

THE JBI HUMAN RIGHTS LECTURE

The Universality of
Human Rights:
Pragmatism Meets Idealism

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Founded in 1971 under the aegis of the American Jewish Committee, the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) continues in that capacity to strengthen human rights through the United Nations and other intergovernmental bodies. JBI strives to narrow the gap between the promise of the Universal Declaration of Human Rights and other international human rights agreements and the realization of those rights in practice.

Jerry H. Biederman is Chairman of the JBI Administrative Council, and Felice D. Gaer is the Director of the Institute.

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Introduction

HUMAN RIGHTS EXPERTS, legal scholars, academics, members of civil society and other friends of the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) gathered in New York City on May 18, 2016 for the second JBI Human Rights Lecture. The JBI Human Rights Lecture is one of a series of lectures presented by prominent human rights personalities on pressing international human rights topics. JBI was pleased to feature the views of Professor Yuval Shany, Dean of the Law Faculty and Hersch Lauterpacht Chair in International Law at the Hebrew University in Jerusalem. The lecture, entitled “The Universality of Human Rights: Pragmatism meets Idealism,” discusses a number of current challenges to the implementation of international legal norms.

At the 1993 World Conference on Human Rights, Member States adopted the Vienna Declaration and Programme of Action by consensus. This key instrument states clearly in its first paragraph that “the universal nature of these rights and freedoms is beyond question.” It goes on to clarify the issue in paragraph 5, dispelling questions that arose earlier in the UN’s preparatory conferences:

All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The Vienna Declaration thus reiterates what the 1948 Universal Declaration of Human Rights proclaimed: that human rights are universal and belong to each individual. How those rights are implemented has, of course, been the focus of domestic legislation and policies, reflecting the provisions of binding international treaties and conventions. As long as human rights do not fall below the universal norm, many diverse means of implementing these universal human rights can provide adequate protection for the individual rights holder.

Although the Vienna Declaration clarified the universality of human rights, the notion of fundamental, inalienable rights endowed to each person regardless of race, sex, religion, nationality, or any other factor, has sometimes been challenged by academics or government officials making arguments of cultural relativism.

In his lecture Professor Shany explores whether the universality of human rights is in fact fixed and beyond challenge. He confronts a number of ways in which rights may not be delivered to right holders in a uniform or universally similar form. Shany recounts some familiar arguments concerning the need to adapt to the different cultures in the world and, using the example of the right to life as it relates to abortion, takes the position that while human rights are universal, an inflexible view of culture and justice may lead to resistance and noncompliance that can ultimately be detrimental to the human rights system as a whole. He delves into issues of enforcement of rights including the failure of States to invest adequate financial resources to monitor rights resulting in a lack of effective monitoring at the international level. These elements reveal how rights are *not* being upheld in every situation or context, *de facto*, but they do not necessarily mean the rights themselves lack universal application or normative value.

Professor Shany is a member of the Human Rights Committee (the Committee), a UN-administered treaty-monitoring body that oversees the implementation of the International Covenant on Civil and Political Rights. He has served as an independent expert on the Committee since 2012 when he was nominated by the government of Israel and elected by the States parties to the Covenant. His experiences on the Committee examining the implementation of fundamental human rights in various countries throughout the world have informed his position.

During Professor Shany's tenure on the Committee, new members, elected from different countries, have occasionally articulated different interpretations of the scope of Article 6, the right to life. Shany has served as rapporteur for the preparation of a revised General Comment on this article. While the rotating composition of the Committee's experts provides some diversity of perspectives on the rights enshrined in the Covenant, the Committee's stance on the universality of human rights has remained unchanged – standing firm on the view that all individuals are afforded the same fundamental human rights and the States have the duty, as the Vienna Declaration said, to protect them. In the most recent draft of the Committee's revised

General Comment on the right to life, the text affirms the absoluteness and universality of the right, stating “Article 6 recognizes and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies... it also constitutes a fundamental right, whose effective protection is the prerequisite for the enjoyment of all other human rights.”

Although Professor Shany notes that treaty bodies and other human rights mechanisms exist with the purpose of protecting human rights, some of them struggle to do so effectively. Shany also references political context as a factor influencing the implementation of human rights. While politics undoubtedly plays a role in the manner in which States implement, ignore, or abuse human rights, the actual universality of global treaty-based human rights norms is not lessened by the political situation in a particular State at a particular time. Even in a state of emergency, only some human rights may be suspended and only for a short time—and Article 6 is not one of them. Moreover, the inability of a human rights treaty body to enforce rights protection obligations effectively should not initially alter the universality of those rights any more than the failure to enforce traffic norms or anti-rape laws would invalidate those norms. In other words, the availability and effectiveness of enforcement mechanisms (or lack thereof) for human rights obligations do not alter the universality of the rights themselves. The legitimacy of other laws and rights that are poorly enforced is not questioned simply because of poor enforcement.

In a presentation to the JBI Administrative Council, the late Sir Nigel Rodley, former Chair of the Human Rights Committee and co-rapporteur on the General Comment on Article 6, explained “The universality versus cultural and regional specificity issue is one that won’t go away. States will raise the issue from time to time but one can always point to the language that gets increasingly stronger from the Tehran World Conference to Vienna to the World Summit outcome document, which says human rights are universal. Is there room to recognize specificity of implementation? Of course there is. Are there areas of disagreement about interpretation of human rights? Of course there are. But the line of progress is clear.”

A robust discussion of Professor Shany’s lecture followed its delivery in which questions were raised about the role of UN human rights treaty bodies, about whether it is valid to suggest that only certain “core” elements of human rights are truly universally binding on States, and about the State-

centric character of most of the cultural relativism arguments. Some participants raised concerns that Professor Shany's argument could lead to an outcome in which UN human rights bodies would allow States to implement only human rights-related recommendations that align with their understanding of what is consistent with "culture" and thereby inappropriately limit the universality of human rights. As outlined in his lecture, Shany holds steadfast to the position that to ensure the preservation of human rights as a normative force more generally, international monitors should adopt a "thin" understanding of universality (i.e. one which takes into account cultural differences). We hope this lecture provides—and provokes—added reflection on the relationship of international human rights norms and their realization in practice, and encourage readers to address the questions it raises in the context of the ongoing effort, as set forth in the Vienna declaration, "to promote and protect all human rights and fundamental freedoms."

In addition to Professor Shany's previously mentioned roles at Hebrew University and on the UN Human Rights Committee, he also currently serves as Editor in Chief of the *Israel Law Review*, directs the Project on International Courts and Tribunals (PICT), and is a senior research fellow at the Israel Democracy Institute. Professor Shany is the recipient of the University President Prize for Outstanding Research at Hebrew University in 2009, a 2008 recipient of a European Research Council grant awarded to pioneering research leaders, as well as the 2004 American Society of International Law book award.

