Chapter 1
Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes

Frédéric Mégret

Abstract This chapter is an attempt to survey the broad field of critical approaches to international human rights law through a series of "vignettes" that give a sense of the diversity of the critique. Based on a stylized account of that critique's many voices—epistemological, historical, ideological, pragmatic, etc.—it suggests that it has much to contribute to our understanding of a series of challenges that the discipline of international human rights often has a hard time tackling. The chapter finishes by outlining a few leads for what a sustained critical/constructive engagement with human rights could be, one that is neither utopian endorsement nor mere pragmatic detachment but based on a deliberate reactivation of the politics of human rights.

Contents

The author would like to thank Karen Engle, John Haskell, and Ralph Wilde for very helpful comments.

F. Mégret (✉)
Faculty of Law, Canada Research Chair in the Law of Human Rights and Legal Pluralism, McGill University, Montreal, QC, Canada
e-mail: fredericmegret@gmail.com

J. M. Beneyto and D. Kennedy (eds.), *New Approaches to International Law*,
DOI: 10.1007/978-90-6704-879-8_1,

1.1 Introduction

Human rights increasingly occupy a central place within international law. In many ways, they have emerged as one of the key ways in which international law seeks to reinvent itself after the Cold War. The critique of human rights thus is bound to occupy a key place within the critique of international law, one that potentially makes more complicated or even threatens to compromise international law's reconversion into a "law of people" rather than a "law of peoples".

Yet there is no doubt that the last two decades have witnessed, coinciding with the dramatic rise of international human rights law as a force to be reckoned with, the emergence of a significant, sustained, and complex critique of the global reach of human rights. By and large, the "victory" of international human rights in the Post-Cold War era was a victory by temporary default, rather than one that heralded anything like the end of History. Debates supposedly buried by the rise of international human rights have simply (or not quite so simply) re-emerged as debates conducted *within* human rights. At the same time, the post-Cold War has also been a liberating era for a critique that is no longer constrained by or suspected of being simply an emanation of geopolitical interests. The critique is multifaceted and it is not the object of this piece to present an exhaustive portrait of it. However, it is also often misunderstood and caricatured by those who see it as an unmitigated threat to the human rights project.

This chapter seeks to survey the field by engaging in a broad exploration of what might be called "critical international human rights", i.e., a vision of international human rights broadly informed by critical insights. Critical approaches to human rights have their source in something approximating an existential angst about the practice of human rights. David Kennedy is probably the author who has been most forthcoming about the tension between reality and professional roles, as well as a subtle feeling of imposition that can affect even the best

meaning, compassionate professional.[1] However, this existential unease also has its source in some of the unavoidable and never resolved dilemmas that are at the very source of human rights as a way of seeing the world as much as a program to change it. As the expression suggests, critical human rights is not a project of hostility to human rights and therefore not to be confused with a long tradition of anti-human rights projects, but it is a project that is, at the minimum, prudent and even skeptical about some claims made relating to international human rights, even as it recognizes the particular place that human rights have come to occupy in our global legal imagination.

Critical approaches to human rights stand in a productive dialectical tension with human rights, and their attitude can best be expressed as one of ambivalence: willing to applaud the accomplishments of human rights when those seem significant, but keen to caution against some of the limitations and even dangers of the discourse—and, most importantly perhaps—dubious that the two can be disentangled. Perhaps the best way to describe that attitude is as agnostic about human rights, although broadly committed to the broad pursuit of some of the ideals that underscore them. There are many strands of the human rights critique, and this article will only deal with the relative few that specifically addressed international human rights law, as opposed to, for example, the general idea of human rights or domestic human rights law, even though the two are connected.

Critical approaches to international human rights should be distinguished from the great diversity of approaches and sensitivities *internal* to human rights that have, at any one point in time, expressed reservations about particular features of human rights. Needless to say, international human rights as a field of practice and scholarship is internally diverse, almost extraordinarily so. One of the difficulties in developing a coherent critique of international human rights as a project is this richness. This makes it easy to confuse a part for the whole, or what is said on behalf of human rights for what the project actually does, or manipulations of rights for "real" rights. It is important for the critique not to target a "straw man"[2] and to construct what it critiques in as fair a way as possible. This article will assume that classical human rights proponents are sophisticated, savvy, and worldly, even perfectly aware of the deeper critiques levelled against them, even if not always willing to engage with them.

Quite central to the idea of a critique is that, for all its diversity, there is such a thing as an "international human rights movement," part idea, part professional field, and part historical project. This project proposes the prospect of a unitary, all-encompassing ideal focusing on the dignity of human beings that transcends the world of states. It has its blind spots, its pet peeves, and a few skeletons in its closet. Although as we will go on to see, part of the challenge is defining who counts as the "international human rights movement", this chapter will primarily focus on the classical international human rights movement as it has emerged

[1] Kennedy 1984.

[2] Alston 1996.

principally in the West in the second half of the twentieth century and manifested through the rise of major transnational human rights NGOs and mechanisms within intergovernmental fora.

This chapter is in a broad panoramic and strategic genre that will sacrifice in detail what it hopes to gain in breadth of survey. It aims to offer a broad illustrative rendering of the critique of human rights in its diversity rather than a fully articulated discussion of its tenets. It will proceed to present 18 "vignettes" that each synthesize a crucial critical intuition of the critique of international human rights law whether at the level of theory, explanation, or proposal. I begin by suggesting a stylized portrait of the critique of international human rights as a movement and of its fundamental coherence (1.2). I then suggest a number of concrete ways in which critical approaches to international human rights envisage and shed light on a range of real world issues (1.3). Finally, I propose an outline of what currently seem some of the most fruitful leads to develop a critical sensitivity to international human rights law (1.4).

1.2 A Portrait of the Critique as a Movement

Although the critique can appear diverse, it is arguably united by several strands. Three factors, in particular, inform its genesis. First is the perception that, unlike the human rights movement's own self-presentation and its recurrent emphasis on the "victim", human rights are actually in many ways all-powerful, even hegemonic, if only in that they have become the central criterion of the legitimacy of political action in many places (raised equally by the virtuous and not so virtuous). Human rights are what allow the Turkish government to refuse to give a veiled woman her university diploma because she wears a veil, what allows hundreds of human beings torn by shrapnel to be computed in the legal category of collateral damage, or what allows international financial institutions to dictate huge conditions to the attribution of loans. Indeed, it is the very turn from human rights as a revolutionary and vulnerable ideology of contestation to human rights as a rather established mode of governance[3] that opens the stage for the critique.

Second, the movement is based on a frustration with a certain tone of human rights: conquering, millenarian, end-of-History trumpeting, hubristic. The movement is suspected of claiming too much for itself, of portraying itself as a cause of that which it is merely a consequence of, of taking the credit retrospectively for accomplishments that it merely ratified. Indeed, human rights are suspected of being fetishistic, of liking the thing more than what it is made for ("humanism worshipping itself"),[4] of turning human rights into an "object of devotion". The reliance of proponents on the media, on the "cause célèbre" and a certain spectacular rendering

[3] Weiler 2001.

[4] Ignatieff et al. 2003, 53.

of the world causes them to be highly selective in their indignation,[5] and to perpetuate a crisis mentality.[6]

Third, the development of critical approaches is also triggered by what one might describe as the post-metaphysical turn in human rights, i.e., the idea that human rights do not really exist in an absolute or metaphysical sense. Critical theorists are not alone in taking that turn more or less for granted, but they take it further than various brands of human rights pragmatists: if human rights are the rights that humans beings decide to give themselves, then this opens up a considerable space not only for instrumental reason, but to think about why we want rights, what for, and even whether we want rights at all. The liberation from the ontology of rights, in other words, opens up much needed space for debates about what we are left with, such as an idea that is less truth-claim and more social practice.

In this context, it must be noted from the outset that the critical movement has profound misgivings about the possibility of transcending the world of states by projecting a global concept of the good life, and a suspicion that this cannot be done genuinely, without manipulation or violence, or without forfeiting things that we should value at least as much as rights. At the same time, critical views of human rights tend to share much of the distaste for oppression, injustice or discrimination that has arguably characterized the human rights movement at its best. Beyond that, critical paradigms are, in fact, a family of approaches that ties together different, sometimes competing and sometimes complementary critical sensitivities. In what follows, I will seek to highlight some of their fundamental coherence.

1.2.1 The Critique of Epistemology: of Indeterminacy

The claim that international human rights law is fundamentally indeterminate or at least inconclusive is one that is quite central to the critical project, although it is also often the most misunderstood. The peculiar indeterminacy of international human rights is both a feature of human rights, and of the international law in which it is embedded. International human rights law is the project to internationally "legalize" human rights. Even as it seeks to reform international law, it has a tendency to fall prey to it, and to the constant oscillations between apology and utopia that Martti Koskenniemi has famously identified.[7] Human rights law today is often a consciously transformative project that sees itself in opposition to classical public international law. It proposes something else to what came before it. Hence, human rights will be grounded in appeals to some higher law, antecedent or superior to the international law of states. However, they can never entirely overwrite the international law in which they are embedded, except at the cost of

[5] Mégret and Pinto 2003.

[6] Charlesworth 2002a; Starr 2007.

[7] Koskenniemi 2005.

irrelevance. They must render their own apologetic tribute, which is not that far removed from that of international law *simpliciter*, recognizing what they owe to the sovereign as a source of legitimacy, power and order. Irrelevance is too high a price to pay even for idealism. However, sticking too much to the reality of the interstate world will result in the project's implosion through excessive apology.

In addition to the indeterminacy of international legal thought, international human rights law has to deal with the inconclusiveness of the concept of human rights itself.[8] This is the sheer indeterminacy of human rights as a body of law that is all principles, that does not even try to have the pseudo rigidity of rules. Here we are in the familiar terrain of even positivist critiques of rights adjudication except that the critique is not based so much on the indeterminacy of words as the embeddedness of human rights legal discourse in intractable liberal dilemmas. As Koskenniemi has argued, the attempt to prioritize "rights" over the "good" is doomed, because the former are constituted by our visions of the latter, and that when it comes to the latter we are notoriously undecided.[9] This manifests itself in rights being forever subject to "reasonable", "necessary" and "proportional" limitations, which only seems to push back the problem and to involve debates about what the function of the state is, and the status of the individual in relation to it—exactly the sort of question that resort to rights language was supposed to have at least significantly resolved. "Reasonableness" either barely conceals a reference to "Reason", which we have reason to be skeptical of, or is a recipe for generalizing the preferences about what is reasonable for whoever happens to be deciding.[10] To answer these difficult questions one cannot safely proceed from rights. One must instead understand what the right was meant to protect and why, but this leads us back to foundational debates and invariably questions the utility of rights.[11]

Moreover, most contemporary rights claims involve the complex weighing of some rights against others. This forces human rights back into the utilitarian calculations that it initially forcefully rejected. The only way human rights reach a degree of determinacy is by referring back to certain community understandings buried deeply behind the veil of rights talk. What is then seen as relative determinacy and routinely credited to rights, is simply the comforting feeling of looking back at oneself. Domestically, such community understandings may exist, although it may just as likely be the imposition of a majority on the minority. The internationalization of rights, if anything, radicalizes the claim of intrinsic indeterminacy, as rights now uncomfortably straddle borders and a vast plurality of cultures. The trouble with inconclusiveness is that it leads straight to the discretion of the judge or the technocrat, a risk that is perhaps even direr in the case of human rights than it was in the case of international law, which at least was substantively uncommitted and bent on process.

