Given the above, I believe that a more robust understanding of human rights norms as constitutional norms is warranted by the legitimating criteria of widespread social agreement. The human rights provisions—when seen as constitutional norms for the state system—serve as the Law that determines what can count as laws. As in all cases of constitutional norms, the agreement that gives rise to them can be incomplete and elements of these norms can even be contested. But they cannot be unilaterally refused if one is to claim to be an ongoing participant in the practice.

### 3.6 State Sovereignty as a Countervailing Norm of the State Practice

Of course, even given the above considerations, the greatest obstacle to the changes necessary for bringing the legal practice of human rights into alignment with its own principles is a competing understanding of the state practice as dependent upon fundamental and inviolable notions of state sovereignty. State sovereignty and the protections it affords, have been taken to be so sacrosanct in the state system that the consent-based theory of international human rights law has been taken to be the *only* (however inadequate) option available to the legal human rights practice. It is therefore worthwhile to consider what gives rise to this understanding and how it might be reframed in keeping with what has been said above.

It is widely agreed that the present understanding of the principle of state sovereignty finds its origins in the signing of two 17<sup>th</sup> Century treaties collectively known as the “Peace of Westphalia.” The first agreement, signed in January of 1648, ended 80 years of war between Spain and the Dutch. The other agreement, signed in October of that same year, ended what has become known as the “Thirty Year’s War” between the Holy Roman Emperor Ferdinand III,

other German princes, France, and Sweden. The import of the Peace of Westphalia is that it initiated recognition of the full territorial sovereignty of the member states of the empire. States were empowered to contract treaties with one another and with other foreign powers (with the caveat that the emperor and the empire suffered no prejudice). By this and other changes the princes of the empire became absolute sovereigns in their own dominions.

This somewhat novel notion of sovereignty, seen as necessary to settle the peace of a region that had so long been at war, ushered in a new age of “international relations.” It set forth a new set of terms for relationships between independent political bodies, one that was based primarily on territorial authority. Through the recognition of state identity, it became possible for those states to negotiate, and trade, and treat with one another; it also gave these states a certain degree of self-determination to set and administer their own laws and policies without outside interference. It also became the case that persons born, or emigrating, or in some cases traveling to those territories were subject to the law of those bodies.

But the Peace of Westphalia, which amounted to agreements between only five of the nations that we currently recognize (Spain, Denmark, Germany, France and Sweden), was only the beginning. As Daniel Philpott has shown in his historical account of how ideas about justice and legitimate authority fashioned the global sovereign states system, this understanding of territorial authority has spread worldwide over the last three and one-half centuries. He writes that after the Peace of Westphalia, the system spread most rapidly across the globe when the colonial empires collapsed after World War II. He cites colonial independence as a sort of “second revolution,” the first being the movement from the medieval world to the international state system. He sees both developments as “forging moments, which successively wrought the sovereign state system.” Both can be seen as “the yield of volcanic periods, ones of wars, crises,

and imbrolios that in the end amounted to refining furnaces, casting an apparatus so hardy that it came to organize every piece of land on the globe...” An apparatus that Philpott has argued is now beginning to crack. He writes:

Revolutions in sovereignty result from prior revolutions in ideas about justice and political authority. What revolutions in ideas bring are crises of pluralism. Iconoclastic propositions challenge the legitimacy of an existing international order, a contradiction that erupts in the volcano—the wars, the riots, the protests, the politics—that then brings in the new order. This, through a typical chain of events: The ideas convert hearers; these converts amass their ranks; they then demand new international orders; they protest and lobby and rebel to bring about these orders; there emerges a social dissonance between the iconoclasm and the existing order; a new order results. In early modern Europe, it was the Protestant Reformation that brought a century of war, culminating in the Thirty Years’ War (1618–1648), which in turn brought about a system of sovereign states. In the twentieth century, it was nationalism and racial equality that brought the revolts, protests, and colonial wars that extended the system globally. For both revolutions, international agreement upon sovereign statehood was the terms on which a crisis of pluralism was settled.<sup>142</sup>

Such a view is in keeping with what I have offered here, that the legal practice of human rights is emerging in light of revolutionary changes in our understanding of state sovereignty. The resistance to seeing an international constitutional order of the sort proposed here comes from a conservative understanding of the existing international order as natural, uncoerced, and static. It is, of course, none of those things. The rise of principles of state sovereignty and the practice that these states engage in—by virtue of being states—is dynamic and responsive to the aims and demands of that practice in light of changing circumstances both practical and ideational. For decades now and with increasing frequency, human rights and the legal rights that they afford have become emblematic of this dynamism. The general and widespread understanding of human rights has created a new form of legal authority that is extra-territorial,

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<sup>142</sup> Daniel Philpott, in *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001), 4-5.

which to date has been recognized only by consent or by customary law but the legal authority of human rights is being increasingly woven into the fabric of the state system.

Which is not to say that the emergence of a new system of legal authority for human rights is not also in keeping with our ordinary understanding of legal authority more generally. As mentioned earlier, what I aim to show here is not so much that our understanding of international human rights law needs to be *sui generis*, it is that our understanding of state sovereignty and jurisdictional boundaries within this legal practice needs to be seen as something new and emerging. In other words, for this practice to be realizable, we do not need a new idea of legal rights, legal obligations, and their adjudicability. Rather what we need is to utilize these ideas as we reframe our notions of state sovereignty in a way that can make these rights legally authoritative for the practice as a whole, beyond the consent-based understanding of the Modest Account, toward satisfying the universal aims of the practice found in the Maximal Account. I have recommended adopting an understanding of human rights legal norms as constitutional norms because this offers a common means for establishing superior legal authority.

At this point we can see that our talk of “practice” has become varied and disparate—including talk of the practice of human rights, and the practice of legal rights, and the overall “state practice” that perhaps will allow for the former practices to converge. To put this state practice in context, it will be helpful to return to the earlier discussions in Chapter One of Rawlsian political constructivism, the constructive notion of reflective equilibrium offered by Ronald Dworkin, and Aaron James’ contribution to the structure for practice-sensitive justifications. James describes three main stages of moral and political justification for and from



an independently identified and interpreted social practice—*Individuation, Framing Characterization, and Substantive Argument*.