Through research, advocacy, constituency building, and collaboration, the Jacob Blaustein Institute for the Advancement of Human rights has pursued the protection and enforcement of human rights in accordance with universality, as discussed in this lecture. JBI was established in 1971 under the aegis of the American Jewish Committee in honor of Jacob Blaustein, a past President of AJC who represented the organization at the San Francisco Conference that established the United Nations and who successfully pressed for the inclusion of human rights in the UN Charter. Since that time, JBI has worked with human rights defenders, lawyers and diplomats to generate ideas and clarify human rights concepts, to strengthen international human rights norms and institutions, and to develop means to realize these ideals and proposals. In past years, we at JBI have carried out programs to enhance the content of international legal obligations to prevent genocide and torture; we have called on the United Nations and individual Member

States to insist on the protection of the rights of human rights defenders, members of religious minority communities, women, and others under threat; and we have encouraged the development and strengthening of institutions and mechanisms to enforce human rights obligations at both the national and international levels, such as the International Criminal Tribunal for the Former Yugoslavia, the Special Adviser to the UN Secretary-General on Prevention of Genocide, and the post of UN High Commissioner for Human Rights.

JBI is grateful to Robert S. Rifkind for his vision and generosity in establishing the JBI Human Rights Lecture series. Mr. Rifkind, a distinguished attorney and civic leader, served as Chair of the Institute's Administrative Council from 2000 to 2007 and remains an active member of its Steering Committee. His steadfast belief in the efficacy of law and indispensable need to guarantee and protect the human rights of every person has been an inspiration to JBI's Administrative Council and staff. We welcome his ongoing involvement, advice, and support.

We encourage those reading this lecture to consult the other lectures within the JBI Human Rights Lecture series, and to explore ways to address other pressing human rights issues.

—*Felice D. Gaer*
DIRECTOR

The Universality of Human Rights: *Pragmatism Meets Idealism*

INTRODUCTION

THE DEVELOPMENT of international human rights law (IHRL) in the post-World War II era has been premised on the notion that human rights—that is, those claims of individuals for basic entitlements and freedoms accruing to them by virtue of their membership in the human family—are universal in nature.¹ This normative assumption finds expression in numerous provisions, found in major international legal instruments dealing with human rights issues, including the 1945 UN Charter,² the 1948 Universal Declaration of Human Rights³ and in the corpus of IHRL treaties concluded from 1948 onwards.⁴ It also manifests itself in numerous declarations,⁵ judicial decisions,⁶ State practice⁷ and civil society initiatives⁸ confirming the universality of human rights. Thus, the principle that human rights are universal appears to be universally accepted: virtually all States have ratified the UN Charter and/or at least one major IHRL instrument proclaiming the universality of human rights,⁹ and there is overwhelming support in the literature for the proposition that universality constitutes a basic tenet of contemporary IHRL.¹⁰

While the notion that human rights are universal is accepted as part and parcel of international law *dogma*, the precise scope and contents of those specific human rights norms which have obtained universal acceptance remains highly contested. Such controversy is nourished by universality's opposing ideological position—cultural relativism, a position which revolves around the proposition that human rights, representing human needs, interests and beliefs on what constitute the 'good life,' should be construed in a contextual manner, depending on the relevant culture, circumstances and experiences of the social group in whose midst such rights are to be implemented.¹¹ Cultural relativists have thus argued that many norms comprising IHRL emanate from a particular Euro-centric or Judeo-Christian historical experience, and have limited relevance or justification for their application

to post-colonial and traditional societies from the global south.¹² Such relativists, together with nationalist proponents of a maximalist understanding of State sovereignty,¹³ have sometimes accused international institutions of advocating an overly broad reading of universal human rights and thus engaging in ‘rights imperialism,’¹⁴ that is, imposing in effect standards developed in rich Western countries on poor countries against the preferences of local communities. Instead, such critics of rights universalism have called for a ‘thin’ reading of universal human rights, covering only those few norms on which genuine international consensus can be identified.¹⁵

The present article does not seek to resolve the fundamental tensions between universality, relativism and nationalism, which have accompanied the development of the international human rights movement from its very inception. Nor does it purport to comprehensively discuss the theoretic, moral and legal basis underlying the scope and contents of universal human rights. Instead, it discusses some of the concrete dilemmas confronting one international body responsible for monitoring the interpretation and application of IHRL—the UN Human Rights Committee (UN HRC)¹⁶—when it discusses the implementation of human rights treaty norms. Since the UN HRC monitors the implementation of a key international human rights treaty—the International Covenant on Civil and Political Rights (ICCPR), which was ratified by most States (170 States) and which introduces a broad spectrum of rights, touching upon many sensitive issues of culture, tradition and social practice—it often meets challenges to the universality of some of the norms whose implementation it seeks to advance.

The tensions relating to the universal or relative nature of the rights monitored by the UN HRC are exacerbated and compounded by the structural weakness of all UN treaty monitoring bodies, which lack formally binding authority and have limited enforcement capabilities. This, in turn, results in sub-optimal implementation of the treaty obligations the Committee monitors. Whereas some States are complying, by and large, with most of their obligations under the ICCPR, others are chronically failing to meet many important normative standards—at times, because they are unwilling to do so, at other times because they are unable to do so, and yet at other times because they are both unwilling or unable to do so.¹⁷ This situation leads to de facto variations in the level of enjoyment of human rights in different States, resulting in diverging human rights practices notwithstanding the universal ambition of the relevant norms.

The two challenges confronting the UN HRC—the effectiveness and the universality challenges—are in reality interconnected. Extending the scope of what constitutes universal human rights through a broad interpretation of the ICCPR by the UN HRC, may result in larger implementation gaps, as increasing numbers of States may find such new interpretations, requiring them, for instance, to liberalize their abortion laws or recognize same-sex marriage, morally unacceptable or impractical. Furthermore, expanding the scope and contents of universal human rights may reinforce the opposition of some States and important stakeholders therein to the IHRL project as a whole, and could adversely affect the implementation of all human rights. Thus, the monitoring mission of the UN HRC may require balancing between a protective impulse, which pushes the Committee towards expanding the scope of human rights protections and engaging in progressive updating of norms to new social conditions and sensibilities, and concerns about normative overreach, which may result in strong resistance and limited norm-implementation. At a more doctrinal level, it may be argued that, as a body responsible for applying what are essentially consent-based obligations encapsulated in a treaty, the UN HRC has to consider when interpreting the ICCPR to what extent it has the legal authority to introduce through the process of interpretation new specific obligations not envisioned by the State parties upon ratification of the Covenant. Such a balancing act is complicated by the notion that perceptions of excessive conservatism or excessive activism may affect the legitimacy of the Committee and its work in the eyes of key constituents (States, civil society, academia etc.).