---

[8] Tushnet 1983.

[9] Koskenniemi 1990.

[10] Koskenniemi 2000.

[11] Petman 2011.

1.2.2 The Critique of History: The Never Ending Civilizing Mission

What is missing from the relatively theoretical claims made about indeterminacy is a sense of where these ideas come from and, to put things bluntly, *à qui le crime profite*. Much critical work on international human rights is archaeological in nature. To understand the system's biases internationally is to reach back in time substantially for the dawn of the movement. For international lawyers, particularly international human rights lawyers, who consider that international law has moved on once and for all, the invocation of the specter of colonization is a particularly stinging one. But the idea that international law has already purged itself of some of its colonial biases allows it a little too easily off the hook. The colonial moment will not go away that easily because it helped forge some of the very basic concepts of international law and human rights. In particular, the claim that human rights is new to international law and transformative of it and therefore does not come with the baggage associated with the emergence of international law is a point that is remarkably misleading. As Tony Anghie has argued, cardinal concepts of international law did not pre-exist the colonial encounter as readymade rules to be applied to new problems; rather, they were given their specific meaning *through* the colonial encounter.[12] The "standard of civilization," in this respect, was not so much an instrument as a product of the colonial encounter, one that served to vet new entrants on the basis of something remarkably akin to "human rights".

Vitoria believed Indians to have a rationality of sorts, which meant that they could and should abide by the *jus gentium*. But the benefit of reason was granted to Indians only to allow them to extend an open ended invitation to the Spaniards. Moreover, Indians were found not to be quite up to their ontology as rational beings, and thus in need of being brought up to Spanish universal standards, thus arguably making Vitoria one of the founders of humanitarian imperialism.[13] Of course, Vitoria may have been an improvement on many of his contemporaries. His was not the brutal colonialism of the ruthless conquistadores, who would have simply butchered everyone for gold. But it was a particular form of "enlightened" colonialism nonetheless. In due course, the great birth pangs of modern human rights coincided with the perpetuation of slavery and colonization. In the nineteenth century, colonization was justified in part because of the failure of the Africans to abolish slavery.[14] Similarly, the plight of women has consistently been invoked to justify intervention in the affairs of non-European peoples.[15] Later on, international human rights would miss a historical chance to be at the forefront of

[12] Anghie 2005.
[13] Anghie 1996.
[14] Mégret 2012a.
[15] Ahmed 1992.

decolonization, only ratifying self-determination in the structure of international law by the time it had been hard won by peoples.[16]

The ways in which that colonial past expresses itself today continue to haunt international law. Human rights have been associated with processes of "othering," often heavily focused on racial, cultural, or religious markers. Makau Mutua has framed this in terms of a "savages-victims-saviors" metaphor.[17] Female genital mutilation is presented as the most abhorrent of practices, for example, but the West's own long tradition of subjugating the female body, be it in informal and subtle ways, is neglected[18]; the media vividly portrays the Southern despot (Bokassa, Mobutu) as eccentric and the Eastern despot (Hussein, Pol Pot) as uniquely cruel whilst disenfranchisement, fraud, and massive confusion of interest in the North are presented as accidents of democracy; the Middle-Eastern terrorist is presented as nihilist whilst the Western response is presented as political.[19] Human rights law continues to be part of the "standard of civilization", albeit in more subtle ways.[20] International human rights institutions for example are a product and a guarantor of a certain differentiating function, regulating the gates of accession to the EU for example, or deciding which cases are prosecuted internationally or ripe for armed intervention.[21]

1.2.3 The Critique of Voice: Who Speaks?

The critique of "voice" or of the "subject" has perhaps never been as important as in critiquing a movement that famously begins with a "*We* believe these truths to be self-evident". Who is the "we"? What does it hide? Who is speaking in whose name? International human rights' power lies in its ability to portray certain issues as being "human rights" issues and others not, in ways that can leave certain groups profoundly sidelined. Women, children, migrants, workers, the disabled, indigenous groups, or sexual minorities have all at one point or another been presented as raising issues that are not strictly about human rights. There is a strong suspicion among critical voices that human rights' inclusive embrace always comes at the cost of exclusive practices.

In contesting these boundaries, perhaps no strand of thinking about international human rights has been more illuminating than feminism. Gender has proven to be a powerful prism to challenge hierarchies implicit in the international human rights movement. The critique of international human rights law's androcentrism arguably operates at three levels. First, in the way the proclamation of the great

[16] Rajagopal 2003; Mégret 2009b.
[17] Mutua 2001.
[18] Tamir 1996.
[19] Mutua 2002.
[20] Donnelly 1998; Fidler 2001.
[21] Mégret 2011.

domestic "men's" rights instruments was seen as compatible with inferior status in private law, denial of the right to vote, violence against women, or a general failure to take issues of discrimination seriously. Second, feminist scholars have highlighted the way human rights law is structured by masculinist assumptions including, most notably, an emphasis on the public sphere of the state as opposed to the private sphere where most women's experience of rights violations occur. Third, feminist analysis has focused on how international law, in which human rights are embedded, is itself deeply indebted to certain schemes of thought—for example, sovereignty as a form of private-sphere writ-large, and which profoundly conditions human rights' development.[22]

Following some of these feminist overtures, critical race theory has challenged the "whiteness" of the dominant narrative and indeed of the human rights movement itself,[23] whilst indigenous people,[24] the gay and lesbian community,[25] and the disabled,[26] have all sought to both challenge and be recognized by the human rights narrative. The relationship between these critiques and human rights however is fraught with tension and raises complex dilemmas about whether liberal human rights can ever accommodate the demands of difference,[27] in a context of sobering reassessments of the contribution of international human rights to women's rights.[28]

1.2.4 The Critique of Substance: What Lies Behind Human Rights?

Against claims that human rights are neutral, critical lawyers have emphasized their core ideological assumptions.[29] The critique of international human rights is based on a strong skepticism of a number of claims that are often made about human rights.[30] First, the critique of universalism. After the global spread of international law, the suspicion is that human rights is a second, deeper stage in Western universalization. The universality of human rights rests on the plausibility of certain minimal criteria for the good life, abstracted from culture, religion or even politics. There is by now considerable and convincing critical literature on the extent to which human rights "expresses the ideology, ethics, aesthetic sensibility and

[22] Romany 1993.
[23] Lewis 2000.
[24] Williams 1990.
[25] Sanders 1996.
[26] Stein 2007.
[27] Brown 2002.
[28] Otto 2009.
[29] Mutua 1995.
[30] Kapur 2006c.

political practice of a particular Western Eighteenth-through Twentieth-Century liberalism".[31]

Second, critical thinkers typically take issue with this other standard of Enlightenment thinking, the idea of Progress. Human rights occupies a very special place in international law's contemporary rhetoric of triumph, it is its *avant garde*, perhaps its best hope for redemption. Progress validates the idea that a project can break loose from its moorings, that there is no curse, no fatality from which one cannot recover decisively. It encourages a developmentalist and convergencialist view of the evolution of societies towards human rights. This sentiment is reinforced by a narrative of progress which always presents the "crowning addition" (a new treaty, a new court) to be just round the corner. Critical views of human rights counter this narrative of progress and renewal by inscribing it against a historical background of repetition and continuity. Every move to liberate has tended to be simultaneously a move to incarcerate. The present is haunted by the ghosts of the past, mental habits die hard, structures even more so. From this perspective, progress as a concept is at best unhelpful at worst, it is a dangerous obfuscation.

Finally, and linked to all of the above, critical theorists take issue with human rights' close association and occasional virtual indistinguishability from the tradition of political liberalism. Rights are criticized for their individualism and its tendency to do violence to the communal nature of human life, even in those societies that have given rise to the individualist archetype (and far more beyond them). Human rights, like modernity, tend to disaggregate the social fabric by making each the keeper of his/her rights. International human rights law has insisted that it is compatible with a range of political regimes, but in practice some clearly attract more of its favors. Although liberalism presents itself as a "thin" and minimalist theory of justice, there is a strong suspicion that its basic foundations individualism, rule of law, democracy, are quite thick, and this becomes particularly apparent in the context of the transnational diffusion of human rights. The suspicion is that human rights are occasionally a sort of Trojan horse for the global expansion of something much broader, including not only liberalism but also democracy, the rule of law, good governance, and market capitalism.

1.2.5 The Critique of Means: On Over-Reliance on Law and Lawyers

The rise of international human rights is the result of a massive investment in law as a regulatory project.[32] In fact, perhaps the defining phenomenon in human rights of the last 60 years globally is the attempt to operate a *rapprochement*, emulating many a domestic constitutional reform, between rights as aspirational rhetoric and

[31] Kennedy 2002.

[32] Meckled-García and Cali 2006.

positive international law. Whilst rights are powerful ways of formulating claims against the powers that be, critical theory has a long-standing issue with their formalism, and not simply because of the problem of indeterminacy. There are dangers to entrusting our most deeply held moral intuitions to lawyers. The legal discourse of human rights can lose us in a meander of debates about whether a norm is customary or not, or whether it has *jus cogens* status or not, or whether a state is actually a party to it, rather than discuss the substance of the norm itself. It can make us believe that what drafters said about a treaty decades ago matters more than the complex issue at hand today. It can lure us into a false sense of safety that certain values are protected because they are embodied in the Law, even as the jurisprudence busily outlines exceptions and limitations to these values. It can make the most important issue hang on whether something called "genocide" was committed or not, even when tens of thousands are killed; or make ratification of a treaty seem like the most important item on a reformist agenda. The law can set up a veil between us and the norms, encouraging us to believe that if we produce "valid" law then we also achieve just outcomes.

The discourse of rights dramatizes oppositions rights are either violated or respected through strident moralization of political discourse, in a way that makes necessary political compromises more improbable.[33] Human rights are said to foreground procedure over substance, elections over meaningful participation, economic rights over economic justice, etc. The prioritization of human rights as opposed to citizens' rights in itself devalues the significance of political associations, suggesting an image of the state as purveyor of rights rather than locus of political association within which all are more than their individuality. At a certain level, rights talk is decried as profoundly anti-democratic (in that popular sovereignty is reduced to an expression of the search for rights), and even anti-political (in that taboo reinforces struggle).[34] The pursuit of a strategy of legalization for human rights is also part and process of a transfer of authority to international technocrats and judges.