At the first stage, we individuate a candidate social practice; we single out an object of social interpretation, at first in relatively uncontroversial terms, with reference to various interpretive “data points” or “source materials” that any further conception of the social activity should take into account and explain (or “explain away”). At the second stage of the method, we work up a general characterization of the practice, in light of its distinctive structure and (presumed legitimate) purposes. Here social interpretation can be “constructive,” as long as any use of moral terms comports with canons of interpretation (e.g., consistency, coherence, explanatory power, simplicity, etc.).<sup>143</sup> At the third stage of the method, we engage in substantive moral reasoning about what principles of conduct apply, as framed and guided by the specified framing conception. Such reasoning and the resulting principles are “practice sensitive” in the sense that our interpretation of the practice shapes our substantive evaluation at each stage, and that the whole set of interpretive and moral considerations is seen as *sufficient* to justify basic, normally conclusive regulative principles of conduct. Absent further argument, no further principles are assumed to apply (although they may well apply, given further argument).<sup>144</sup>

James has recently turned this understanding toward questions of the authority of popular sovereignty in the state system in light of the social contract tradition in political philosophy. He finds that according the “practice account,” even if the moral and legal rights of a sovereign state are sensitive to the domestic sense of the social contract tradition, they are also conditioned by the *associative* obligations that any political group incurs simply by availing itself of the rights afforded by a larger territorial division of authority. Because territorial rights are part and parcel

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<sup>143</sup> See, James, “Authority and Territory,” *supra* note 23.

<sup>144</sup> *Id.* at 2.

of a political social practice, they can come with “associative obligations” for state conduct, including obligations to follow emergent treaty and customary law, quite aside from a given state’s consent.<sup>145</sup>

In applying that practice-sensitive methodology, James finds that at the first stage of individuation, we can divine a general social practice that offers a bundle of sovereignty rights over territories, assigned to specific claimants, in a manner that serves some presumed valuable ends; a practice that is open to various interpretive data points that show a coordinated conduct of agents rationalized toward a shared, or at least *presumed*, purpose. This purpose need not be widely endorsed “if enough of the agents accept that enough of the other agents endorse a purpose.” Most peoples and their officials at least act as *if* a state system exists according to James, and they act on the presumption that enough others are doing likewise; they rationalize or adjust norms of state conduct according to the presumed purpose of the system—through state policy, treaties, international administration and so on.

At the second stage, the practice can be generally characterized according to its distinctive structure, offering a constructive social interpretation of the practice in keeping with the moral demands of such things as consistency, coherence, explanatory power and simplicity. In this sense, the Westphalian sovereignty norm of nonintervention is not a constitutive norm—one that must be upheld in order to have a system of this sort as opposed to any other—it is rather, a regulatory norm; it is a default norm which can be qualified by other secondary norms without threatening its constitutive nature grounded in the territorial division of authority.

In keeping with what has been argued in this work, human rights norms can provide this sort of secondary norm without undermining the basic territorial system, particularly since one of the presumed purposes of the Peace of Westphalia was to maintain peace by reducing the threat

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<sup>145</sup> *Id.* at 12.

of war and violence. Other aims of the state system, James points out, include the establishment of property rights, the conservation of resources, collective self-governance and self-determination, and the realization of basic, civil, political, and economic rights. In this sense, I contend, the practice of international human rights can be seen as part and parcel of the territorial state system more generally. The interpretation of the shared aims of these conjoined practices can be quite open, and disagreement over the principled dictates of the practice will frequently serve to strengthen and reify, rather than undermine, the shared nature of that practice. This leads easily into the third stage of development, the “substantive argument.” We can treat the principles of that practice that are not subject to any strong countervailing complaints, as normatively conclusive requirements for how the practice must be organized. In this final sense, it bears reminding that Dworkin’s initial motivation for a constructive equilibrium was that the principles are mind-dependent and result from some interpretive work on our part. The benefit of this approach is that it allows for a certain agnosticism regarding the detectability of moral facts. It treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed. In this sense, James asserts “that putative natural rights, per se, have no relevance or force, unless the interests or claims they represent are refashioned as inputs into some such reasoning.”<sup>146</sup>

What this analysis permits for is an understanding of the system of popular sovereignty based in territorial rights as essentially a social practice of associative obligations centered around presumed aims. The demand for states to recognize and protect human rights is one such aim; resort to a norm of nonintervention arising from Westphalian sovereignty cannot count as a countervailing complaint, so long as the human rights demands are not inconsistent with the systems aims at facilitating peace and security.

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<sup>146</sup> *Id.* at 19

The final piece, of course, is a question of the public justification for a system-wide extension of the legal authority of human rights law. That is, how to justify making the human rights practice, which is a central aim of the existing state practice, an effective legal practice. This is ultimately a question of accountability, if the above holds, and the presumed shared aims of the human rights practice need not be shared by all participants but only recognized as being shared by others in the practice, then the countervailing claim that accountability is only appropriate for those who positively consent must be evaluated in terms of whether it best serves the aims of the shared practice. It does not. It is neither justified by the recognized (universal) aims of the human rights practice nor by the shared understanding of the aims of a human rights legal practice to provide an effective, fair, and procedurally just hearing of human rights claims before an authoritative judicial body vested with the power to issue a decisive and reasoned determination.

## CHAPTER FOUR

### Justifications, Applications, and Conclusions

The practice of human legal rights internationally and transnationally is still an emerging practice, it's story in many respects is still unwritten. But the principles that guide the narrative of its development are abundantly clear. As the preamble of the UDHR affirms, the recognition of “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” And the recognition that Member States have pledged themselves “to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,” has culminated in an understanding of the Declaration as offering:

[A] common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Of course, the existing practice of human rights has not as of yet secured the universal and effective recognition of the rights and freedoms enumerated in the Declaration. Indeed, the existing practice is based on a consent-based theory of legal human rights that undermines its own commitment to recognizing the equal and inalienable rights of all the members of the human family by making the rights of some members legally cognizable while denying legal recognition to other members (many of whom are in the most dire need of it). Alongside this internal inconsistency in the present practice, there is also evidence to suggest that treaty ratification alone—providing formal consent to human rights treaty provisions—has proven to have only equivocal results in encouraging the recognition and observance of actual human

rights. So much of measuring success in this regard is dependent on what happens after ratification—whether domestic measures are made to implement the treaty provision, how stable the ratifying country is, whether groups of individuals mobilize to demand their rights, and so on. This evidence comes in a variety of ways; for instance, there are some persuasive anecdotal accounts of recognizable shifts in behavior post ratification. As Beth Simmons has detailed, after ratifying CEDAW, both Japan and Columbia took measurable steps to protect the rights of women, influencing the realization of rights for women in appreciable ways. In both cases, the treaty provided a “crucial hook” for Japanese and Columbian women to demand that their rights be recognized in constitutional changes, and domestic institutions, thus recognizing the demand for gender pay equity and reproductive rights in particular, and improving the likelihood of successful litigation when faced with discrimination.<sup>147</sup> But beyond the anecdotal, statistical evidence of treaty compliance and effective improvement on the realization of rights protections for individuals has been notoriously difficult to discern.<sup>148</sup> And for our purposes, what should be recognized is that the effective improvement of rights recognition arising from the consent-based theory of international human rights practice has been wildly inconsistent and varied. As Eric Posner has starkly put it, under its best possible light, the current statistical studies show that “a small number of treaty provisions may have improved a small number of human rights outcomes in a small number of countries by a small, possibly trivial amount.” And, I believe it should further be pointed out that, under the consent-based understanding of the practice of international legal human rights, whatever gains can be shown in this regard will continue to remain subject to

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<sup>147</sup> Simmons, *supra* note 103, at 237-253.

<sup>148</sup> See, Oona Hathaway, “Do Human Rights Treaties Make a Difference?” 111 *Yale Law Journal* 1935 (2002); Eric Neumayer, “Do International Human Treaties Improve Respect for Human Rights,” 49 *Journal of Conflict Resolution* 925 (2005); Emilie M Hafner-Burton & Kiyoteru Tsuttui “Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most,” 44 *Journal of Peace Research* 407 (2007); Daniel W. Hill Jr. “Estimating the Effects of Human Rights Treaties on State Behavior,” 72 *The Journal of Politics* 1161 (2010); and Yonatan Lupu, “The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects,” 57 *American Journal of Political Science* 912 (2013).

the whims and willingness of newly instated regimes.<sup>149</sup> Thus, this practice, I have argued, will need to be improved in order to become consistent with its own demands.

I have also argued that adjudicability can offer a useful metric for knowing when coherence in the practice has been achieved. I have argued that if human rights can be recognized as superior law over state actions, and the legal human rights of *all* individuals can be effectively claimed before an authoritative decision-maker, then this would be an indication that the practice had become consistent with its own primary aims. I also have offered possible avenues of development on both fronts. First, that as to the superior law element, an understanding of constitutional norms as superior legal norms can provide a familiar legal construct for understanding how such legal norms concretize, allowing them to emerging from the “constitutional space” to become effective grounds for the legal rights claims of individuals. Second, that, as to the authoritative decision-making element, the ongoing discursive practice of transjudicialism—whereby judges and other quasi-judicial bodies see themselves as engaged in a shared practice of public reason—indicates a growing ability to adjudicate human rights claims. This development can find its most effective expression at the domestic level where individuals can lay direct claim to their rights before recognized authorities of a regime that is required by its juridical nature to answer and determine them.

Such a proposal does not foreclose the possibility that there are *other* means for bringing the practice in line with its own principled demands, nor does it speak to the *likelihood* of the success of what has been offered here. What it does indicate is the distance that needs to be covered before the aims of the practice can be said to have been satisfied. This is also not to say

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<sup>149</sup> One need only to consider the recent election of Donald J. Trump to office of the President of the United States. Trump has publicly indicated that the policies of his government will depart from the commitments of the previous administration in that they will include such things as torture, extra-judicial killing, war crimes, the refusal to recognize the rights of refugees and asylum seekers, regular denial of due process, racially discriminatory searches and seizures, religious persecution.

that there is a theoretical point of “completeness.” A legal practice of human rights, as an interpretive practice, could never be complete. There is no ultimate culmination. Rather, given the ongoing and dialectical nature of the practice, the goal must simply be to satisfy the demands for its legitimacy. Structurally, institutionally, and procedurally the elements of the emerging legal practice must develop in a manner that can fairly, consistently, and perpetually achieve the ends to which it is dedicated. Because the practice alleged here is part and parcel of the international state system, widespread acceptance among the states of the principles of the human rights practice improves not only the legitimacy of the system of international human rights law, but this acceptance concurrently furthers the legitimacy of the state system and of the states themselves.<sup>150</sup>

There are, however, a few remaining observations and conclusions to be drawn from the proposal offered here. And so this chapter will be dedicated that desiderata, and the likely

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<sup>150</sup> As Ronald Dworkin has pointed out, there is a “snowball effect” to the satisfaction of these demands; that as more nations recognize a duty to accept and follow widely accepted principles this increases the wide acceptance of those practices (and so on). It is from the inherent dignity of individuals that Dworkin derives a standing demand for sovereign states and their governments to endeavor to improve their own legitimacy and, furthermore, he finds they have a standing duty to improve the legitimacy of the international order as well. This in turn gives rise to a duty among all nations to help create and enforce a general scheme of international law toward that end. Of course, even with legitimacy set as its end, there is no reason to believe that only one sort of regime of international law best serves that end—there may be several different regimes that serve to improve the legitimacy of the international order. So it is with this concern—and with this end—in mind that Dworkin offers the “principle of salience.”

*If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect would improve the legitimacy of the international order.*

The principle of salience, Dworkin argues, explains the contemporary and ancient role of *ius gentium* and customary law, it better accounts for the sources of international law found in Article 38 of the International Court Statute (which he claims the consent based theory makes circular), and it also explains why the constitutional courts of separate nations are drawn to notice and attempt to achieve some integrity with the constitutional principles of other nations. The goal of the work here is intended to extend this view—beyond an imagined court and hypothetical applications toward a more concrete reality for legal human rights. “A New Philosophy for International Law,” *supra* note 64, at 19-21.



lingering questions and objections to this approach. First, an explanation and explicit recognition that this is a state-centered, institutional-based approach to human rights, and a defense of why such an approach is appropriate here. Second, a short review of the ways in which this view compliments rather than subverts the moral and political functions of human rights. In this regard, we will discuss an exemplary application of this approach to a particularly “hard case” of human rights, as well as a demonstration of how it better fills the gaps left by other views, ultimately offering a path to making the practice more coherent and consistent with its aims.