Confronted by such conflicting policy imperatives, it is not surprising that the UN HRC has been looking for possible methods for ‘squaring the circle’—strengthening universal human rights protections, while refraining from being perceived as over-extending its authority. Although the Committee did not follow the European Court of Human Rights (ECtHR) in developing a ‘Margin of Appreciation’ doctrine for obtaining this goal,¹⁸ I claim here that it did adopt certain alternative methods designed to allow it to undertake normative development, while minimizing pushback from State parties. These methods include some deference afforded to national decision-makers in the process of application of IHRL, exercise of ‘light scrutiny’ of State discretion in cases of right-balancing, a move from immediate to gradual realization of certain human rights standards, requiring significant social transformation, and a constrained reading of certain ICCPR rights.

Part One of this lecture discusses key features of the background political context in which the universality debate takes place before treaty bodies, such as the UN HRC, underscoring the deep ambivalence of States about human rights monitoring by international institutions. Part Two examines the specific effectiveness dilemmas that confront the UN HRC and the pros and cons of the short-term and long-term existence of gaps between law on the books and law in action. Part Three focuses on the accommodation methods developed by the UN HRC in reaction to objections founded on cultural relativity claims, and suggests that they should be read against broader concerns about the Committee's legitimacy and effectiveness. Part Four concludes.

PART ONE

The politics of the universality of international human rights law

Before delving into normative questions, relating to the scope and contents of universal human rights, it is useful to briefly discuss the political power dynamics in which the universality debate is conducted and which largely determine, as a pragmatic matter, its outcome. This linkage between law and politics should not come as any surprise to students of international law;¹⁹ nor should the allusion to the politics of IHRL necessarily have a pejorative connotation. After all, law is always shaped by the political choices of the relevant lawmakers (and perhaps, to a lesser extent, by the political choices of the relevant law-interpreters and law-apppliers).²⁰ In the same vein, the decision whether or not to comply with the law is often shaped also by political considerations or constraints.²¹

There is little question that the contents of IHRL reflect a political choice by lawmakers—principally States—to address a perceived or potential problem of governance through the development of normative side-constraints, which would limit the policy options available to the various branches of State government.²² While such norms are clearly based on a theory about the proper balance that needs to be struck between State power and individual rights and liberties, which is, in turn, informed by notions of justice and fairness,²³ the actual decision to create a binding legal obligation is ultimately a political decision, adopted by politicians (members of the legislature, the constitutional assembly or treaty negotiators), reflecting, *inter alia*, political considerations. Hence, for example, the international prohibition against torture, which can be found in article 7 of the ICCPR and in article 2

of Convention against Torture,²⁴ stems from a combination of factors, including a moral abhorrence of the use of torture by government agents against individuals, a pragmatic concern about the counter-productiveness of resorting to torture (e.g., generating false confessions), and a political will to undertake an international legal obligation to that effect, signaling thereby acceptance of the prohibitive norm and a commitment to follow it.²⁵ Arguably, similar dynamics, involving moral, legal and political considerations, also underlie the inclusion of the prohibition of torture in many national constitutions and criminal laws.

Although the interpretation and application of legal norms by courts and other professional law-applying bodies, such as the UN HRC, is expected to be objective in nature and removed from political pressures, in many venues of legal decision-makings the influence of politics is apparent. This is either because politics shape the relevant decision-makers' outlook on legal issues, or because some of them understand the law as a possible tool which can be employed in order to further broader political goals (or policy goals, shaped by political agendas).²⁶ For example, international law experts coming from the global North in international settings often take a position on the contents of IHRL (e.g., the right to development) which is quite different from that taken by law-appliers coming from the global South, and which appear to be correlated to the different political perspectives of the two blocs.²⁷ Finally, compliance with legal obligations—especially in the realm of international law—is also sometimes strongly influenced by political considerations, such as domestic public opinion,²⁸ interest in avoiding the reputational harm associated with non-compliance,²⁹ and responses to pressure from other States to comply.³⁰

The upshot of these considerations is that it is difficult to understand the reasons for including or excluding certain norms from the scope of IHRL without understanding the politics of international law making; moreover, it is difficult to fully understand why certain norms are construed narrowly or broadly, and why some norms are under-enforced, whereas others are effectively enforced, without understanding the politics of law-interpretation, law-application, and legal compliance. A pragmatic discussion of the universality of IHRL should therefore be mindful of the political dimension of what constitutes universal human rights, and which human rights are likely to be applied and enforced universally.

At a high level of abstraction, one may find at the heart of international

politics relating to the creation and application of international law a tension between stability and change.³¹ This tension, which is informed by ideals of international peace and justice, implies that the architects of the international law system should, at times, choose whether to embrace an existing status quo or push for reform. While some degree of stability and change are inevitable in any social system³² (in the same way that interests of peace and justice depend on one another to some extent),³³ it would be a fallacy to ignore the availability of an element of political choice between these values, at certain points in time (particularly, in ‘constitutional moments’ of the life of the international community).³⁴ Thus, for example, the UN Charter reflects, in my view, a long-term preference by the drafters for stability over change. Although the Charter pays lip service to ideals of justice, which were viewed in 1945 to be quite revolutionary in nature, such as sovereign equality of nations,³⁵ self-determination of peoples³⁶ and respect for human rights,³⁷ its key provisions protect the post-World War II status quo: It enshrines the territorial integrity of existing states,³⁸ protects their political independence,³⁹ prohibits intervention in their internal affairs,⁴⁰ and grants the five great powers, for an unlimited period of time, permanent seats at the Security Council with veto power on its resolutions (i.e., veto on change),⁴¹ and exceptionally broad legal authority to maintain and restore international peace and security⁴² (note that no similar authority was granted to maintain and restore international *justice*).⁴³ In light of this configuration of legal powers, which seriously limits the ability of the UN and its members to facilitate reform in the legal and political status quo, it is not surprising that the UN has been regarded by some as primarily geared toward maintaining world order,⁴⁴ and as a vestige of a gone-by era, which now constitutes an impediment to progress and to obtaining justice on a universal scale.⁴⁵

IHRL too features a tension between stability and change. On the one hand, IHRL challenges the status quo by requiring States to change some of their laws, introduce important governmental reforms, and take specific measures designed to render States and, by extension, the international order, more fair and just. Such a challenge is accompanied by the rhetoric used in some of the principal IHRL instruments, suggesting that their objective is a major overhaul of the international order.⁴⁶ On the other hand, IHRL can be regarded as means to legitimate the existing international order—i.e., by facilitating an image of an existing international legal order

based on principles of international law and justice. Furthermore, the contents of IHRL derive, to a large extent, from the contents of the domestic human rights laws of many States. Thus, it has been alleged that greatest contribution of IHRL is in the guarantee it provides for new democracies against backsliding,⁴⁷ that is, against a regressive change of the status quo.