In fact, "institutionalization" may be the defining trend in the growth of international human rights rather than simply the amorphous rise of an idea.[35] Inevitably, international human rights law will become caught up in professional projects and the construction of fields of expertise that tend to present themselves as an all-encompassing solution.[36] Internationally, the investment in law may be seen by some as a form of "overlegalization" that in fact does harm to its own purported goals,[37] or stultifies the necessary development of our political and moral intuitions,[38] or more generally sanitizes the radical charge in human rights

[33] Ignatieff et al. 2003, 20.

[34] Gauchet 1980.

[35] Oberleitner 2007.

[36] For a fascinating introduction to the sociology of the movement, see Dezalay and Garth 2006.

[37] Helfer 2002.

[38] Waldron 1993.

through repeated proceduralization. As such, international human rights law raises very problematic questions for the functioning of domestic democracy,[39] or about the absence of an international one.

Critical voices in international human rights seek to explore how the movement has structured itself over time; how its existence as a movement is somehow a reality onto itself that must be understood sociologically; and how the politics of human rights expertise also have hegemonic connotations.[40] The "movement" does not exist outside a web of interests, strategies, funding, etc. It is crucial to understand it as one internally constituted by strong currents of social stratification, for example between "elite" NGOs and their cohorts of lawyers from top global universities, and the boutique operations of grass root movements. The critical sensitivity in human rights asks the hard questions about how the human rights movement is constructed by this dependency: for example, what are the links between global capitalism and the major human rights NGOs? Why is there an ATCA only in the US, and what does its use for the purposes of transnational human rights litigation say about the role of global US legal firepower? Why are there no or very few Southern human rights NGOs doing human rights work in the North? Why is the urge to comment on the ethical record of other nations and governments so intense in the West when it seems so muted in other places? Why do the leading global human rights NGOs seem to have very little to say about economic and social rights, war, or disability issues?

1.2.6 The Critique of Praxis: When the Road to Hell is Paved with Good Intentions

The critical voices in human rights are, finally, often less interested in foundational issues than they are in what might be described as the praxis of human rights. Kennedy has had some memorable passages on the over investment in the language of human rights as a particular lens that generalizes or particularizes, foregrounds or backgrounds too much.[41] Human rights tend to infiltrate all discourses, displace and eventually replace them. There are human rights approaches to development, to corruption, to trade, to the environment, to culture, to the internet. These occupy "the field of emancipatory possibility" and "crowd out other ways of understanding harm and recompense".[42] Human rights tend to be rhetorically absolutist, and risk operating as a sort of fundamentalism.[43] They encourage a culture of indignation and denunciation, rather than adjustment and compromise. They evade questions of History and conflict for the benefit of a

[39] Gauchet 2000.

[40] Guilhot 2005.

[41] Kennedy 2002.

[42] Kennedy 2002, 108.

[43] Kinley 2007.

horizon of commensurable ends. Human rights encourage gradualism, reformism through adjudication, rather than political struggles, disobedience, or revolution. Victories are won every now and then, but at a high cost that distracts from the aggregate effects of injustice. The result might be a massive discounting of the possibilities of politics, as rights assume priority over the pursuit of competing visions of the good society, and strikingly reduce the horizon of what is achievable. Human rights, which were supposed to only set out the minimum conditions for the good life, actually become equated with the good life. The movement also has a tendency to speak in the name of others, often on the basis of dubious mandate or authority, and that may in fact condemn the "other" to obscurity.[44]

International human rights' reign often comes at a considerable cost, that of apology and deferring to the sovereign, even as it presents itself as an ideology of countering sovereignty. Built into human rights is a considerable toleration for state power and the needs, for example, of a "democratic society." Perhaps nothing is more misleading than the Dworkinian image of rights as "trumps." The state seems to stand to have much to lose from human rights in terms of power, yet the modern human rights state is a more difficult state to challenge precisely because it drapes itself in human rights. Human rights law tends to have a very conservative bent, recognizing certain social advances, e.g., in relation to homosexuality only by the time all relevant states have, and conspicuously failing to take a pioneering role. Human rights are routinely quite willing to defer to either a wide domestic "margin of appreciation" or to public international law, e.g., in relation to immunities.[45]

Another dimension of human rights is their implication in patterns of violence. That violence could be the violence of speaking in the name of others, or of speaking for all; it might lie in the unquestioned legitimization of the sovereign[46]; or in the obligation to frame complex, local, irreducible problems in the language of human rights if one wants to be heard internationally at all.[47] Human rights is a form of power, but one that does not recognize itself as such, and has not developed a corresponding vocabulary of the exercise of power.[48] Finally, international human rights' praxis can be seen as part and parcel of processes of exoticization, that draws attention away from local "problems" to "international human rights issues." International human rights has at times become a catch phrase less for universal than for *foreign* human rights.[49] One's "international human rights" students, for example, may manifest a certain displeasure if the

[44] Engle 1991.

[45] For example, it was clearly the ECHR that decided to defer to the rule on sovereign immunities in Al-Adsani v. United Kingdom, not, for example, the ICJ. Thomas and Small 2003.

[46] Noll 2003.

[47] Merry et al. 2005.

[48] Evans 1998.

[49] As exemplified in the US by the reference to human rights as always describing the rights of, rather than the *civil* rights of the American demos.

class does not take them on an exotic journey to the Heart of darkness, and instead brings them back to the discomfort of their own neighborhoods, and their role in sustaining them. The field's aspiration to exoticism is reinforced by a number of metaphors that portray the "other" as a far-flung victim.

1.3 A Few Illustrations

Critical discourses on human rights have occasionally been criticized, even by those sympathetic to them, as being too abstract or too elusive about their intentions or even their politics.[50] In what follows, I propose to highlight six issue-areas for international human rights, and analyze them from the point of view of "critical international human rights." I suggest that critical approaches can at the very least raise troubling questions about the ordinary operation of international human rights, clarify what it is we actually value about rights, and highlight what may be part of darker legacies that human rights lawyers should be wary of.

1.3.1 The Torture Debate

Perhaps few debates have marked the terrain of human rights more than the contemporary debate on torture. Where human rights seems to be permanently about weighing basic human entitlements against legitimate democratic priorities, torture is the one "deontological" right that is supposedly to be entirely inelastic to social demands. On the face of it, human rights lawyers can indeed point to sources systematically indicating that torture is a non-derogable and non-limitable right. In this context, it should come as no surprise that the international human rights movement rallied against apologists for torture, especially at times when all else seemed to be in flux.

Where international law would in the end fall short of requiring that states disintegrate rather than risk using nuclear weapons, international human rights law would actually demand that torture not be used even in "ticking time bomb" scenarios. The problem is that this position takes flight into utopia whereby it is not likely to be treated very seriously by states, which will be prompted to invoke the language of the human right to life or security, for example, to justify extreme action against suspected terrorists. Human rights lawyers have accordingly searched for ways out of "ticking time bomb" scenarios. One is to say that they never exist in reality in quite the way that their proponents seem to suggest, that things are never that clear. The argument is not very convincing, however, because surely one can think of cases where something very much like a ticking time bomb scenario would occur. An alternative route is to say that there may be "ticking

[50] Charlesworth 2002b.

bombs" but that we should proscribe ever allowing them to justify torture because the dangers of abuse are too great. The problem is that this is where a particular kind of robust republican liberalism argues for allowing the use of coercive interrogation techniques under some sort of judicial mandate and supervision.[51]

This leaves human rights lawyers in a quite uncomfortable position. An alternative and quite common route, then, is to say that "torture does not work", and that it in fact almost always fails to yield the information it is meant to obtain. This sort of reasoning avoids the dilemma of deontological v. instrumental rationality by suggesting that "what works" and "what is right" converge, that there is no tragic moral or political choice involved. Surely, however, this promises too much. There will be cases where torture works, and cases where it does not work and if this were the sole deciding factor then the calculation would be one of whether torture was "worth it" in any particular case. More importantly, in anchoring the prohibition to an instrumental justification of its efficiency, those against torture fundamentally weaken their own case by allowing themselves to be led into the realm of costs and benefits, a domain where they can claim no particular expertise.

What the international human rights movement seems to fail to recognize or to refuse to acknowledge is how much the absolute prohibition on torture relies above all on our profound moral intuitions. We feel that allowing torture would perhaps corrupt our souls or would corrupt democracy, in the same way we believe torture is wrong even if we have a hard time convincing a traditional international lawyer of its status as a customary norm under international law given that more than 70 states practice torture, and some do not even seem to be shamed by contrary *opinio juris*.[52] The point is the argument against torture cannot be made unproblematically from within human rights law as if it were a matter of course, especially in view of the fact that human rights law seems to tolerate so much otherwise when it is done for good reason. We are simply, when it comes to torture at least, deontologists and, in that, a straight line runs from Kant to the mainstream of human rights. This is perfectly defensible, it is also more precarious, radical, and even glorious than it is sometimes presented as being.

1.3.2 Invasion, Liberal Imperialism, and the Laws of War

International human rights has a very ambiguous relationship to both old and new problems of international violence. At a certain level, international human rights endorses the regulation of at least certain forms of violence. Yet objectively and perhaps despite its conscious self, the international human rights movement has often been at the forefront of the international interventionist agenda, providing particularly pointed ways to legitimize intervention *on behalf* of the population of

[51] Dershowitz 2001. It is revealing that the proposal, shocking as it may seem, comes from one who is often been presented as a leading human rights lawyer.

[52] Koskenniemi 1990.

the receiving state,[53] notably on behalf of women.[54] There are important questions that need to be asked, of course, from Kosovo to Timor, from Rwanda to Darfur about the occasional need to use force. But the suspicion is that human rights are used to justify violence when not warranted (e.g., the "liberation" of Iraq), yet fail to sway decision makers when some degree of external coercion might be necessary (e.g., Rwanda). It is almost as if, at times, the human rights community had been, more or less unwittingly, furbishing the tools of the military.[55] The subtle orientalization of the "other" through human rights, in particular, has served this powerful interventionist agenda.[56]

Some in the international human rights movement, for example, certainly insisted that the invasion of Iraq for example should not go ahead "in their name".[57] However, the human rights movement was not among the leading voices condemning the invasion, and there has been a tendency to not ask too many questions when it came to the use of force itself perhaps because the movement was subconsciously attracted by the prospect of a "human rights"-oriented reconstruction of Iraq.[58] This is even though the refusal to denounce aggression flies in the face of a tradition at least as old as Nuremberg that sees the use of force as "the mother of all crimes".[59] It is also at odds with a tradition of pacifism that once had much in common with human rights. In Kampala, when the adoption of a definition of aggression for the Rome Statute was mooted recently, human rights NGOs, to the great surprise of many involved in the negotiations, either came out strongly against the adoption of such a definition on the grounds that it might prevent humanitarian intervention,[60] or displayed their indifference. The suggestion that invasion and occupation are valid in this context if they respect international humanitarian law and human rights risks appearing as little more than a whitewash[61]; the emergence of a heavily human rights influenced notion of *jus post bellum* may appear as an attempt to make the best of the spoils of violence[62]; constitutional exercises launched in the midst of chaos seem to be at best the result of ill-timed legalistic thinking.[63] All in all, well-meaning human rights

[53] Denike 2008.