#### 4.1 An Institutional Account

As should be evident by now, the account that has been offered here might easily be viewed as an “institutional account” as Thomas Pogge understands it—one that is distinct from an *interactional* account. Also, in keeping with Pogge, it is also largely “state-centric” in that it assumes that human rights legal claims are the sorts of things brought against states or those acting under color of authority. Pogge writes:

We should conceive human rights primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions. Such an *institutional* understanding contrasts with an *interactional* one, which presents human rights as placing the treatment of human beings under certain constraints that do not presuppose the existence of social institutions... On the interactional understanding of human rights, governments and individuals have a responsibility not to violate human rights. On my institutional understanding, by contrast, their responsibility is to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights<sup>151</sup>

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<sup>151</sup> Thomas Pogge, *World Poverty and Human Rights* (London: Polity Press, 2002). 46, As an example, Pogge argues that having one’s car stolen by a thief is not obviously by itself a human rights violation, even “if the car may be its owners most important asset” while “an arbitrary confiscation of her car by the government, on the other hand, does strike was a human rights violation, even if she has several other cars left. This suggest that human rights violations, to count as such, must be in some sense official, and that human rights thus protect persons only against violations from certain sources. 57

Which is not to say that I think that the only perpetrators of human rights violations are state actors, they are not. Indeed, some of the most heinous human rights violations in the world today are being perpetrated by non-state actors like Boko Haram, Daesh, the Sinaloa Cartel, and other organized crime syndicates who regularly violate basic rights to life, liberty, and the security of individuals and groups by subjecting them to mass executions, torture, slavery, mass rape, cruel, inhumane and degrading treatment, violations of property rights, and restrictions on the freedom of movement. However, even given these rampant violations, when we think about the United Nations tracking a record of human rights violations, it is a *country's* human rights record that we look toward. This I take to be indicative of the practice; that the correlative duty of legal human rights is the duty that states have to prevent violent and dehumanizing acts from being perpetrated against their citizens.

But one might think this institutional approach to legal human rights claims is misdirected in that it fails to directly address these important violations of basic human rights to dignity and autonomy perpetrated by non-state actors. This is a fair concern. The hope is that much of this failure can be recaptured in light of the duty that governing institutions (international, national, state, municipal governments) owe to those whom it expresses police power over—the duty to protect equally the safety, health, and well-being of its citizens. And it is even possible that this model will capture more than the interactionist model. For instance, Kristin Hessler, in keeping with Pogge's institutional approach, has offered a helpful example arising out of racial discrimination in the United States.

Consider the case of felony disenfranchisement, which is a practice peculiar to the United States,<sup>152</sup> by which a felony conviction of any sort (not merely obviously pertinent cases of say

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<sup>152</sup> The European Court of Human Rights determined in 2005 that a blanket ban on voting *from prison* violates the European Convention on Human Rights, which guarantees the right to free and fair elections. Indeed, almost half of

treason or voter fraud) has been contended by most states as grounds for barring an individual from exercising their voting rights, oftentimes for the rest of their lives. Presently, over 6.1 million voters in the United States are disenfranchised in this way. Evidence shows that nationwide, one in every 13 black adults cannot vote as the result of a felony conviction, and in four states—Florida, Kentucky, Tennessee, and Virginia – more than one in five black adults is disenfranchised.<sup>153</sup>

Given that this policy of disenfranchisement is far more likely to affect members of racial minorities, Hessler shows that there is a strong argument that it violates civil and political rights protected under human rights law. But on the interactionist conception of human rights it is difficult to capture the nature of this basic human rights violation. Because it is institutional in nature and because the policy is facially race-neutral, we will need to look at the “disproportionate impact” of the policy on minorities across the aggregate population in order to show the basis for the claim. We need an institutional account of human rights, according to Hessler, one that primarily assesses whether the institutional order and public culture combine to ensure that all members of society have secure access to the objects of their human right<sup>154</sup>

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European countries allow all incarcerated individuals to vote, facilitating voting within the prison or by absentee ballot. In Canada, Israel, and South Africa, courts have ruled that any conviction-based restriction of voting rights is unconstitutional. See, Laleh Ispahani, “Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement laws” A. Ewald & B. Rottinghaus (ed.s), *Criminal Disenfranchisement in an International Perspective* (Cambridge, MA: Cambridge University Press, 2009), 25-58. See also, data found at that Sentencingproject.org, and Michelle Alexander, *The New Jim Crow* (New York: The New Press, 2010), p. 193.

<sup>153</sup> See, The Sentencing Project, Sentencingproject.org. (Last accessed 10/20/16).

<sup>154</sup> Kristin Hessler, “Equality, Human Rights, and Political Legitimacy,” A. Follesdal, J. Karlsson Schaffer, and G. Ulfstein (ed.s), *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2014) 131-132 (citations omitted).

## 4.2 A Complement to Moral and Political Accounts of Human Rights

So in this sense, the institutional account of legal human rights can prove more effective. It is also worthwhile to remember that the account offered here has been directed at improving—not supplanting—the moral and political arguments offered in the existing human rights practice. It aims to move the human rights moral claim from what might be thought of as merely a “manifesto” right to an effective legal claim-right that is grounded in the individual. This claim, as a legal claim, demands a response. It equalizes the parties before the law and it requires the defendant (oftentimes the state) to *defend* against those claims. It also requires the judicial body to issue a reasoned determination on the merits of that claim, a determination that is open to public scrutiny and can be normatively measured against the principles of public reason. This does not, however, take away any of the force that moral arguments for human rights presently have or could have. That force remains. This approach merely aims to enhance its effectiveness by providing a vehicle for the exercise of practical reason in a legal forum.

Mattias Kumm has pointed out the advantages of this thinking in his response to challenges to judicial review by U.S. scholars. He points out in particular that these challenges do not fit with and cannot illuminate contemporary European human and constitutional rights understanding and what he calls the “Rational Human Rights Paradigm.” The point of judicial review in this context, he finds, is to legally institutionalize a practice of “Socratic contestation.”