The gap between the robust contents of IHRL norms and the uneven impact of its enforcement institutions may also be indicative of an attempt by the field's legal architects to strike a balance between stability and change. On the normative plane, IHRL treaties introduced many important innovations, which at the time of their adoption were considered quite revolutionary. These include a right to equality for women,⁴⁸ protection of children⁴⁹ and persons with disabilities,⁵⁰ minority rights,⁵¹ the right to elect and be elected,⁵² the prohibition on enforced disappearance,⁵³ and the right to adequate standards of living.⁵⁴ Such rights were further extended, by way of interpretation by international law-apppliers, to include other innovative concepts, such as the LGBT rights,⁵⁵ rights of indigenous peoples,⁵⁶ and the right to truth.⁵⁷ The legal order maintained at the global level from 1945 onwards contains, however, very limited enforcement mechanisms to implement universal legal standards when confronting recalcitrant states, interstate and intra-statal actors. For example, the UN treaty bodies, including the UN HRC, do not have, as a rule, any formally binding legal powers;⁵⁸ furthermore, they are manned by unremunerated experts, serving on them on a part-time basis, in an organizational environment that is chronically underfunded and understaffed.

This configuration of legal authority and operational capacity, appears to be the product of a conscious design choice—to create a large number of relatively weak treaty bodies and special procedures, without investing them with significant authority and capacity.⁵⁹ So, while the norms of IHRL develop constantly and inject into the international legal system an element of constant change and reform, the weakness of the monitoring institutions that exist at the global level allow those States who wish to preserve the status quo to do so without incurring a great cost (illustrating, once again, how principles of justice tend to become subjugated in international life to political expediency). It may be noted that in some regional contexts, legal institutions supporting the implementation of international human rights instruments offer more guarantees of effectiveness (the European Court of Human Rights (ECtHR) is the prototype example of a strong IHRL

application body). However, even in such contexts, under-enforcement of norms persists; furthermore, since regional human rights norms have been shaped by regional experiences and traditions the degree of change of the status quo they require is sometimes more limited than that required by universal norms in other settings.

PART TWO

The UN HRC's Effectiveness Challenge

One important implication of the current state of affairs, according to which the universal norms of IHRL are not backed by a robust institutional apparatus, is a chronic gap between IHRL norms on the books, and their actual implementation in reality. This is because institutions such as the UN HRC have very limited tools for enforcing IHRL, and can only try to pressurize States to change their human rights practices by applying a combination of persuasion,⁶⁰ public shaming⁶¹ and support of implementation efforts by other international and local actors.⁶² The success of such attempts depends, however, on a variety of factors, including the degree of resistance to the norms in question by the relevant States and their power to effectively resist the pressures put on them.⁶³ Furthermore, as in other areas of international law compliance, a 'feedback loop' exists between the effectiveness of the UN HRC in promoting compliance with the ICCPR and its institutional legitimacy: successful resistance to enforcement attempts weakens the authority and credibility of the enforcement body, thus rendering its future ability to enforce norms even more uncertain.⁶⁴

The practice of the UN HRC, discussed below, suggests that resistance is particularly strong with regard to Covenant norms, which are at odds with deeply entrenched cultural and religious practices, or which stand in tension with fundamental ideological tenets or key political interests of the target State. It also suggests that the ability of any State to mount effective resistance to international enforcement efforts depends on its geopolitical status and vulnerability to international criticism.⁶⁵ At the same time, the existence at the domestic level of independent judicial institutions, effective national human rights institutions, and an active civil society with an operating space and ability to influence governmental policy, increases considerably the prospects for compliance with IHRL. This is because such domestic entities can help to bridge gaps between international standards and local norms and practices, and reinforce international enforcement efforts.⁶⁶

Hence, for example, one can explain the relative success of the UN HRC in inducing the Czech Republic to commit to remove a pig farm located on a World War II Roma concentration camp by way of allusion to its ability to effectively embarrass a State which has an active civil society, and which belongs to a group of middle-sized States that are concerned about their reputation in the field in human rights, about an issue which generates limited ideological and political pushback.⁶⁷ In the same vein, the Committee seems to have been successful in pressuring South Korea legal institutions to change its laws on initial judicial review of detention of criminal suspects,⁶⁸ pushing Canada to change its laws conferring indigenous Status under the Indian Act,⁶⁹ and encouraging Ghana to maintain its moratorium on the application of the death penalty.⁷⁰ At the same time, the Committee was unsuccessful, up until now, in inducing China to introduce free elections in Hong Kong—a failure that could be explained by China’s ability to resist international pressures due to its geopolitical status and the particular sensitivity of norms requiring free democratic elections for the Chinese State.⁷¹ The Committee was also unsuccessful in getting Sudan, whose civil society has not engaged at all with it during the review process, to change its religion-based criminal laws and to abolish the death penalty for apostasy and marital infidelity.⁷² The upshot of the limited ability of the UN HRC to push State parties to the ICCPR to comply with their IHRL obligations is the emergence of a problematic equilibrium: The rights enumerated in the Covenant *appear* to apply equally to all States and to protect all individuals governed by them; yet, *in actuality*, there are chronic gaps in implementation of certain human rights, across certain regions and in respect to certain powerful States.

While some gap between law on the books and law in fact is a common legal phenomenon (perhaps, inevitable in any human society), an overly broad gap between the IHRL and reality could put in question the actual acceptance of certain human rights norms and undermine the legitimacy of IHRL as a universally applicable standard governing equally the conduct of all States.⁷³ It may also suggest that IHRL monitoring institutions are ineffective and lack credibility.⁷⁴ One may note in this regard that the gap between law on the books and law in fact is not a unique problem in the application of the ICCPR by the UN HRC, but rather cuts across all human rights instruments and enforcement mechanisms. Thus, for example, the prohibition against discrimination on the basis of gender—which is found in article 3 of

the ICCPR, as well as in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁷⁵ (one of the most widely ratified human rights treaties—189 State parties), the Universal Declaration⁷⁶ and UN Charter⁷⁷—is clearly one of the most fundamental norms of international human rights law.⁷⁸ Still, despite the universal character of the norm and multiple enforcement efforts by the UN HRC, the CEDAW Committee and special procedures at the international level dedicated to promoting gender equality,⁷⁹ women continue to be victims of discrimination everywhere, and in some cases, gender discrimination is deeply embedded in culture and institutions of government.⁸⁰ This gap between the contents of the universal norm prohibiting gender discrimination and the chronic and widespread nature of contrary practices implicating State and non-State actors can be explained by the blunting of law through political power: While enough political support could be amassed behind the legal prohibition against discrimination to allow for its creation and continued existence and even development, political resistance to the norm has manifested itself in a combination of measures designed to dilute its influence, including failure by some powerful states to ratify relevant human rights treaties,⁸¹ the introduction of far-reaching reservations to instruments protecting women's rights,⁸² adoption of restrictive interpretative positions for key IHRL provisions on equality,⁸³ and weakening of the jurisdiction of enforcement mechanisms, denying them from having binding legal authority.⁸⁴ Hence, the structural weakness of treaty bodies, such as the UN HRC, is part of a broader constellation of power which allows for a persistent gap between universal law on the books and law in action.