[54] Engle 2007; Cooke 2002.

[55] Orford 2003.

[56] Abu-Lughod 2002; Bhattacharyya 2008.

[57] Roth 2004, 13.

[58] Chandler 2001.

[59] Luban 1980.

[60] Aggression and the international criminal court, letter addressed to the Foreign Ministers attending the Kampala conference, signed by 40 NGOs, May 10, 2010, online: <http://www.soros.org/initiatives/justice/focus/international_justice/news/icc-aggression-20100510/icc-aggression-letter-20100511.pdf>.

[61] Mandel 2004, pp 7–8.

[62] Nesiah 2009.

[63] The Brussels Tribunal, *Open Letter to Amnesty International on the Iraqi Constitution* 7 October (2005), online: Brussels Tribunal <http://www.brusselstribunal.org/AmnestyLetter.htm>

cosmopolitanism may be hard to disentangle from the logic of Empire.[64] If anything, the logic of the "war on terror" has shown the plasticity of human rights discourse, which is today routinely invoked under the guise of protecting that "most important of rights", the "right to security".

The failure to denounce aggression goes hand in hand with a movement to align human rights in armed conflicts with the teachings of international humanitarian law, which represents a huge concession to the violence of the world as it is. Many human rights voices, for example, have surrendered to the idea that international humanitarian law is the *lex specialis* of international human rights. International humanitarian law, for its part, has long made no secret that it considers a large amount of violence against combatants and, collaterally, non-combatants, to be compatible with international law, a fact not missed by the military who have arguably fully internalized the enabling logic of the laws of war.[65] There are specific humanitarian reasons for this humanitarian tolerance of violence, i.e., the need to ensure that the laws of war can operate as an autonomous regime in cases of armed conflict. It is conceivably a legitimate strategy to "humanize" and even "human rights-ize" the laws of war, to try and minimize the killings.[66] Yet from a more fundamental point of view, this approach misses the point that even the killing of combatants in armed conflict could be considered to be a violation of human rights to life, dignity, and peace, especially in situations of aggression.[67] In its effort to "civilize" international law, it also makes an immense concession to the permanence and, to a degree, legitimacy of war.

1.3.3 The Veil, Gender, and Minorities

Few issues have agitated human rights minds recently more than the debate on the Muslim veil and, beyond that, the place of religion in multicultural societies. What has been less noticed is the extent to which arguments *against* the burqa or to prevent the building of new minarets have increasingly absorbed and based themselves on the language of human rights. Indeed, such arguments in France, Belgium, Australia, Italy, or Québec are increasingly specifically framed in terms of the protection of women's rights even, of course, against the clearly expressed wishes of women wearing the veil. For example the Preamble to the Belgium law banning the full "Islamic veil" in any public space refers to concerns for "the dignity of women", in addition to "Belgian values."

The defense of the ban includes feminist activists and some highly contextual and articulate calls not to render women's rights subservient to religious minorities,[68]

---

[64] Douzinas 2007.

[65] Kennedy 2004.

[66] Bennoune 2004; Watkin 2004.

[67] Schabas 2007.

[68] Bennoune 2006.

but also some clearly opportunistic voices.[69] In particular, a number of extreme right parties, not known otherwise for their human rights inclination or for their feminist militancy, have jumped onto the human rights bandwagon and reinvented themselves as the defenders of women's rights.[70] The risk or the intended result is that human rights will be used to "otherize" Muslim immigrant communities accused of human rights "backwardness," reinforcing the construction of exclusive narratives of nationhood with strong islamophobic connotations.[71] Many xenophobic demagogues are, ominously, "human rights populists." What does international human rights law have to offer in the vicinity of such strange bedfellows?

One might think that this was simply a manipulation of human rights, and indeed there has been no shortage of principled civil liberties stands against the proposed bans, but human rights is not entirely innocent of this wave. The ECHR itself has bent backwards to allow countries like Turkey to ban the Muslim veil in certain public spaces, on the basis of relatively specious arguments, including the fact that Turkey faces a Muslim fundamentalist threat.[72] In its rush to understand the issue as one of oppression and women's equality, the movement risks minimizing women's autonomy, while reifying a vision that denies their agency and fostering a sense that they are in need of being saved.[73] The denial of the right to wear certain religious symbols stands oddly with the shrill invocations and fetishization of the right of freedom of expression in the wake of the Prophet cartoons polemic. Conversely, the temptation to protect minorities under the guise of freedom of opinion by deferring to groups' self-understanding risks degenerating into a superficial political correctness and cultural essentialization. In this context, generalizations based on "freedom of expression" or "dignity of women" seem too broad for their own good, helping to construct the debate as one of incompatible absolutes. They risk reinforcing a narrative of the "clash of civilizations" where dialogue, attention to individual cases and a sophisticated understanding of multicultural dynamics seem of the essence.

1.3.4 Economic Rights and Poverty

World poverty is by and large recognized as one of the greatest threats to the enjoyment of human rights. Economic and social rights are in this context, by most accounts, a progressive move. They seek to complement the "bourgeois" nature of civil and political rights. And indeed, in the global panorama of international human rights there is little doubt that economic and social rights represent a sort of

[69] Ho 2007.

[70] Fekete 2006; Kapur 2006a.

[71] Ho and Dreher 2009.

[72] Bleiberg 2005.

[73] Kapur 2006b.

avant garde, associated with pressing demands for food, water, health. Most of the skepticism about economic and social rights has come from libertarians who warn that they will violate negative liberties. But perhaps a more biting critique can be made from traditions inspired by the left. The rhetoric of economic and social rights has increasingly taken over from alternative discourses of economic, social and distributive justice, including those produced by Marxist, socialist and welfare traditions. It frames aspirations to economic and social justice as minimal even in societies where the discussion of social and economic justice could and arguably should be carried much further.

By focusing on the prize rather than the means, it fails to address head-on the distributive implications of securing economic and social equality. The discourse relies on vague notions such as "progressive realization," that lack any clear political tempo, and can easily become mechanisms for endless deferral. To the extent that economic and social rights rely on litigation, they can channel progressist energies away from collective or mass action towards more particularized claims or discourage all but a very select type of activism. This is in a context where we know that the vast majority of welfare advances that have been obtained in industrialized societies have not been secured through economic and social rights, as much as through class struggle, organized labor, or social activism. The discourse also diminishes the emphasis on solidarity or fraternity, even sacrifice, for the benefit of a disincarnated ideology of basic sustenance.

One story waiting to be told, in this respect, is that of how the international labor rights movement has been sidelined from the mainstream of international human rights. Although international labor rights were amongst the earliest to be recognized internationally through the creation of the International Labor Organization, they are strangely absent from the Universal Declaration, except indirectly through the idea of a right "to work" and "freedom of association." Moreover, international human rights mechanisms have by and large stood aside from most significant labor rights developments, and the principal human rights NGOs do not see these as part of their core mandate. This is despite the fact that labor conditions are an absolutely crucial part of the daily life experience of a very large part of humanity, and that much of what counts as grass roots human rights work, involving a real and tangible element of struggle against oppression, is organized labor.[74] Approaches that challenge this conventional separation and have sought to more aggressively mix both agendas,[75] such as the International Convention on Migrant Workers, have been shunned, in particular, by industrialized states. It is hard not to see how such a separation is part of the complex management of a legal framework receptive to the operation of a capitalistic economy.

The international human rights movement has also found itself unwilling to really problematize the international distribution of wealth, except to say that

[74] Gross 2003.

[75] Compa 2008.

states have different levels of obligation towards *their own* population depending on their resources. The movement's infatuation with agency, is also what frequently leads it to discount the importance of *structures*. Because of its embeddedness in the liberal structure of rights, social democratic rights discourse risks succumbing to the public–private dichotomy by focusing on state duties, in ways that fail to challenge dominant private actors or the operation of the market.[76] This renders the movement vulnerable to the accusation that it is deeply complicit in the operation of neo-liberal economic policies.[77] Human rights' very "legalization" through international law serves to elude the extent to which rights violations occur as a result of power relations for example between the North and the South, rather than simply states' inattention to the economic well-being of their populations.[78] In this context, "rights approaches" to economic problems are often little more than humane discourses of capitalistic governance. Challenges to the fundamental inequities engendered by the operation of multinational corporations' are absorbed by the discourse of "corporate social responsibility," arguably an attempt by multinationals to contain the counter-hegemonic potential of more radical discourses.[79] Rights-based-approaches to development may only have gained credence with international institutions because they have distanced themselves from the earlier language of the "right to development" and any direct challenge to international inequality of wealth distribution.[80] Those emphasizing the discourse of human rights to ground duties in the world's rich towards the poor remain on the fringe of the mainstream human rights movement.[81]

1.3.5 Jurisdiction and Hegemony

Behind the rise of international human rights lies a fundamental transformation of the very notion of *jurisdiction*, both prescriptive, adjudicative and enforcement. The international human rights movement has militated for many decades for an expansion of jurisdiction that communalizes the international interest in human rights, and make promotion of rights an interest of all. This has manifested itself in calls for ever greater degrees of, particularly judicial, centralization. Bypassing the limits of traditional inter-state adjudication, specific human rights bodies have been created (the ECHR, the ICC). When those prove insufficient or too slow to bring change, the preferred strategy has been to encourage transnational litigation using the domestic courts of some states (e.g., ATCA, universal criminal

[76] Stammers 1995, 501.
[77] Gathii 1999.
[78] Evans 2005.
[79] Shamir 2004.
[80] Cornwall and Nyamu-Musembi 2004, 1424.
[81] Pogge 2008.

jurisdiction). This has powerfully reshaped the notion that there is a "domaine reservé," an area of competency that is at least residually purely domestic.