Socratic contestation refers to the practice of critically engaging authorities, in order to assess whether the claims they make are based on good reasons; it gives institutional expression to the idea that all legitimate authority depends on being grounded in public reason. It also “allows courts to engage all relevant moral pragmatic arguments explicitly, without the kind of

legalistic guidance and constraint that otherwise characterizes legal reason.”<sup>155</sup> Such a process, he finds, make it possible to identify a wide range of pathologies that are common, even in mature democracies. The benefits of this view for the approach here are several: It provides a checklist of individually necessary and collectively sufficient criteria that public authorities need to meet in order for their actions to be justified in terms of public reason and it provides a structure for those reasons. It also broadens the notion of rights protections rather than narrowing or limiting them—it looks first to a range of interests that enjoy *prima facie* protection. For instance, this might be as broad as an infringement of the “right to liberty” or a “right to equality.” It then asks whether that infringement can be justified according to certain limitations. For instance, people have a right to liberty, so long as the expression of the right to liberty does not “infringe on the rights of others or offend against the constitutional order or the rights of public morals.”<sup>156</sup>

This leads to an understanding of rights as statements of value, or principles. They are to be afforded to individuals to the greatest extent possible by legitimate authority, absent countervailing concerns. *Prima facie* violations of right become *definitive* violations of right simply when the interference with the right lacks sufficient justification. “Reasoning about rights,” Kumm adds, “means reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.”<sup>157</sup> Were human rights understood to be available to all people on the Maximal Account offered here, the proportionality test of the Rational Human Rights Paradigm that Kumm offers, allows for the demand for public reason

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<sup>155</sup> Mattias Kumm, “Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review,” 1 *European Journal of Legal Studies* 2, (2007), p. 154.

<sup>156</sup> *Id.* at 158.

<sup>157</sup> *Id.* at 159-160. Incidentally a proportionality test also comes into play in rights jurisprudence in the United States through the judicial doctrine of “strict scrutiny.” Once it has been determined that a fundamental constitutional right is in question, the Court will utilize the highest level of scrutiny to determine the state’s justification for infringements on that right. Strict scrutiny asks whether there is a compelling state interest for the restriction of the right, *and* whether the law or policy in question is narrowly tailored toward serving that interest or is the least-restrictive means for obtaining that objective.

justifications for legitimate authority to be seen as means for incorporating the moral arguments of the practice into effective legal arguments.

Similarly, the approach offered here is not intended to undermine the force of the *political* paradigm for human rights discussed above, rather it is designed to enhance it. Political practice approaches—absent a legal institutional model of human rights—are focused on the valuable tools of human rights in international relations and in justifications for outside intervention in human rights violations. These pursuits, it has been argued in Chapter One, can be improved upon by furthering the legitimacy and scope of a legal human rights practice. An example of the need for such an improvement can be found in the difficulty—inability even—of the political approach to effectively address the widespread violations of women’s human rights across the globe.

Consider, for instance, Charles Beitz’s account of contemporary human rights as a political practice, one which attends to the practical inferences that can be drawn from what competent participants regard as valid claims of human rights by looking to the “linguistic commitments one would undertake if one were to participate in good faith in the . . . practice.”<sup>158</sup> However, Beitz himself recognizes that protections of women’s human rights under this schema pose a challenge. He sees them as a “hard case” because of the degree of social deference that a doctrine of human rights owes to existing social moral codes, and he wonders whether “there are any feasible steps open to the international community or its agents that would induce states to adopt policies reasonably likely to accomplish the transformations of cultural belief and practice necessary to secure women’s human rights.”<sup>159</sup> He adds that changes in “patterns of belief that are well established in a culture, or for that matter in culturally sanctioned habits of legal and

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<sup>158</sup> Beitz, *supra* note 1, 103-104.

<sup>159</sup> *Id.* at 190-191

administrative practice,” only come through a slow, complex, and inadequately understood process; that there are substantial “epistemic barriers” facing outside agents who seek to influence those patterns of belief; and that the means of such influence may seem crude and not well-suited to the task.<sup>160</sup>

This leads Beitz to conclude that given the state of the existing practice of human rights that...

...there may be little that any external agent can do to change the conduct of a government that resists adopting measures aimed at inducing comprehensive changes in conventional beliefs. For this reason, human rights doctrine may overreach in embracing an open-ended entitlement to social and cultural change.<sup>161</sup>

It seems that, on Beitz’s view, given the linguistic commitments of good faith participants in the existing practice, certain culturally sanctioned practices of gender discrimination may prevent the recognition of the equal status of women in the human rights practice. Obviously, given the aims and principles of the human rights practice as they have been asserted throughout this work, Beitz’s view that women’s human rights (when seen as non-neutral) “may generate doubt about whether these rights are suitable to serve as grounds of international political action,” illuminate the central motivation of the approach offered here.

If under Beitz’s theory of the political practice of human rights the unavailability “of permissible and potentially effective forms of international action”<sup>162</sup> means that the human rights of millions upon millions of women to be free from subjugation and gender discrimination, then a different understanding of the practice appears to be in order. The institutional approach to the legal practice of human rights offered here aims to take seriously the

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<sup>160</sup> *Id.* at 196.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Id.* at 194.

challenges that Beitz presents by avoiding, or at least delaying, his concern of how to craft an effective international action.

If, as I have contended, the heart of the challenge to consistency in the human rights legal practice arises from the failure to recognize the equal standing of all members of the human family to assert their human rights, then a focus on adjudicability can better satisfy this demand. The demand to recognize equal standing, or what Allen Buchanan has termed the “status egalitarian function” of the human rights practice, is the requirement that all states (and, as I have argued, the *legal practice* of human rights itself) must “affirm and protect the basic equal status for all.”<sup>163</sup> He points out that there is a fundamental commitment in the practice of human rights to make “everyone’s rights effective, and to not make any distinctions among persons that would disadvantage anyone with regard to the effectiveness of their rights.”<sup>164</sup> Central to this concern is the demand for equal standing and rights against discrimination.