Still, it is important to also note some of the potentially beneficial consequences of the aforementioned implementation gap (whose very existence could be, as mentioned before, an inevitable feature of any legal system). First, societies sometimes resort to gaps between law on the books and law in practice in order to deal, on a pragmatic basis, with complicated dilemmas which *ex ante* legal norms might prove too rigid to handle. For example, decisions not to prosecute rebels in order to stop a civil war or to allow life in exile for former dictators in order to facilitate transition of power to democracy, may justify creative *ad hoc* extra-legal arrangements, which deviate from the ordinary norm of legal accountability for violations of IHRL.⁸⁵ Still, legislating in advance such exceptional arrangements might be counter-productive as it could indirectly encourage the commission of human rights violations in the

future. A gap in the actual implementation of accountability norms could help in ‘squaring the circle’ of reconciling the need to do what is necessary at a particular situation without irrevocably sacrificing an important moral and legal principle. The reconciliation of such contradictory impulses could only work, however, if deviations from the norm are truly exceptional in nature or where an ‘acoustic separation’ exists between the normative and practical domain (i.e., no ‘feedback loop’ is established between law and practice), so as to prevent erosion of the norm itself as a result of its partial application.⁸⁶

Second, while a gap between law on the books and law in action may reflect an equilibrium between law and power, it may also have the potential for gradually changing the status quo, and for allowing individuals, NGOs and other States to challenge the under-enforcement of universal norms. In particular, a push toward fuller implementation of universal norms may occur following a change in the prevailing political conditions and power-dynamics, which may render plausible the enforcement of norms that been regarded until then as utopian in nature.⁸⁷ One dramatic change of such a nature, resulting in a considerable narrowing of an implementation gap pertaining to important international norms, has been the transformation into reality of the UN Charter’s abstract call for self-determination of peoples during the era of decolonization in the 1950s and 1960s. The so-called ‘Arab Spring’ may represent yet another push to implement the right to democratic governance, which has long been regarded for many peoples round the world as a ‘hollow hope.’⁸⁸ Thus, powerful ideas about universal norms of IHRL may have, when the conditions are ripe, real effects on the state of human rights in the world. Still, it appears that large gaps between law and practice would require particularly great efforts to overcome, thus putting the feasibility of relevant reforms into question. Moreover, a sharp move from one equilibrium to another may entail loss of stability of the international order, which could create new sets of problems—failed states, civil wars, and substitution of old dictatorships with new dictatorships.

Ultimately, the long-term project of creating and maintaining an effective body of universal human rights norms is likely to suffer from the persistence of broad gaps between law and practice. Such chronic gaps could affect the contents of the norms (casting doubt, *inter alia*, on their universality) and complicate efforts to close them. It might also adversely affect the credibility of treaty monitoring bodies such as the UN HRC. Since institutional effectiveness and legitimacy are closely interconnected,⁸⁹ repetitive failure by

some States to comply with recommendations issued by the UN HRC may erode its perceived authority in the eyes of all States.⁹⁰

PART THREE

The Universality Dilemma

The effectiveness challenge posed by the limited ability of the UN HRC and other treaty bodies to enforce their decisions, is one reason for them to try to avoid normative overreaching. Interpreting human rights norms in an expansive manner, which is likely to be resisted by many States and to result in non-compliance on their part, may lead to loss of institutional legitimacy and to less-than-universal application of human rights standards. At the same time, failure on the part of the UN HRC to meaningfully exercise its mandate to effectively implement the ICCPR through adopting excessively narrow legal constructions may also entail effectiveness and legitimacy costs. Here too, the Koskenniemi tension between apology and utopia presents itself quite clearly,⁹¹ cautioning the Committee both against overreaching (i.e., adopting ‘utopian’ positions far removed from actual or probable State practice) and underachieving (i.e., adopting ‘apologetic’ positions, which merely reflect how States conduct themselves anyway). At a different level, UN HRC may need to strike a balance between two competing sets of consequential interests: Creating gaps between IHRL and State practice through progressive interpretation of human rights law stimulates progressive change in State practice, yet overly broad gaps between law and practice may generate much uncertainty and instability, which could result in doubts about the contents of human rights law and about the Committee’s own authority.

The other fundamental tension, which efforts to apply IHRL on a universal scale confront—the above-mentioned cultural relativism objection—raises another set of normative considerations. As opposed to the phenomenon of limited implementation which represents a compromise between ideal and power, the debate around cultural relativity raises the question of whether the universal application of IHRL is indeed an ideal that the human rights movement should aspire for, and whether monitoring bodies, such as the UN HRC, should adopt a ‘one size fits all’ outlook on all human rights norms. Such questions arise with particular force when the cultural practices in question enjoy broad social acceptance in the relevant State party, including by those who are deemed victims thereof (such as women in patriarchal societies).⁹² In such cases, it is sometimes claimed that the human rights norms

offended by the cultural practice in question should be counter-balanced against other human rights norms which validate group and individual autonomy and choice.

Examples of such dilemmas abound. For example, the debate in France over the wearing of Burkas or Burkinis in public introduces the tension between what is regarded by many as a symbol of gender oppression and discrimination and the right of minority women to decide whether or not to wear traditional garbs.⁹³ In the same vein, questions arising in Israel relating to segregation of men and women on public transportation lines serving ultra-orthodox communities, allegedly on a voluntary basis, and to the introduction of secular education in religious schools, contrary to the wishes of the students and their parents, raise tensions stemming, *inter alia*, from competing claims under IHRL.⁹⁴ In such cases, treaty bodies such as the UN HRC are confronted with the question of whether there should be uniform formulas for balancing between conflicting claims for rights, or whether one should rather accept the position that different groups and individuals may have different visions of what constitute good and dignified lives, which may depend on their unique cultural and historical experiences and the socio-economic context in which they exist. Furthermore, a second-order question which arises in such cases is whether international legal institutions are better situated than their national counterparts to address such dilemmas.