The language of the efficacy of "enforcement" and "compliance" has tended to displace discussions about the justice or even the conceivability of interference (e.g, the Declaration on Friendly Relations between States). In encouraging this trend, often uncritically, human rights lawyers have arguably furbished the tools of the hegemon. Human rights concerns are potentially so broad that they can be used to justify interference on any range of issues. Conditionality powerfully reshapes the ability of a state to choose a distinct path in conditions of dependency. Transnational prescription and adjudication involve very significant shifts of the regulatory burden in which, under the guise of human rights, the more or less idiosyncratic preferences of forum states will be imposed on other states. The emphasis on mechanically "enforcing" human rights thus tends to put in the background issues of forum selection, cultural sensitivity and symbolic economy who is judging who, where, and why?[82] It impoverishes the range of ways in which one might respond to human rights violations, typically highlighting the West's own highly specific forms of legal response. Moreover, transnational judicial flows typically follow a North South route, often one strangely reminiscent of former colonial paths.[83]

The urge to extra-territorially apply human rights by some activists, for example in contexts of foreign occupation, is generally presented as allowing foreign nationals to benefit from the "higher" human rights standards of the home state and making that state accountable. Yet it may also be reminiscent of an earlier and justly rejected tradition of extra-territoriality of law's application, or contribute, under the guise of regulating it, to the legitimization of foreign presence. States, victims, stake holders are dispossessed of the application of local law for the dubious benefit of any law being applied. Conversely, international human rights law extra-territorial applicability may be denied, on the basis of an account which, under the pretext of not thrusting cultural norms on others, is deeply indebted to a dubious, orientalist account of the "other".[84] Either way, it seems, international human rights law finds it difficult to escape the temptation of hegemony or differentialism.

Supranational adjudication may be a marginal improvement on the transnational sort in that it more clearly centralizes the triggering of cases. Even in conditions of subsidiarity/complementarity, however, it also involves a very real potential for dispossession of a *contentieux* and the ways to dispose of it, which is implicit in the notion that crimes have been committed "against humanity" rather

[82] Mattei and Lena 2000.

[83] For example, it is quite striking that a great many of the exercises of universal jurisdiction in Europe involved former imperial powers France, Belgium, vis-à-vis former colonies Rwanda, the Congos.

[84] Wilde 2010.

than against a particular people, or particular individuals of flesh and blood.[85] Although the jury is still out on whether truth and reconciliation commissions are compatible with the obligations contained in the Rome Statute to prosecute, there is certainly a strong human rights constituency in the West that militates for an absolutist anti-impunity stand, and is ready to back such an injunction even in the face of renewed conflict or killing, and perhaps even when domestic alternatives have been chosen democratically. Moreover, there is often little understanding or sympathy for traditional means of dealing with crimes, which tend to be gauged on the basis of their ability to conform to rigid international human rights standards, regardless of their local legitimacy. Finally, the centralization of international judicial resources also involves conferring considerable powers no less in the case of international criminal justice than deciding who gets prosecuted to a few international technocrats with little accountability and, more importantly, in conditions where the loose criteria for picking defendants "gravity" invariably appear to be in the eyes of the beholder and take international criminal justice's gaze away from the West and onto Africa.

1.3.6 Human Rights and Ecology

One of the consequences of the domination of the international human rights movement is a tendency to want to make international human rights into a cure for all ills, and to minimize the tension with alternative social and international agendas, in a way that limits our collective ability for hard choices. This is evident in the way every social good can be translated in a "right to" language, and the resulting inflexibilities and exclusions, as well as the way in which the international human rights movement is defined as much by what is part of it than what is not.

One area where a link is currently being made between human rights and a not easily subsumable concern but with potentially very ambivalent consequences is the environment. This encounter has given rise to the idea of a "right to the environment,"[86] a claim particularly formulated in the context of global warming and presented as adding renewed vigour to arguments to curb global carbon emissions. Yet there is also reason to think that the invocation of human rights, for example for the worthy cause of protecting the Inuits and their arctic livelihood,[87] is fraught with hidden tensions. The fundamental intuitions that gave rise to the human rights project, in particular, may have begun to be deeply at odds with some of the challenges to which humanity is confronted. One thing that the international human rights movement can never escape is that it is, viscerally, a humanist movement.

More importantly it is a particular anthropocentric movement profoundly embedded in a form of modernity that has made the total domestication and

[85] Alvarez 1999.

[86] Shelton 1991.

[87] Goldberg and Wagner 2004.

control of nature for human needs an article of faith. The unrelenting exploitation of the planet's natural resources began in the eighteenth Century and has culminated in the last decades as the accomplished form of liberation of man by man. Deeply ensconced in the human rights psyche is a sense of entitlements that may derive from nature but that also deeply reify nature. Nor can human rights easily free itself of these biases. As de Sousa Santos has shown, human rights is above all an episteme embedded in a particular Western dissociation between subject and object, human and nature. Hence the suspicion, only beginning to be voiced, that human rights are too "human-centric" for an era profoundly challenged by the catastrophic impact of human activity. The framing of the problem as that of a "right to an environment," whilst it may achieve some tactical goals, risks reinscribing the original and highly problematic pattern of anthropocentric domination over nature in an endless loop. Similar arguments could be made about the complex relationship between human and animal rights.

1.4 Reimagining Human Rights as a Critical Project

The temptation of reconstruction in the grand sense is one that the critical project would probably rather avoid, and its forays into something in a less typically critical vein should be seen as more a work of reimagining than reconstruction. Yet precisely because the critique is often pragmatic it must also recognize the huge capital of sympathy from which human rights benefit, and the positive uses that capital can be put to. A part of the critical project is thus devoted to thinking critically about how to actualize both the project and practice of human rights in ways that avoid or at least minimize some of the dangers that have historically beset human rights.

1.4.1 Critical Cosmopolitan Horizons

In seeking to gain an international foothold, human rights law has in some ways conceded too much and too little to the world of states. Too little, because in its rush to universalize it has glossed over the sheer diversity of the world and exposed itself to accusations of imperialism. But also too much because it has too readily accepted that the state is necessarily the ultimate arbiter of justice domestically, neglected the transnational and the interstitial for the benefit of the domestic, and forgotten to really address how the interstate world is its own source of violence and exclusion. International human rights' universalism has often been a thin universalism, one in practice powerfully mediated by—but also highly reliant on the world of states.

Turning a cosmopolitan human rights against public international law is one strategy with serious transformative potential. The cosmopolitanism I have in mind

is one in which the benefits of plurality are not paid by the price of isolation and indifference, and the aspiration to commonality is not paid by a glossing over difference. Critical legal voices in that more deliberately reimagining genre have been far and few and sometimes await an unguarded moment,[88] but the work of authors as different as Philip Allott[89] or Patrick Macklem come to mind.[90] Macklem proposes an alternative account of international human rights law, one in which "the legitimacy of international human rights lies in their capacity to serve as mechanisms or instruments that mitigate some of the adverse consequences of how international law organizes global politics into an international legal system".[91] In essence, Macklem faults human rights for its excessive apology of the international legal system of sovereign states, which is an interesting sort of critique since it challenges human rights to be in a sense truer to its promise than it has been. For example, international human rights law is called to account for its role in defining morally relevant political communities, which are typically presumed to exist and unproblematized, at the exclusion of some. These might include the state, the *civitas maxima*, but also various forms of sub-state identification. Rather than reify territorial political arrangements, international human rights law could be about challenging the very distribution of sovereignty as opposed to simply its "unjust" manifestations, for example when it comes to minorities and indigenous peoples.[92]

There is by now a spattering of work of this sort, which is not content with taking the distribution of international authority as neutral from the point of view of human rights. International economic inequality is an obvious target.[93] The state is supposed to guarantee economic rights, but the state's ability to do so is seemingly dissociated from its place in the international system. International human rights law has made moves to better understand how its inability to challenge the very injustice of the international system may occasionally be part of the problem. The right to development is, for example, an uneasy attempt to mediate economic and social rights on the one hand, and the unequal—and morally arbitrary—worldwide distribution of wealth as resulting from the interstate system. Challenges to the interstate system's ability to exclude individuals from circulating freely around the globe, an ability deeply reinforced by the logic of human rights, also seem to have a more radical potential than the liberal concentration on right to asylum for the few.[94] Human rights critiques of the humanitarianism of the laws of war also challenge the extent to which the regulation of war has conceded too much to its reality, and needs

[88] Kennedy 2006.

[89] Allott 2002; Allott 2001; Allott 1992.

[90] In many ways this work complements work being done in political theory that seeks to chart possible moves beyond the current limitations of a world of sovereign coexistence. See Nardin 2000.

[91] Macklem 2007.

[92] Macklem 2006.

[93] Chatterjee 2004.

[94] Benhabib 2004.

to rediscover critical energies,[95] rather than consider that the jus ad bellum is an issue of "politics" that is beyond human rights as most human rights NGOs, somewhat sheepishly, do.[96]

1.4.2 *Decentering the Subject and the Politics of Defining the "Human"*

The critical project is typically less interested in definitive catalogues of rights and their interpretation than it is in the conditions of participation in the human rights movement. What matters is not what human rights are in the absolute, but who gets to participate in the "dialogue" about what they should be, and who defines how that dialogue operates. As Rorty and others have highlighted, perhaps the central dynamics of human rights is the definition of *what counts as human*.[97] "Humanity" has often been described in remarkably narrow ways that benefited whoever was in a position to monopolize that exercise of definition. A great part of the history of human rights has involved the gradual problematization of what it means to be human, and the enlarging of the circle of participants. Under a conventional liberal framework, the first efforts consisted in promoting strong "anti-discrimination" norms. The "right to equality" then gradually gave a more substantive and proactive meaning to the obligations of states reasonable accommodation, positive discrimination, etc., even as it became more central within the human rights edifice.

Increasingly, however, the challenge is not only promoting a norm of equality, but recognizing that being human means different things to different humans, and that we are human in irreducibly different ways. In particular, demands for equality have increasingly led to demands for *inclusion*,[98] in the form of societal acceptance of a diversity of ways of being human and a diversity of "rights experiences." This has led to a fragmentation of international human rights law, underlined the precariousness of univocal claims in the name of human rights, and contributed to loosen some of the intemporal and universal assumptions of human rights discourse. It is interesting to note that this movement has for the most part not come from the mainstream of international human rights. For example, it was not the High Commissioner for Human Rights, or the European Court of Human Rights, or Amnesty International that militated strongly for disability rights as human rights, but persons with disabilities who, vociferously, effectively, and after decades of being ignored, claimed the human rights language for themselves the same thing could be said of most groups that have sought to obtain specific human rights recognition.

---

[95] Bennoune 2004.

[96] Luban 1980.

[97] Rorty et al. 1993.

[98] Collins 2003.

However, it is also important that the demand made by such groups, beyond inclusion, has also been one for *transformation*, that points out some of the inherent deficiencies in rights language for the purposes of accepting all as they are, and not simply as human abstractions. The original concept and catalogues of rights were what they were also because their reference population was relatively narrow, the beneficiaries "knew who they were." When women, indigenous peoples, sexual minorities, migrants, persons with disabilities have sought to claim their rights in specific instruments they have insisted on reframing what human rights mean for *them*.[99] Contemporary human rights are thus increasingly less the solemnity of the Universal declaration and increasingly a patchwork of group, category, and phenomenon-specific instruments.[100] This leads to an endless work of creative destruction, as one's group concept of what it means to have rights is pitted against another group's critique of that concept, etc. Ultimately, more than merely about inclusion within the liberal house of rights, the demands made by various groups are that this house be fundamentally remodeled to accommodate a rich diversity of life-worlds—or indeed that it no longer be a single house at all.