A focus on the adjudicability of legal human rights claims allows us to measure the equal standing of individuals in this regard; to determine whether everyone is offered an equal opportunity (1) to make legal claims on the basis of human rights, (2) to demand that the agents of state power answer for the alleged infringement of those rights, (3) to receive a fair hearing and reasoned determination on the merits of their claims, and finally (4) to receive justice and compensation for harms wrongly done to them. When the rights demands are situated in this way, in the individual rights holder, the discrepancies in the legal human rights practice, the evidence of exclusion and discrimination and injustice become all the more clear, allowing the

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<sup>163</sup> Buchanan offers an additional function of the system of international legal human rights and that is to ensure that all have access to the condition for leading a decent or minimally good life (which he terms the “well-being” function). Buchanan, *supra* note 2, at 29-36.

<sup>164</sup> This is evident in for instance the UDHR, Article 2 which states that “everyone is entitled to all the rights and freedom set forth...without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political jurisdiction or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty.”



linguistic commitments of the practice to better recognize the central demand for equal treatment within the legal practice, and thus reducing the concern that Beitz and others share about how the international community can best respond to persistent failures. If the scheme of legal human rights claims presented here is successful, if the human rights legal norms are taken as superior legal constitutional norms for the international system of states (that is they become transnational norms) such that they become successfully adjudicable for individual claimants in their own domestic legal regimes, then the need for crafting effective means for external intervention may well be averted. If the domestic regime fails institutionally to address the equal legal standing of claimants, when the superior norms of the state practice (and the linguistic commitments of the practice, in Beitz' terms) demand it, then the justification of international action is evident and becomes uncontroversial. Of course, the question of what effective actions are available remains. In keeping with the focus on adjudication, it would seem that a regional system offering a venue for individual claimants to bring an appeal is required before any further outside enforcement measures could be said to be legitimate.

However, the challenges that Beitz raises about the effective protection of women's human rights are complex and there is a concern that the implications of his view—that “culturally sanctioned habits of legal and administrative practice” must be addressed before the practice can offer full protection to women's human rights—could theoretically prove an exception that swallows the rule. Thus, this final section will attempt to address his further challenge that women's human rights are in some sense “non-neutral” because they require additional protections for women (presumably over the protections afforded to men) in order to show how an institutional approach to legal human rights can better answer this particular concern.

### 4.3 Women's Rights as Human Rights

As our initial examples of the cases of Mukhtār Mā'ī and Jessica Gonzales have demonstrated, there is a fundamental failure of equal standing between them in the present practice that must be addressed. But these cases also point to another fundamental failure cross-culturally and that is the unequal standing that women have to men in a vast majority of nation-states around the world. The inability of the present system—and in the philosophical and legal theories that work to justify this system—to address these deficiencies in equal standing is a glaring omission, and it provides an important impetus here since one might reasonably ask why it is even desirable in the first place for human rights standards to be taken as legal standards. The answer that has been contended throughout this work is that only by extending legal claims of right to all persons at the level of the individual claimant can this problem of equal standing truly be addressed.

There is no question that an extensive corpus of international standards exists to provide formal protection for a wide range of human rights but, ultimately, the challenge of human rights lies in ensuring the actual equal enjoyment of those rights. While the setting of standards is important and necessary to achieve this goal, it is not enough; equal standing to seek a proper adjudication of claims is essential to making them effective, particularly for women.

However, the effective protection of human rights for women poses a particularly vexing problem. For one thing, we would do well to remember that the liberal, predominantly Enlightenment notions of what it is to be “human” and to have rights as such, have historically not included women. The natural rights underpinning the human rights project is largely predicated on the liberal notion of an abstract natural individual whose rights are fundamental and inalienable and yet, in the mind of the law, the recognition of autonomous individuals has

been until quite recently, exclusively reserved to the province of men. Of course, as Hannah Arendt has pointed out, the liberal notion of an abstract natural state-less individual whose rights are pre-institutional never actually existed. Nonetheless, the practical understanding of the idea of a “human” individual in legal rights discourse has long been elided with the idea of “man” when asserting the rights that one has *qua* human.<sup>165</sup> So, given this history of exclusion, that is, of excluding human persons from rights recognition on the basis of their gender, special care must be taken when adopting these ideations and measures to specifically include them now.

However, this is more easily said than done for two reasons. First, feminist theorists frequently contend that human rights discourse still privileges male-defined aspects of civil and political rights against state actions. For example, the predominant concerns of human rights to protect against arbitrary arrest, torture, indefinite detention, and the death penalty, while clearly important concerns, can be seen to represent the types of concerns that “men fear will happen to them in their relation with the state, society, and other men.”<sup>166</sup> The important contention here is that gender bias in the public law understanding of human rights frequently works to deny gender-based violence against women as a proper “human” rights concern—leaving it otherwise to be considered as a matter in the purview of the private law of domestic jurisdictions. In this way, the practice of the “core” “universal” rights of “humans” is exclusive of the rights of women to repel specific (state sanctioned) threats to their basic material and physical wellbeing.

The claim here, as Beitz indicates, is that if one construed human rights on a universal model of natural or fundamental rights, “it might appear incoherent to hold that there could be a

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<sup>165</sup> *c.f.* The United States Declaration of Independence, July 4, 1776. *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights,*

<sup>166</sup> Hilary Charlesworth, “What Are Women’s International Human Rights?” In *Human Rights of Women: National and International Perspectives*, ed. Rebecca Cook. (Philadelphia: Univ. of Pennsylvania Press); *see also*, Niamh Reilly, “Cosmopolitan Feminism and Human Rights,” *Hypatia*, Vol. 22, No. 4, (Autumn, 2007), pp. 180-198

‘human’ right that could only be claimed by a proper subset of humanity.”<sup>167</sup> In this sense the demand to treat everyone equally under the rubric of universal human rights excludes the specific concerns of women’s rights. On this view, treating every human the same under human rights law prevents women from making effective demands for human rights protections against gender-based threats to the physical security and autonomy, such as: threats of domestic abuse, domestic work exploitation, workplace discrimination and sexual harassment, discriminatory inheritance and divorce law, the feminization of poverty, forced marriage, ineffective or non-existent rape prosecution, male guardianship requirements, public veiling requirements, “dowry murder,” sati, female genital cutting, honor killings, sex trafficking, female infanticide or any other practice that specifically targets women and as such requires “special” gender-based rights protection. It also serves to maintain the private-public distinction in human rights discourse, and it relegates those rights not included in the public law understanding of human rights to the private domain, where they are unlikely to be recognized as rights violations, but treated as criminal or civil matters—if treated at all.