The European Court of Human Rights (ECtHR), which like the UN HRC has confronted the need to engage claims suggesting competing and relative values, has resorted in many of these cases to a margin of appreciation doctrine, according to which it is for national decision makers to balance difficult tensions between competing rights and interests, such as between freedom of expression and privacy (publication of photographs of celebrities on private holiday),⁹⁵ or between the interest in protecting a secular public space and religious freedoms (wearing of headscarves by university students).⁹⁶ In adopting this approach, the Court has not only accepted that national institutions are better situated than it for the purpose of applying the Convention, but it has also accepted that certain values protected by international human rights law norms can enjoy greater currency in some societies than in others. Indeed, the margin of appreciation has been criticized as a manifestation of normative pluralism, which is less than fully compatible with the notion of universality of human rights.⁹⁷

The UN HRC has refused so far to follow the footsteps of the ECtHR and

recognize a margin of appreciation in the interpretation and application of the ICCPR.⁹⁸ This position partly derives from institutional concerns: the large diversity of national decision makers subject to review by the UN HRC and the limited democratic credentials of many State parties to the ICCPR, renders resort to a margin of appreciation doctrine and to the broad deference to the discretion of national authorities it entails, an unpalatable option for the Committee. In fact, it is precisely the lack of trust in the ability of national governments to adequately protect human rights, which led to the establishment of monitoring bodies, such as the UN HRC, and international instruments, such as the ICCPR. Hence, reverting back to the discretion of national authorities without sufficient institutional guarantees in place to ensure the IHRL compatibility of their decisions, could result in negative outcomes for potential victims of human rights violations. Moreover, the very legitimacy of the UN HRC as a body of experts monitoring in a fair and impartial manner State compliance with the ICCPR—an instrument including universal human rights norms—might suffer were the Committee to endorse a pluralistic attitude towards implementation of the Covenant. Accepting that the contents of IHRL depend on the social or cultural context in the monitored State party undermines a powerful rhetorical justification for IHRL, that is, that such rights are universally acceptable because they are based on self-evident truths and justifications, which makes them a pre-political conditions for life with dignity.⁹⁹ A nod towards a margin of appreciation approach is thus a nod towards regarding human rights as no longer pre-political, but rather as the product of internal political deliberations notwithstanding that such deliberations gave rise to the need to create IHRL to begin with.

Still, although the UN HRC has been reluctant, for all of the above reasons, to embrace a margin of appreciation doctrine with regard to the contents of the ICCPR, its effectiveness deficiencies have pushed it to find other methods for avoiding confrontations with State parties over universal standards whose implementation may encounter considerable resistance. In affording State parties some latitude in the application of the ICCPR without renouncing its universal nature, the Committee tried to strike a balance between the ideal of universality and pragmatic considerations affecting its work.

One method adopted by the Committee, especially in deportation cases in which the decision of the deporting State on the risk which the deported

individual is likely to encounter in the receiving State, has been to accept that a certain degree of deference should be afforded to national decision makers when evaluating facts relevant for the application of IHRL norms.¹⁰⁰ Hence, although the norm against non-refoulement of asylum seekers remains universal in nature (regardless of the prevailing domestic attitudes towards migration in many countries), the UN HRCs case law potentially accommodates situations in which different sending States reach different factual conclusions on whether or not the conditions in a the receiving State expose the individual whose deportation is sought to a real risk of a serious harm. It thus limits the resistance to its views (i.e., decisions in individual communications), by deferring to domestic fact-finders.

In the same vein, the Committee has been willing sometimes to accept in cases involving balancing between different human rights, the justifications invoked by the States for limiting ICCPR rights, without undertaking a robust analysis of the necessity and proportionality of the restrictions sought. This approach, which mirrors to some extent the US Supreme Court minimalist 'rational basis' level of scrutiny of decisions whose constitutionality is challenged,¹⁰¹ allows States to enjoy de facto some regulatory space when applying the Covenant, without conceding the instrument's universal character. Hence, for example, in the *Faurisson* case, the Committee accepted without much discussion the reasonableness of the restrictions imposed by France on Holocaust denying statements (balancing freedom of expression against non-discrimination),¹⁰² and in the *Singhe Bhinder* case it accepted without a detailed analysis the safety justification provided by Canada for requiring a Sikh employee to wear a hard hat, notwithstanding the adverse effects this has on his freedom to manifest his religion and his willingness to assume the attendant safety risk (balancing the right to life with freedom of religion).¹⁰³

Another method embraced by the UN HRC with a view to reconciling the ideal of universalism with the pragmatic need to avoid the backlash which may ensue from attempts to enforce universal norms that require a change of deeply embedded cultural practices, involves incrementalism. When engaging with States in the course of reviewing their periodic reports about the implementation of the Covenant, the Committee has sometimes formulated its criticism and recommendations in a manner that allow states to move gradually towards full compliance with the Covenant. This approach amounts, in effect, to acceptance of the role of cultural and political constraints in determining the timeline for implementing universal norms.

Hence, for example, South Africa appeared before the Committee in 2016 and described the practice of polygamy as culturally embedded and as a post-apartheid reaction to the suppression of indigenous practices during the apartheid era.¹⁰⁴ It also claimed that the apartheid era ban on polygamy did not, in effect, prevent the practice of polygamy, but rather pushed polygamous relationships to the ‘shadows,’ resulting in lack of effective legal protection for women involved in such relationships.¹⁰⁵ Although the Committee has taken in the past the view that the universal principle of equal rights for men and women requires that polygamy be outlawed (especially when permitting multiple marital relationships for men, but not for women),¹⁰⁶ it seemed to have taken the view during its review of South Africa that imposing this universal standard, as a strong obligation of result requiring immediate eradication of the practice, may result in resistance and, possibly non-compliance with the norm. The Committee may have also had some concerns as to whether pushing South Africa to outlaw polygamy without allowing it some time for inculcation of the relevant norm would actually benefit women, given the particular social conditions and history of polygamy in South Africa. Hence, it adopted what may be regarded as a flexible prescription: while expressing concern “at the existence in law and in practice of polygamous customary marriages in the State party, which undermine the principle of non-discrimination,” the Committee called on South Africa merely to “take adequate measures to *reduce* the incidence of polygamy, with a view to bringing about its abolition” (emphasis added). In other words, both realpolitik and cultural relativity considerations may have led the Committee to opt for an incremental approach in implementation of the relevant universal norm against polygamy, call on the State to take gradual measures in the right direction, while maintaining the ultimate goal of abolishing the practice altogether.

Similar, flexible temporal prescriptions were adopted by the Committee in other cases, involving deeply embedded cultural practices. Indeed, in its latest concluding observations on Ghana, the Committee stated its position on a number of harmful traditional practices:

The Committee is concerned about the persistence of certain harmful practices, notwithstanding their prohibition by law, such as female genital mutilation, *trokosi* (ritual servitude), forced early marriage and witchcraft accusations leading to confinement in witch camps. The Committee also expresses its concern about the practice of polygamy, which is still

permitted through religious or customary norms and widely accepted in society. While, as explained by the delegation during the dialogue, the cultural background of these practices must be borne in mind when devising strategies to address them, the Committee recalls that a failure to comply with the obligations contained in the Covenant cannot be ultimately justified by reference to political, social, cultural or economic considerations within the State (general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant).¹⁰⁷

Hence, the Committee appeared to accept that cultural relativity considerations may have a role in devising strategies for combatting harmful traditional practices, although *ultimately* such cultural considerations cannot justify a violation of the Covenant. The actual recommendation issued to Ghana—to further enhance “efforts to prevent and eradicate harmful traditional practices”¹⁰⁸—also supports the view that the UN HRC has been willing to regard the problem as requiring a long-term response, which imposes, at least at present, largely obligations of means, and not result.¹⁰⁹