1.4.3 Sovereignty, Community, and the Justice of Self-Determination

A further direction for the critical project in human rights has been to better problematize the relationship of human rights and sovereignty, universalism and pluralism, individual rights and self-determination. This is a central dilemma of the movement that human rights lawyers are keenly aware of, but a certain form of domestic human rights liberalism projected onto the international sphere can have the effect of systematically making sovereignty and community appear as part of the problem rather than the solution. Critical views on human rights, because of their skepticism of universalism and their sensitivity to how human rights can be used to legitimize agendas of intrusion and invasion, seem better suited to understanding the inherent value that lies in forms of collective existence, and the intimate links that exist between individual and collective rights.

This is obviously very familiar to third world critiques of human rights, and international human rights law since the 1960s has nodded to the right of self-determination, even though little has come out of this in terms of interpreting actual rights. In fact, the tensions between a Third World agenda of national liberation and the liberal framework of human rights remain quite glaring and recent historical research has reminded us of how uneasy and unnatural their union was from the start.[101] This may call for a re-exploration of the normative foundations of sovereignty, not simply as a second best solution but as expressing some

[99] Mégret 2008a.

[100] Mégret 2008b.

[101] Moyn 2010.

form of fundamental recognition of value diversity, incommensurability of ends, and aspiration to live in distinct communities. Value pluralism, in that respect, is a richer proposition than relativism, which sounds like it is for ever caught up in indecision or looking for excuses.[102] However, if international human rights law goes down that route, there is no reason why it should stop in midstream, and reserve respect for autonomy to states as particular historically and juridically constituted communities. The margin of appreciation could well become a tool to tolerate human rights variation within a sovereign framework and to rediscover what have been some of international human rights' perennial blind spots: minorities, indigenous peoples, multicultural societies in a world of migrations, etc.[103]

Yet the traditional rights critique that sovereignty and community are always at risk of becoming the tomb of rights also needs to be taken seriously. Rather than simply deferring to an unproblematized "margin of appreciation" that becomes a route to legitimizing the status quo or internal systems of oppression, critical international human rights would use human rights to highlight both the reality and the contingency of communitarian bonds. It would be attentive to the fact that, whilst sovereign oppression no doubt exists, individuals also exercise agency in how they cope with communal demands and that certain forms of "voluntary servitude" are inherent to social life. It would be sensitive to the extent to which radical change, however desirable it may be, has human costs, whilst outsiders with a reformist urge will often not have to bear the brunt of it themselves. It would be committed to the idea that one cannot protect individuals' autonomy against their own autonomy, without at least going against the very idea of human dignity.

Most importantly, critical international human rights would emphasize the impossibility and undesirability of settling the tensions between rights and culture, individuality and community along anything resembling a universal formula. Instead of the "rights of communities," with its considerable potential for reification of culture and existing hierarchies, it would emphasize "communities of rights", i.e., how every human group is not simply a subject but a producer of rights logic that needs to be interpreted hermeneutically and on its own terms before it is dissected for compatibility with a universal framework. Rather than a rights violation framework, it would think in terms of rights compromises, the difficult compromises that human beings make when they accept conditions that others might find hard to accept, for reasons that at least have the merit of being their own. Instead of freeing people from themselves, it would merely offer to side by those involved in their own "arduous struggle to become free"—or whatever else it is they want to become—"by their own efforts."[104]

---

[102] Danchin 2006.

[103] Mégret 2012b.

[104] Mill 2006.

1.4.4 Making the "International" Accountable

One thing that makes the critique of the depoliticizing effect of human rights particularly biting in the international context is that the international system creates very few structures of accountability and debate to sustain a critical practice of human rights. The emphasis is on developing enforcement capability and international human rights mechanisms, at the expense of a true human rights public sphere. Human rights law is therefore not merely tangentially depoliticizing, it is often a *substitute* for an international politics of debate and vision about the role of human rights. None of the existing UN institutions, and certainly not those specializing in human rights, provides the right sort of forum. Diplomatic dialogue caters to fundamentally other needs and the emphasis after adoption of instruments has too often been on rigorous implementation rather than renewed democratic debate.

Only the most recent international human rights instruments testify to a truly significant investment by international civil society but even then in conditions that one would hesitate to describe as democratic. No wonder then that international human rights is routinely decried as sharing some of the worst depoliticizing features of human rights domestically, without any of the normal countervailing forces. Reinventing the international public sphere,[105] or rendering it more democratic,[106] in this context, are critical human rights strategies that seem to have the potential to capitalize on some of the residual energies of the project.[107] There would seem to be a deep logic to the idea that global human rights issues should be debated by those primarily supposed to benefit from them,[108] not only in terms of adopting instruments but also of the many policies that are taken in their name.

Moreover, international organizations generally, including those involved in human rights promotion, typically cannot be made to be accountable for human rights violations. The perception, by and large, has long been of international organizations that "can do no harm" because speaking in the name of a necessarily benevolent "international community." A critical practice of international human rights would see international organizations as just as capable if not sometimes more of committing human rights violations. It would turn the human rights critique on those that promote human rights standards for others. It would challenge human rights INGOs[109] and NGOs,[110] for example, to answer for some of the consequences of the policies they advocate, rather than seeing the state as the only repository of rights obligations. It would also seek to problematize recurring invocations of the "international community" or "Humanity" as fundamentally deresponsibilizing moves that abstract human rights initiatives from their real cultural, political and economic moorings.

---

[105] Fraser 2007.

[106] Falk 2000a; Falk and Strauss 2001.

[107] See also Falk 2000a.

[108] Goodhart 2008.

[109] Mégret and Hoffmann 2003.

[110] Slim 2002; Collingwood and Logister 2005.

1.4.5 International Human Rights from Below and Legal Pluralism

For a movement that is philosophically obsessed with individual agency, international human rights law as a practice has also tended to be obsessed with the state. The international human rights paradigm is still largely indebted to a formal positivist concept of the Law. There is a strong association between the project of human rights and the aspiration to a more centralized international legal order capable of backing norms by credible threat of sanctions. International human rights lawyers typically think of international human rights sources as a hierarchy with universal organs superior to regional ones, and regional ones superior to domestic ones. A critical approach to international human rights would seek to transcend this reliance on international and formal organization and instead emphasize the degree to which human rights norms today are produced in a great variety of interstitial spaces, in ways that make the distinction between hard and soft law largely redundant. For example, it would emphasize the degree to which human rights norms are produced as much by NGO reports, domestic and transnational litigation, or even popular culture as by the Human Rights Committee or the Human Rights Council. It would thus contribute to dissociating the aspiration to human rights from the strict legal forms that purport to constrain it.

Against international law's very top-down approach to international human rights, it would emphasize the degree to which human rights are the product of a multitude of not particularly authorized encounters in the state, transnational and global realms.[111] Rajagopal is perhaps the author most associated with the attempt to conceptualize a theory of "human rights from below,"[112] and emphasize the degree to which social movements in particular have appropriated the discourse of human rights to challenge certain dominant features of international law. There are some ambiguities involved in the attempt to reframe the "international human rights movement" as something else than it purports to be, yet this attempt also takes seriously the notion that "human rights" is in a sense nothing else than a struggle over the socially acceptable meaning of the term. It is a narrative that can give their due to social forces, where international law has often been only too happy to take the credit for conquests that were hard won elsewhere. It can focus attention on the idea that it is not rights themselves that have brought about advances in rights, but the willingness of people to invest them with meaning. Nor would a critical approach to human rights mistake the fact that certain actors invoke human rights with the triumph of human rights; rather, it would be attentive to how every use of human rights is an attempt to reframe them for a particular cause.

[111] Mégret 2010.

[112] Rajagopal 2006.

In the effort to elucidate the actual meaning of human rights for those actors, it has never been more necessary to understand human rights anthropologically, as a social practice. Both mainstream human rights lawyers and critical ones have at times tended to operate at the level of the ideological superstructure, or of elite discourses about human rights major NGOs, intergovernmental organizations, at the expense of work more rooted in an observation of the actual uses of human rights. More than ever it seems what is needed is to answer the question "what do human rights do?"[113] and to answer it in detail with an eye for the local and the idiosyncratic. The goal should be to better understand, from a legally pluralistic perspective, how rights are produced and reinvented by their holders.[114] Anthropologists have considerably enriched our understanding of human rights by treating them as cultural practices and shown the benefits of a more grounded perspective to understand the potential and the constraints imposed by resorting to human rights language.[115] Legal pluralism can also channel attention to non-legal modes of norm production and the extent to which various forms of resistance, rebellion or civil disobedience are also at heart normative practices.[116]

1.4.6 Human Rights: Between Pragmatism, Ethics, and Politics

Today, it seems, everyone is a human rights pragmatist. Human rights cease to be believed in as "things in themselves", and become merely a tool of politics, albeit an idealist or virtuous politics. Pragmatism, however, is a complicated place from which to proceed. It assumes that we know what the goals are, when what is much needed is a politics of ends. Pragmatism may only work because the pragmatist is speaking to a particular community of reference, one that happens to share his world view, and within which talk of "costs" and "benefits" or distributive effects immediately makes sense. Moreover, pragmatism does not offer us much in terms of assessing competing world views, and can leave human rights pragmatists' either quite isolated or in strange company. Could it not also be said that John Yoo is a "well meaning, compassionate legal professional" who heeded the call to think pragmatically about the law in an age of terror? Moreover, there is a sense in which human rights pragmatism is a political agenda that advances masked, constantly hiding behind an anti-political smokescreen. A politics, even a *realpolitik* of human rights might of course fully acknowledge and accept the movement's aspiration to power. But human rights cynicism hardly seems an improvement on human rights naivety.