Of course, with that said, it cannot be denied that significant gains have been made in specific and targeted institutional human rights protections of the rights of women. Which leads us to the *second* concern: where women’s rights are separated out as different from the human rights protections of “humans,” the conceptual weight of that difference is extended and perpetuated. There is a sense that because women’s human rights are separate from “human” rights, that by virtue of their gender they require special institutional protections, often in the form of what can be considered (perhaps ironically) “paternalistic” measures. These special

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<sup>167</sup> Beitz, *supra* note 1, at 189. As discussed in the earlier section, his answer to this problem is to regard human rights *functionally*, as elements of a practice that is designed to elevate certain threats to urgent interests of international concern and measure the importance of that concern against the cost and feasibility of protecting against them—he then further finds that the costs of protecting women’s rights in many social settings is too high to be accommodated.

measures invite a backlash, a pushing back by the dominant culture against what is perceived as a distinctly liberal and often costly imposition on a society's practices; it is seen in Beitz's terms as a "non-neutral" intrusion on the status quo. Furthermore, there is evidence that the effectiveness of such instruments, such as the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) as a matter of law has been notably weak. Much of the oversight and reporting on CEDAW has been done by UN committee reports and NGO analysis, and the result has been that the treaty provisions have been less than effective. This is in large part because what is required, as Beitz point out, are "feasible steps that would induce states to adopt policies reasonably likely to accomplish the transformations of cultural beliefs and practices necessary to secure women's human rights."

So, there is evidence here of what Martha Minow has classically called a "dilemma of difference;" where on the one hand treating people differently emphasizes that difference and hinders them on that basis, while on the other hand treating people the same creates insensitivity to essential differences and likely hinders them on *that* basis.<sup>168</sup> It is a dilemma in the sense that where the aim is improving equality, neither option—treating people the same under a universal doctrine of human rights, or treating women's rights as special category of human rights—can provide a satisfactory outcome. As a means of taking some of the sting out of the dilemma, Minow asks us to consider a set of five underlying assumptions that when uncritically embraced tend to maintain or exacerbate the stigma of difference.

First, she points out that in talking about difference, we often problematically assume that the relevant differences are intrinsic as opposed to a product of comparison. For instance, in our question about the differential treatment of women in the human rights regime, if we assume that

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<sup>168</sup> Martha Minow *Making All the Difference: Inclusion, Exclusion, and American Law*. (Ithaca: Cornell UP, 1990), 40-41

the problem arises because men and women are just naturally different, as opposed to those differences being a product of the history of discriminatory and oppressive treatment against women, then our understanding of this treatment as just or unjust will be determinately different.

This assumption about the nature of the difference leads to the second assumption, which is that in order to be “different” there must be something that one is *different from*. Very often this measure of comparison comes in the form of an “unstated norm.” But it is important to consider *why* that is, and what it is that makes this norm *the norm* of comparison. In our example, the norm against which women’s human rights are being compared is what? In one presentation, as Beitz indicates, women’s human rights are being compared as different from the norm of “human” rights.” But how these “human rights” are identified is not made clear. There is a suggestion that human rights are natural rights, that they are the sorts of things that arise from basic human dignity, or that afford a person with at least a minimally decent life. Are human rights then just the rights that are *shared* by men and women alike, while women’s rights are different from these rights? Perhaps in this sense we could look to the center of a Venn diagram of the basic and fundamental rights shared by men and women; that there are men’s human rights and women’s human rights, and between these two sets there are shared human rights. The problem with this view is that there doesn’t seem to be any men’s human rights. Men’s human rights are simply understood to be “human” rights, and so we might rightly wonder why *this* should be the norm of human rights, why it is men’s human rights that should be seen as coextensive with human rights. Why shouldn’t it be the case that *women’s* human rights are taken as the norm for human rights? If women’s human rights were instead understood to be “human” rights, and all people were protected on this basis, wouldn’t the human rights practice be more inclusive and protective of the rights of all?

Minow's third assumption points out how the law (or here, philosophical perspective, or political theory) seems to assume that an observer can see without a perspective; that objectivity is achievable and not merely aspirational. The history of the consideration of women's rights (as human rights or otherwise) is rife with "objective" claims about their status and nature (for instance, that women are naturally inferior, that they are incapable of exercising full citizenship rights or establishing economic independence, that they are naturally predisposed to maternal concerns, and so on). The assumption is that these claims arise not out of the situated perspective of the observer, whose assumptions, experiences, and interest might play a role, but from statement of objective truth. This assumption then leads to the fourth assumption that given this assumed objectivity, the perspectives of others (in particular those of the persons alleged to be different) are irrelevant to the consideration at hand. It seems obvious that we should carefully hunt out these assumptions in the matter at hand, particularly where our assessment of the need for the protection of women's human rights is weighed against the demand of deference to discriminatory cultural norms and traditions.

There are several layers of objective assumptions to consider here. To begin with, the position in favor of cultural deference offers an objective claim about the urgency and feasibility of the successful protection of women's rights. Obviously no measure of the urgency and feasibility can be clearly and objectively stated, and theorists who must make such assessment would do well to recognize that were they the subject of the violative acts in question their sense of what counts as urgent and feasible would be distinctly different. The danger is in the believing that merely by occupying the perspective of "not-the-subject" this somehow makes that perspective more objective on the matter in question, which, in turn, leads to viewing alternative

perspectives (particularly the perspective of those who are subject to human rights abuses) as less relevant or inconsequential.

The position in favor of cultural deference also implicates other claims to objectivity in the sense that it requires deference to the positional claims of the dominant culture in question. What is to be taken, as an objective matter, to be “the culture norms” or “the traditions” to which deference is owed? How easily are these norms and traditions objectively isolated? And is there a danger that, in taking these discriminatory cultural norms and traditions to be the sort of norms that require deference, this implicitly recognize the internal “objective” claims of these norms—that this is what women are really like; that the differences between men and women are natural or God-given and justify differential treatment; that there is a truth to claims about what position women must hold respective to men?