The final method employed by the Committee in order to address the tension between claims concerning universality and cultural relativity, involves narrow interpretation of the scope of certain potentially universal rights, in the light of inconsistent cultural practices. One prominent example of this tendency is found in the UN HRC’s analysis of limits on the power of States to regulate access to abortion services. The Committee’s draft General Comment 36, which strives to codify the work of Committee on matters relating to the right to life, attempts to strike a balance, in this regard, between allowing State parties some regulatory space and protecting important rights of women:

Although States parties may adopt measures designed to regulate terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or her other rights under the Covenant, including the prohibition against cruel, inhuman and degrading treatment or punishment. Thus, any legal restrictions on the ability of women to seek abortion must not, *inter alia*, jeopardize their lives or subject them to physical or mental pain or suffering which violates article 7. States parties must provide safe access to abortion to protect the life and health of pregnant women, and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or when the fetus suffers from fatal impairment. States parties may not regulate pregnancy or abortion in a manner that runs contrary to their duty to ensure that women do not have to undertake unsafe abortions. . . .¹¹⁰

The Committee has not accepted, up until now, the claim that there exists a broad right for abortion at will (arguably premised on the universal right to equality or privacy)—even not with the confines a *Roe v. Wade*-like trimester system.¹¹¹ At the same time, the Committee has also refrained from explicitly pronouncing itself on the controversial question of whether the Covenant affords any rights to the unborn fetus. It thus adopted what could seem, with regard to the interests of both women and fetuses, a ‘thin’ understanding of the relevant provisions of the Covenant. Such an outcome may be justified on the basis of a contextual interpretation of the Covenant (for example, the relative nature of the right to privacy may allow for limits on abortion, yet no limits can be permitted in cases where more fundamental rights are affected—such as the pregnant woman’s right to life and her right to be free from emotional distress amounting to cruel, inhuman or degrading treatment), and on the drafting history of the Covenant (during which, reference to the fetus as covered by the right to life was considered and discarded).¹¹² This ‘thin’ understanding can also be explained by the interpretative principle relating to the need to consider when interpreting treaty texts any subsequent practice relating their meaning, which is found in article 31(3)(b) of the Vienna Convention on the Law of Treaties:¹¹³ Since the practices of the State parties to the Covenant on the regulation of abortion vary radically (due to differences in culture, religion etc.), the Committee should arguably construe narrowly the relevant provisions of the Covenant which reflect the scope of their agreement on the obligations they have assumed in this regard. Such a narrow construction may also be explained by the diversity of views on the matter on the Committee itself,¹¹⁴ which calls for adopting a narrow interpretation constituting a common denominator between the members’ position (interpretation of Covenant provisions is normally reached by the Committee by way of consensus).¹¹⁵

It is important to note, however, that the interpretative approach taken by the UN HRC in this case is also compatible with the broader concerns identified above concerning cultural relativity and its potential for weakening the authority of the Committee. The practical effect of adopting a ‘thin’ understanding of the applicable universal standards is that State parties are left with a regulatory space to address the matter in accordance with their needs and the moral convictions prevailing therein. Such a restrained interpretative approach, in turn, implies a certain deference to local choices, which can increase the legitimacy and effectiveness of the Committee when

enforcing the core limits it has identified on the power of States to regulate abortion (e.g., duty to provide safe, legal abortion in cases entailing risk to life or health, when the pregnancy is the result of rape or incest or when the fetus suffers from fatal impairments). This is because a narrower scope of intervention in domestic regulation exposes the Committee to fewer accusations of cultural insensitivity and so-called ‘rights imperialism,’ and reduces the likelihood of political resistance and non-compliance with its decisions.

In this delicate field, as in other areas of application of IHRL which raise strong cultural resistance, such as LGBT rights or limits on religious education, overreaching may generate more harm than good to the promoted causes of equality and religious freedom. Thus, for example, it may be counterproductive for the UN HRC to construe the Covenant in a manner that would try to compel deeply conservative societies that currently criminalize homosexuality to move to immediately recognize same-sex marriage or to outlaw religious education in public schools (as opposed to opt-out arrangements).

Significantly, the position of the UN HRC on the question of regulation of abortion is different from that of the ECtHR, which has taken the view that the question of when life begins for the purpose of applying the article 2 of the Convention (right to life) is a question subject to a national margin of appreciation. Consequently, Council of Europe States may decide how to strike a balance between the competing sets of interests of the pregnant woman and the unborn fetus, and set appropriate rules which permit or impose conditions limiting the ability of women to obtain abortion. Thus, the Court has upheld, for example, the conformity with the Convention of a stringent Irish abortion law, which permits abortion only when the life of the pregnant woman is at risk and allows other women seeking abortion to travel abroad for getting an abortion.¹¹⁶ The same law has been found by the Committee to violate the Covenant, since it conflicted with the core elements which the Committee identified as indispensable exceptions to any limit on the ability of women to obtain abortion.¹¹⁷ This underscores the point that while there are similarities between the ‘thin’ universality and the margin of appreciation doctrine—as both approaches leave States with some regulatory space—there are also important differences between the two approaches. Whereas the ECtHR primarily monitors the process by which its member States exercise discretion in cases involving sensitive culturally-embedded practices, the UN HRC primarily monitors outcome—whether the actual law and practice conform or not with the normative limits it has identified.

PART FOUR

Conclusions

The UN treaty bodies in general, and the UN HRC in particular, play an important role in developing and applying IHRL as universal standards of conduct. In doing so, they operate as agents of normative change for the international community. However, like other elements of international governance, their activities are influenced by the ongoing dialectics between stability and change in international life. I have identified in this article two serious challenges, which render the task of the UN HRC particularly difficult—the effectiveness and universality challenges—both relating also to the Committee’s legitimacy. The Committee needs to apply IHRL in a political environment which accepts under-enforcement and a resulting gap between law on the books and law in practice that is chronic and widespread. The Committee also needs to proclaim standards common to widely divergent societies, operating pursuant to different sets of cultural notions and ideological tenets.

Ultimately, the various challenges are related: The substantive approaches taken by the UN HRC on the scope of universal rights—and on the liberal paradox of multi-culturalism (i.e., that promotion of tolerance requires lack of tolerance of intolerant practices), cannot be divorced from the problem of under-enforcement and from broader concerns about the relationship between stability and change. Upholding one particular vision of culture and justice may confront considerable political resistance from State parties to the ICCPR and result in non-compliance and instability of the human rights system, thus complicating the Committee’s mission of promoting gradual improvement of the human condition.