Is there room, in seeking to invent a non-hegemonic practice of human rights, for a turn to ethics? A critical ethics of human rights would emphasize how the

---

113 Asad 2000.

114 Nyamu-Musembi 2005.

115 Merry 2006; Goodale et al. 2006.

116 Mégret 2009a.

invocation of rights places the invoker in relation to the "other". It might, for example, shift the gaze of human rights inwards rather than outwards, focusing on rights violations "at home" rather than routinely criticizing the record of others. Bringing the whole of international human rights home more systematically to question one's own practices, rather than using them as an instrument of international projection might expose international human rights less to charges of hypocrisy.[117] It might also encourage the movement to resist the temptation of speaking in the name of others, unless such persons can absolutely not speak in their own name or ask others to do so. There is often an urge to speak for the victims of human rights violations that can end up reducing any meaningful sense of agency on their part, in a way that is deeply antithetical to human rights. Instead, human rights would emphasize an "ethics of invitation". Human rights "interventions" should be at the behest of some significant local human constituency and should learn to not overextend their welcome and not mistake silence for an invitation, not confuse polite curiosity with wholehearted endorsement, and not take an invitation to throw off the tyrant for an invitation to become the new one. An awareness of how human rights can often crowd out and even destroy other competing discourses could surely sensitize to an important hidden cost of rights discourse. A general sense of knowing one's place, of realizing the idiosyncrasy of much of what passes for a universalist human rights discourse, and of acting accordingly is also something with which human rights activists could usefully equip themselves. Finally, problematizing, questioning and ultimately forfeiting some of the unidirectionality of the human rights impetus, e.g., North, South; Center, periphery might also set the stage for a global practice of human rights that centers more. There needs to be space for the logic of *don-contre-don* to express itself, more Southern human rights NGOs visiting Northern prisons, for the global economy of rights not to simply reproduce a geography of rights surpluses and deficits.

Yet there may be something to mild and polite about a mere ethics of rights, a way of rounding corners without challenging rights indeterminacy. A true politics of rights, on the contrary, might emphasize the need to re-politicize rights by foregrounding debate, and process over eternal truths, technocratic rationality, judicialization and universalism. An ability to sense when rights discourse exceeds its welcome and morphs into a tepid, bourgeois superstructure that provides only a gloss of resolution to intractable political dilemmas may in fact be one of the keys to a renewed rights lucidity. A re-policitization of rights would in other words "normalize" rights as values and priorities, and make them amenable to the same sorts of discussions that are characteristic of politics' dialectics of ends and means. The fear of course is that in reducing rights to politics—"not taking them seriously" in Dworkin's famous words—one may be throwing the baby (the sense of some values being sacrosanct) with the baby water (the potentially anti-democratic ethos of rights discourse). Do we really want vigorous political debates on

[117] Geer 2000; Saito 2002.

whether torture is permissible? Yet this is partly a scare tactic, one that fails to recognize how all rights conquests were born from major social struggles or democratic developments, and how most of the issues crystallized in rights (aside, precisely, from torture) are eminently amenable to debate. A more "republican" view of human rights as oriented towards citizenship and participation in the polity also dovetails nicely with the sense that the rights narrative needs to be declined much more diversely.

Repoliticizing rights might involve, for example, putting at the heart of rights thinking the issue of the material conditions of its production, and the role that it serves in the sustenance of the ideological foundations of a globalized economy in the post Cold-War *Weltanschauung*. It could serve as a way to combat human rights' subtle depoliticizing effect as a corroder of class solidarities, and the demobilizing effects of "human rights-ism's" fundamentally humanitarian, philanthropist and charitable ideology. It could foreground the degree to which fundamental distributive issues underlie, produce and constrain debates that are presented as merely doctrinal or formal. It could highlight the degree of alienation that rights discourse can produce even among those who seem to embrace it enthusiastically. It could challenge the automatic association between human rights, democracy, the rule of law and the market economy. It could find common cause and seek to forge alliances with those social movements thinking about the sustainability of the dominant economic model for the planet.

1.5 Conclusion

Where does skepticism even disillusionment about rights leave the project of internationalizing human rights law? Is there a place from which human rights can operate if not safely from such skepticism, in dynamic tension with it? What does it mean to be an ethical, compassionate professional, as Kennedy, for example, frequently claims to be, in a context where formalist idols are crumbling? If there is no space free from politics, then how can rights still constrain them? Recuperating a place free from the angst about rights seems implausible. Yet median, fluid strategies are constantly opening. One of course does not have to "believe" in human rights in any metaphysical sense to see that they either have a deep mobilizing force with some constituencies and at some junctures or, more realistically, that they are occasionally backed by significant symbolic and real resources. Understanding the potency of rights discourse is also to accept that for most people, including many in the international rights movement, rights have long ceased to be a metaphysics and are already simply a register for political action that builds on a sense of community, history and a particular culture of activism. There is an "as if" character to much of human rights praxis as in, "as if rights existed". Taking that potential seriously even as one remains wary of it, is a first step.

A whole range of positions can be defended from within international human rights law. The point of the above discussion was not in itself to show that international human rights have occasionally reached a number of contestable positions, but that these positions are difficult to disentangle from the web that is human rights discourse. Conversely, positions that might at any one point seem to meet expectations of progress or justice are not "required" or "mandated" by human rights in the way that the too often dominant formalist framework would suggest. Rather, they draw their force from the ethical, social or political projects they embody, which human rights at best help shape and market as political projects. In this perspective, human rights is less the international community's governing agenda than a particular style of reasoning. The problem is that this style of reasoning is not quite law, yet not quite politics or ethics either. As a result, one often gets neither the claimed promises of the rule of law nor the frank confrontation of politics or the questioning of ethics, but a bizarre mix of technocratic rationality, consensual policy, and charismatic authority. Moreover, there is no mistaking that the discourse makes important demands on those who seek to use it including, by and large, that they forsake alternative discourses of emancipation or challenge. This then makes it much harder to contest particular human rights outcomes, and ultimately to challenge established hierarchies.

Part of the misunderstanding about critical approaches to international human rights is a misunderstanding about the nature of the project. The project is not one of destruction, but nor is it principally one of construction. In that, it resists the urge to "propose" solutions as itself a little too indebted to the frenzy of "relevance" and the politics of expertise and as such can of course occasionally be criticized for its passivity. Rather it is a project committed to paradoxical thinking, willing to live to the full the contradictory promise of rights, and accept the ambivalence inherent to them. One of its principal contributions may be a particular tone of guarded disenchantment. Critical approaches to international human rights law can help open eyes to the highly indeterminate and therefore highly contentious and political nature of debates about human rights. They can instil a healthy skepticism about overinvestment in one particular legal discourse, and emphasize the need to see human rights from outside as well as from within. They can unearth the hidden violence that lies at the heart of human rights and often threatens to overtake the project. They can reconcile the human rights movement with a particular form of politics, one that can rely neither on metaphysical certainty about the existence of rights, nor on its second best, legal certainty about their content. As such, critical approaches encourage complex thinking and accountability for choices made under the heading of human rights. They discourage grandstanding, sensitize to cost/benefit analysis, and foster a culture of caution rather than triumphalism.

One of the paradoxes of course is the extent to which the critique has by and large been internalized by the mainstream of human rights. What was provocative during the Cold War is the mainstream after it; what was challenging in the 1990s no longer is today. Yet there is also a part of the human rights program's genetics code that is not as easy to shed, and goes beyond tinkering at the margin with the

discourse of human rights. Assuredly, some of the hegemonic drive of the project remains, part of it anchored in the inherent claim of universalism, part of it anchored in the backing of powerful patrons, and part of it crusading enthusiasm of the believers. The international human rights movement does thrive on a certain paucity of alternative projects of international justice, where a critical approach would treat human rights as one emancipatory discourse among several.

Ultimately, critical views of human rights are dependent on what they critique, but reflect what seems like a healthier distance to the project than the human rights movement, which is too dependent on the discourse to be willing to tackle its dark spots head on. The critical project also suggests that there will be no respite from the agony of difficult choices, not even through a reliance on politics, pragmatism or ethics. To speak the "language of human rights" does not make us its servants, and thus does not relieve us of responsibility for the ways in which that language is used in the world.

References

Abu-Lughod L (2002) Do Muslim women really need saving? Anthropological reflections on cultural relativism and its others. Am Anthropologist 104:783–790

Ahmed L (1992) Women and gender in Islam. Yale University Press, New Haven

Allott P (1992) Reconstituting humanity-new international law. Eur J Int'l L 3:219–252

Allott P (2001) Eunomia: new order for a new world. Oxford University Press, New York

Allott P (2002) The health of nations: society and law beyond the state. Cambridge University Press, Cambridge

Alston P (1996) Human rights law. Dartmouth, Aldershot

Alvarez J (1999) Crimes of states/crimes of hate: lessons from Rwanda. Yale J Int Law 24:365

Anghie A (2005) Imperialism, sovereignty, and the making of international law. Cambridge University Press, Cambridge

Anghie A (1996) Francisco de Vitoria and the colonial origins of international law. Soc Leg Stud 5:321–336

Asad T (2000) What do human rights do? an anthropological enquiry. Theor Event 44:1–33

Benhabib S (2004) The rights of others: aliens, residents, and citizens. Cambridge University Press, Cambridge

Bennoune K (2006) Secularism and human rights: a contextual analysis of headscarves, religious expression, and women's equality under international law. Colum J Transnat'l L 45:367–426

Bennoune K (2004) Toward a human rights approach to armed conflict: Iraq. U C Davis J Int'l L Pol'y 11:171–228

Bhattacharyya GS (2008) Dangerous brown men, exploiting sex, violence and feminism in the War on terror. Zed Books, London

Bleiberg B (2005) Unveiling the real issue: evaluating the European court of human rights' decision to enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey, 91 Cornell L Rev pp 129–170

Brown W (2002) Suffering the paradoxes of rights. Left legalism/left critique, pp 420–434

Chandler D (2001) The road to military humanitarianism: how the human rights ngos shaped a new humanitarian agenda. Hum Rights Q 23:678–700

Charlesworth H (2002a) International law: a discipline of crisis. Mod Law Rev 65:377–392

Charlesworth H (2002b) Author author: a response to David Kennedy. Harv Hum Rts J 15:127–131