Minow’s point seems to be that all such claims to objectivity should be interrogated in light of the fact that objectivity is simply unattainable; there is no Archimedean standpoint for us to observe from, and so recognizing that we are all situated in our own perspectives allows us to better recognize the value in the perspective of others. In the case of women’s human rights considerations, this recognition of situatedness prevents us from too easily ignoring or silencing the perspectives of the women oppressed by the cultural norms and discriminatory traditions in the name of practicing cultural deference.

Finally, Minow cautions against a fifth assumption, which is to operate under the belief that the status quo is “natural, uncoerced, and good.” We should not too easily assume that the existing categories, upon which difference is recognized, developed in some sense naturally rather than being socially engineered differences in order to give rise to the fundamental



inequalities that exist.<sup>169</sup> Some aspect of this assumption can perhaps be seen in the position of Beitz and other theorists, those who maintain that a proper doctrine of human rights involves a degree of deference to existing social moral codes in the name of remaining “culturally neutral.” To claim that restraint from impositions on longstanding and deeply embedded cultural practices of subordination is a *neutral* position is to claim in some sense that the existing states of affairs developed *naturally* within that culture, and so they will have to be resolved in much the same manner—without outside (non-neutral) interference from the human rights practice.

It is worth considering the strength of this assumption in light of its opposite. If this “natural and uncoerced” status quo assumption were to be abandoned or called into question, and if instead the status quo was recognized as the product of an unnatural and bad (even evil) form of coercion, and if we saw that the status quo was actually a product of deeply socially-engineered institutional practices designed to create status differences based on immutable traits; differences that have led to the subordination, discrimination, humiliation, degradation and destruction of women, then it seems likely that our calculus about the urgency and feasibility of protecting women’s human rights, even on Beitz’s functional analysis of the practice of human rights, would turn out quite differently.

None of this is to say that awareness and concern for a reasonable cultural pluralism in the human rights practice is unimportant or nonessential. The human rights practice, particularly in its legal institutional iteration, cannot avoid its responsibility to a reasonable pluralism of values—indeed, to do otherwise would be to make institutional claims about the *objectively* correct values to be implemented. The discursive commitments of the legal practice must remain open to all perspectives, hearing and weighing all positions, while aiming toward coherence and an accommodation of values as reasonably feasible. The analysis here is only aimed at pointing

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<sup>169</sup> *Id.* at 70.

out how holding too fast and too easily to the sorts of assumptions that Minow has described can create an unwarranted barrier to effective equal human rights protections for women. Given the danger of these assumptions, it is worth paying attention to the unwelcome role they can play in the political considerations of an account of human rights, and it is necessary to bring serious questions to bear on the weight that has been afforded to them

#### 4.4 Conclusion

Of course, the goal in illustrating the intransigent problem of the effective application of human rights laws for the protection of women is to show how these concerns could be better addressed by an institutional account of legal human rights based on notions of adjudicability. By locating human rights in the equal legal standing of individual claimants, as opposed to framing them in terms of justifications for political intervention from the outside, the legal human rights practice would be able to deal more effectively with the concerns laid out above. The functional aims of the practice are to make human rights claims universally available. When these claims are brought in a manner that recognizes the need for subsidiarity, women can bring their human rights claims directly against the cultural norms in question, they can demand a justification for their alleged violations, and the reasons offered in a determination on the merits of their claim will be subject to the demands of public reason.

Consider once again the case of Mukhtār Mā'ī, if she were she able to bring her claims of human rights violations resulting from her “punishment” in the form of gang rape for the alleged honor crime of her brother; if the claim were understood according to the institutional account discussed above by challenging the persistent discrimination against women as evidenced in the aggregate failure of the state of Pakistan to take action to protect them from the routinely violent

practices of the culture, what might the state answer in response to her claims? Would the answer on offer have come in the form of a cultural justification for the subordination of women? Would the answer have denied her recognition as an autonomous individual who should be afforded basic rights to security, to dignity, and to the ability to develop her capacities? Would the answer have violated any of the numerous rights enshrined in the human rights practice as we have come to know it (as found in the documents, treaties, conventions, and jurisprudence of the practice—including those specifically granting human rights to women)? If so, then the answer would prove inadequate as matter of public reason. It would fail the linguistic commitments of the practice and it would be a glaring violation of the formative principles of human rights from which the practice has grown and to which all states are understood to be bound.

This is what taking adjudicability as the standard for legal human rights has to offer. It can make plain the human rights argument, and it can make these arguments legally autonomous, distinct from but in keeping with the moral and political considerations that make the practice possible. But we are not there yet. As we have seen, on the Minimal Account, there are domestic, regional, and international courts capable of hearing individual human rights claims, but the legal system of incomplete and the ad hoc nature of the human rights legal practice has proved ineffective at recognizing the equal standing of all rights holders—a central principle of the practice itself. What keeps international courts from hearing individual claims of human rights claims is a commitment to a consent-based legal theory, and the same can be said for domestic courts. The domestic courts will say that human rights law isn't law for them unless the state has ratified and incorporated the relevant treaty provisions, and the international courts will say that they can't force state parties into their jurisdiction unless they have consented to the relevant treaties.

The answer seems obvious: remove the dependence on consent-based theories from the system. I have argued that as a matter of jurisprudential theory consent-based theories are inadequate. It should now be clear how recognizing universal jurisdiction under the Maximal Account of human rights law could be warranted. Universal jurisdiction over human rights will grant domestic courts the authority to hear the subject matter of human rights cases like Mukhtār Māī's case, not because she was fortunate enough to find a "revolutionary" natural law judge to hear her case, but because human rights norms have gained such widespread acceptance within the human rights legal practice (as recognized by near universal treaty ratification, customary norms like *jus cogens*, and the long-standing principles of natural law) that there is no longer a question as to their status as superior legal norms for the state system. Universal jurisdiction will also serve to grant regional and international courts with jurisdiction over human rights claims, possibly in a manner that is less a matter of original jurisdiction (which creates unmanageable caseloads and difficulties in fact-finding) and more of a function of appellate review.

Such a system of legal human rights, were it to be realized, would be in keeping with the principles that give rise to the legal practice of human rights, correcting the failures of the present practice, and finally making it consistent with itself.

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