Chatterjee DK (2004) The ethics of assistance: morality and the distant needy. Cambridge University Press, Cambridge
Collingwood V, Logister L (2005) State of the art: addressing the INGO "legitimacy deficit". Political Stud Rev 3:175–192
Collins H (2003) Discrimination, equality and social inclusion. Mod Law Rev 66:16–43
Compa L (2008) Labor's new opening to international human rights standards. WorkingUSA 11:99–123
Cooke M (2002) Gender and September 11: A roundtable: saving brown women, Signs. J Women Culture Soc 28:468–470
Cornwall A, Nyamu-Musembi C (2004) Putting the "rights-based approach" to development into perspective. Third World Q 25:1415–1437
Danchin PG (2006) Between rogues and liberals: towards value pluralism as a theory of freedom of religion in international law. Proc Ann Meet Am Soc Int Law 100:414–416
Denike M (2008) The human rights of others: sovereignty, legitimacy, and "just causes" for the "war on terror". Hypatia 23:95–121
Dershowitz A (2001) Is there a torturous road to justice? Los Angeles Times 8 Nov 2001
Dezalay Y, Garth B (2006) From the cold war to Kosovo: the rise and renewal of the field of international human rights. Ann Rev Law Soc Sci 2:231–255
Donnelly J (1998) Human rights: a new standard of civilization? Int Affairs 74:1–23
Douzinas C (2007) Human rights and empire. Routledge, Cavendish
Engle K (1991) Female subjects of public international law: human rights and the exotic other Female. New Eng L Rev 26:1509–1526
Engle K (2007) Calling in the troops: the uneasy relationship among Women's rights, human rights, and Humanitarian intervention. Harv Hum Rts 20:189–226
Evans T (2005) International human rights law as power/knowledge. Hum Rts Q 27:1046–1068
Evans T (1998) Human rights fifty years on. Manchester University Press, Manchester
Falk R (2000a) Resisting "globalization-from-above" through "Globalization-from-below". In Gills (ed.), Globalization and the politics of resistance, Palgrave, London
Falk R (2000b) Global civil society and the democratic prospect. In: Holden B (ed), Global democracy: key debates, Routledge, New York
Falk R, Strauss A (2001) Toward global parliament. Foreign Aff 80:212–220
Fekete L (2006) Enlightened fundamentalism? Immigration, feminism and the right. Race Cl 48:1–22
Fidler DP (2001) Return of the standard of civilization, Chi J Int'l L 2 pp 137–158
Fraser N (2007) Transnationalizing the public sphere. Theor Culture Soc 24:7–30
Gathii JT (1999) Good governance as a counter insurgency agenda to oppositional and transformative social projects in international law. Buff Hum Rts L Rev 5:107–174
Gauchet M (1980) Les droits de l'homme ne sont pas une politique. Le débat 3:3–21
Gauchet M (2000) Quand les droits de l'homme deviennent une politique, Débat pp 258–288
Geer MA (2000) Human rights and wrongs in our own backyard: incorporating international human rights protections under domestic civil rights law—a case study of women in United States prisons. Harv Hum Rts J 13:71–289
Goldberg D, Wagner M (2004) Human rights litigation to protect the peoples of the arctic, Proceedings of the Annual Meeting American Society of International Law, pp 227–229
Goodale M, Baxi U, Cowan J, et al. (2006) Toward a critical anthropology of human rights. Curr Anthropol 47:485–511
Goodhart M (2008) Human rights and global democracy. Ethics Int Aff 22:395–420
Gross JA (2003) Workers' rights as human rights. Cornell University Press, Ithaca
Guilhot N (2005) The democracy makers: human rights and international order. Columbia University Press, New York
Helfer LR (2002) Overlegalizing human rights: international relations theory and the commonwealth caribbean backlash against human rights regimes. Colum L Rev 102:1832–1911
Ho C (2007) Muslim Women's new defenders: women's rights, nationalism and Islamophobia. In: Contemporary Australia, women's studies international forum

Ho C, Dreher T (2009) Not another Hijab row: new conversations on gender, race, religion and the making of communities. Int Feminist J Pol 11:114–125
Ignatieff M, Appiah KA, Gutmann A (2003) Human rights as politics and idolatry. Princeton University Press, Princeton
Kapur R (2006a) Normalizing violence: transitional justice and the Gujarat riots. Colum J Gender L 15:885–928
Kapur R (2006b) Revisioning the role of law in women's human rights struggles. The legalization of human rights: multidisciplinary perspectives on human rights and human rights law, pp 101–116
Kapur R (2006c) Human rights in the 21st century: take a walk on the dark side. Sydney L Rev 28:665–688
Kennedy D (1984) Spring Break. Tex L Rev 63:1377–1424
Kennedy D (2002) International human rights movement: part of the problem? Harv Hum Rts J 15:101–126
Kennedy D (2004) The dark sides of virtue : reassessing international humanitarianism. Princeton University Press, Princeton
Kennedy D (2006) Sovereignty: responding to Anghie and Aravamudan. Tex Int'l LJ 41:465–468
Kinley D (2007) Human rights fundamentalisms. Sydney L Rev 29:545–576
Koskenniemi M (1990) The pull of the mainstream. Mich Law Rev 88:1946–1962
Koskenniemi M (2000) L'utilisation du "raisonnable" par le juge international: discours juridique, raison et contradictions. Am J Int Law 94:198–201
Koskenniemi M (2005) From apology to utopia: the structure of international legal argument. Cambridge University Press, Cambridge
Lewis H (2000) Reflections on Blackcrit theory: human rights. Vill L Rev 45:1075–1090
Luban D (1980) Just war and human rights. Philos Public Aff 9:160–181
Macklem P (2007) What is international human rights law-three applications of a distributive account. McGill LJ 52:575–604
Macklem P (2006) The wrong vocabulary of right: minority rights and the boundaries of political community. In Sajo A (ed), Abuse: the dark side of fundamental rights, Eleven International Publishing, Utrecht
Mandel M (2004) How America gets away with murder: illegal wars, collateral damage and crimes against humanity how. Pluto Press, London
Mattei U, Lena J (2000) US jurisdiction over conflicts arising outside of the United States: some hegemonic implications. Hastings Int'l Comp L Rev 24:381–400
Meckled-García S, Cali B (2006) The legalization of human rights: multidisciplinary perspectives on human rights and human rights law. Psychology Press, London
Mégret F (2008a) The Disabilities Convention human rights of persons with disabilities or disability rights? Hum Rights Q 30:494–516
Mégret F (2008b) The Disabilities Convention: towards a holistic concept of rights. Int J Hum Rights 12:261–277
Mégret F (2009a) Civil disobedience and international law: sketch for a theoretical argument, Canadian Yearbook of international law, pp 143–192
Mégret F (2009b) Comrades and fellow South Africans…: the end of apartheid and the many strands of an international law "event." In Johns J, Pahuja (eds) Event: the force of international law, Routledge, London
Mégret F (2010) International human rights and legal pluralism: a research agenda. In: Provost, Sheppard (eds.) Human rights and legal pluralism, forthoming
Mégret F (2011) ICC, R2P and the security council's evolving interventionist toolkit, Finnish Yearbook of International Law, forthcoming
Mégret F (2012a) Abolition de l'esclavage et colonisation: de l'ambiguïté de l'œuvre de civilisation facilitée par le droit des gens, African Yearbook of International Law, forthcoming
Mégret F (2012b) Is there ever a right to one's own legal system? Possible rights foundations for legal pluralism, Israel Law Review 45, forthcoming

Mégret F, Hoffmann F (2003) The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities? Hum Rights Q 25:314–342
Mégret F, Pinto F (2003) "Prisoners" Dilemmas': The Potemkin villages of international law? Leiden J Int Law 16:467–490
Merry SE (2006) Human rights and gender violence: translating international law into local justice. University of Chicago Press, Chicago
Merry SE, Stern RE, Deveaux M, et al. (2005) The female inheritance movement in Hong Kong. Curr Anthropol 46:387–409
Mill JS (2006) A few words on non-intervention. New Engl Rev 27:252–264
Moyn S (2010) The last utopia: human rights in history. Belknap Press, Cambridge
Mutua M (2001) Savages, victims, and saviors: the metaphor of human rights. Harv Int'l LJ 42:201–246
Mutua M (2002) Terrorism and human rights: power, culture, and subordination. Buff Hum Rts L Rev 8:1–14
Mutua MW (1995) The ideology of human rights. Va J Int'l L 36:589–658
Nardin T (2000) International pluralism and the rule of law. Rev Int Stud 26:095–110
Nesiah V (2009) The specter of violence that haunts the UDHR: the turn to ethics and expertise. Md J Int'l L 24:135–154
Noll G (2003) The exclusionary construction of human rights in international law and political theory. SSRN eLibrary
Nyamu-Musembi C (2005) Towards an actor-oriented perspective on human rights. In: Kabeer N (ed) Inclusive citizenship: meanings and expressions, Institute of Development Studies, Brighton, pp 31–49
Oberleitner G (2007) Global human rights institutions: between remedy and ritual. Polity Press, Cambridge
Orford A (2003) Reading humanitarian intervention: human rights and the use of force in international law. Cambridge University Press, Cambridge
Otto D (2009) The exile of inclusion: reflections on gender issues in international law over the last decade. Melb J Int'l L 10:11–26
Petman J (2011) Egoism or altruism? No Foundations 373
Pogge T (2008) World poverty and human rights: cosmopolitan responsibilities and reforms. Polity Press
Rajagopal B (2006) Counter-hegemonic international law: rethinking human rights and development as a third world strategy. Third World Q 27:767–783
Rajagopal B (2003) International law from below: development, social movements, and third world resistance international law. Cambridge University Press, Cambridge
Romany C (1993) Women as aliens: a feminist critique of the public/private distinction in international human rights law. Harv Hum Rts J 6:87–126
Rorty R, Shute S, Hurley S (1993) On human rights: the Oxford amnesty lectures. Basic Books, New York
Roth K (2004) War in Iraq: not a humanitarian intervention. In: Human Rights Watch, world report: human rights and armed conflict
Saito NT (2002) Asserting plenary power over the other: Indians, immigrants, colonial subjects, and why U.S. jurisprudence needs to incorporate international law. Yale L Pol'y Rev 20:427–480
Sanders D (1996) Getting lesbian and gay issues on the international human rights agenda. Hum Rts Q 18:67–106
Schabas WA (2007) Lex specialis—belt and suspenders—the parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad Bellum. Isr L Rev 40:592–613
Shamir R (2004) The de-radicalization of corporate social responsibility. Crit Sociol 30:669–689
Shelton D (1991) Human rights, environmental rights, and the right to environment? Stan J Int'l L 28:103–138
Slim H (2002) By what authority? the legitimacy and accountability of non-governmental organizations. J Humanitarian Assist 10:1–12

Stammers N (1995) A critique of social approaches to human rights. Hum Rights Q 17:488–508
Starr S (2007) Extraordinary crimes at ordinary times: international justice beyond crisis situations? Nw U L Rev 101:1257–1314
Stein MA (2007) Disability human rights. Cal L Rev 95:75–121
Tamir Y (1996) Hands off clitoridectomy. Boston Rev 21:21–22
Thomas KR, Small J (2003) Human rights and state immunity: is there immunity from civil liability for torture? Netherlands Int Law Rev 50:1–30
Tushnet M (1983) Essay on rights. Tex L Rev 62:1363–1404
Waldron J (1993) A right-based critique of constitutional rights. Oxford J Leg Stud 13:18–51
Watkin K (2004) Controlling the use of force: a role for human rights norms in contemporary armed conflict. Am J Int Law 98:1–34
Weiler JHH (2001) Human rights, constitutionalism and integration: iconography and fetishism. Int'l LFD Int'l 3:227–238
Wilde R (2010) Compliance with human rights norms extraterritorially: 'human rights imperialism'? Liber Amicorum Vera Gowlland-Debbas. International Law and the Quest for its Implementation, pp 319–348
Williams RAJ (1990) Encounters on the frontiers of international human rights Law: redefining the terms of indigenous peoples' survival in the world, Duke, pp 660–704