Consequently, it appears that difficult policy choices need to be made by the Committee on both pace of its push towards universal application of IHRL and on the scope of the universal rights project. Indeed, the Committee has at times blunted its push for progressing universal standards by applying a combination of methods—deference in factual evaluation, light review of right-balancing, incremental implementation and narrow construction of universal norms—which can be regarded as striking a balance between claims for universality and relativism, while bearing in mind the effectiveness and legitimacy needs of the Committee.

Given the structural weaknesses of IHRL monitoring bodies, such as the UN HRC, one cannot realistically expect that they would substitute

all political deliberation and decision making processes taking place at the domestic level. Instead, one can hope that international monitoring would challenge such processes and confront them with the need to adhere to core IHRL standards, and to ensure that the political processes in which these choices are made are fair and transparent. When viewed from this perspective, the quest of the Committee when developing and applying universal standards is not of 'right imperialism,' but rather a quest for maintaining the legal relevance of universal values.

Notes

- 1 Bertrand G. Ramcharan, *Contemporary Human Rights Ideas: Rethinking Theory and Practice* (2d ed., London: Routledge, 2015), 64 (“[T]he concept of human rights has developed over the centuries and has roots in all of the major world religions. In turn, these principles have been codified in international legal instruments . . . This certainly underscores the universality of human rights”).
- 2 U.N. Charter pmb. (“[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .”).
- 3 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948.) [hereinafter UDHR] (“[A] common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive . . . to secure their universal and effective recognition and observance . . .”).
- 4 International Covenant on Civil and Political Rights pmb., *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . .”); International Covenant on Economic, Social and Cultural Rights pmb., *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . .”); International Convention on the Elimination of All Forms of Racial Discrimination pmb., *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD] (“[F]or the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all . . .”); Convention on the Elimination of All Forms of Discrimination against Women pmb., *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (“Noting that . . . all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein . . .”); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmb., *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (“Considering the obligation of States under the Charter . . . to promote universal respect for, and observance of, human rights and fundamental freedoms . . .”); Convention on the Rights of the Child pmb., *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (“Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person . . .”); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families pmb., *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 (“Convinced, therefore, of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which

- could be applied universally . . .”); Convention on the Rights of Persons with Disabilities pmb., *adopted* Dec. 13, 2006, 2515 U.N.T.S. 4 [hereinafter CRPD] (“Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination . . .”).
- 5 See *e.g.*, World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, pmb., UN Doc. A/CONF.157/23, July 12, 1993 [hereinafter *Vienna Declaration*] (“[I]ncluding universal respect for, and observance of, human rights and fundamental freedoms for all . . .); UN Human Rights Committee, General Comment 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 4, Nov. 2, 1994 (“However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being”).
 - 6 *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (“Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (1980)(US Ct of App., 2nd Circ.) (“[S]everal commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law”).
 - 7 See *e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (Am. Law Inst. 1987) §702.
 - 8 See *e.g.*, “Who we are,” Amnesty International, accessed Dec. 10, 2016, <https://www.amnesty.org/en/who-we-are/> (“Only when the last prisoner of conscience has been freed, when the last torture chamber has been closed, when the United Nations Universal Declaration of Human Rights is a reality for the world’s people, will our work be done”); “About,” Human Rights Watch, accessed Dec. 10, 2016, <https://www.hrw.org/about> (“[C]ommitted to our mission of defending human rights worldwide. Our work is guided by international human rights and humanitarian law and respect for the dignity of each human being”).
 - 9 “Overview,” United Nations, accessed Dec. 10, 2016, <http://www.un.org/en/sections/about-un/overview/index.html> (“The United Nations . . . is currently made up of 193 Member States”); “The Foundation of International Human Rights Law,” United Nations, accessed Dec. 10, 2016, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (“Today, all United Nations member States have ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the

- UDHR and international human rights”).
- 10 See e.g., Martin Dixon, *Textbook on International Law* (7th ed., Oxford: Oxford University Press, 2013), 355 (“Of course, few would doubt (although some do) that there are some ‘fundamental’ or ‘universal’ human rights . . .”); Malcolm N. Shaw, *International Law* (7th ed., Cambridge: Cambridge University Press, 2014), 195 (“[T]he establishment of human rights within the international community as universal principles”).
 - 11 Fernando R. Teson, “International Human Rights and Cultural Relativism,” 25 *Va. J Int’l L.* 869, 870 (1985) (“In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions . . . properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society”).
 - 12 Guyora Binder, “Cultural Relativism and Cultural Imperialism in Human Rights Law,” 5 *Buff. Hum. Rts. L. Rev.* 211, 213 (1999) (“[T]he core instruments of international human rights law . . . have little legitimacy outside the west. These instruments . . . reflect a liberal individualism prevalent in the West, and ignore the importance of group membership, of duties, and of respect for nature prevalent in many non-western cultures”).
 - 13 Grace Cheng, “The Relationship between Nationalism and Human Rights: An Introduction to the Dimensions of the Debate, Nationalism and Human Rights,” In *Theory and Practice in the Middle East, Central Europe, and the Asia-Pacific* (Basingstoke: Palgrave Macmillan, 2012), 2 (“nationalism and human rights seem to represent obviously conflicting principles”).
 - 14 Conor Foley, “Beware Human Rights Imperialism,” *The Guardian*, June 23, 2009, <https://www.theguardian.com/commentisfree/2009/jun/23/human-rights-imperialism-western-values>; Stephen Kinzer, “End Human Rights Imperialism Now,” *The Guardian*, Dec. 31, 2010, <https://www.theguardian.com/commentisfree/cifamerica/2010/dec/31/human-rights-imperialism-james-hoge>.
 - 15 Ruth Gavison, “Taking States Seriously,” in *Reading Walzer*, ed. Yitzhak Benbaji and Naomi Sussmann (London: Routledge, 2014), 43 (“These arguments are supplemented by the distinction between thin (universal constraints, core human rights) and thick (specific interpretations of how things need to be done) issues, and by the more general argument for the right of communities to decide “thick” issues for themselves”).
 - 16 The author has been a member of the UN Human Rights Committee since 2013.
 - 17 Beth A. Simmons, “Compliance with International Agreements,” 1 *The Annual Review of Political Science* 75, 83 (1998) (“A host of studies . . . point to the inability (as distinct from unwillingness) of governments to comply with their international obligations . . . Lacking such administrative or technical capacities, rule-consistent behavior may simply not be within a signatory’s choice

- set.”); *Id.* at 88 (“[N]ormative approaches to the problem of compliance focus on the force of ideas, beliefs, and standards of appropriate behavior as major influences on governments’ willingness to comply with international agreements.”).
- 18 *Handyside v. The United Kingdom*, Eur. Ct. H.R., at 17-19, 21-23 (1976).
- 19 Christian Reus-Smit, “Introduction,” in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), 2 (“[I]t is the complex entanglement of politics and law that stands out. In each case one struggles to locate the boundary between the political and the legal, to the point where the established concepts of politics and law no longer seem especially helpful in illuminating pressing issues . . .”).
- 20 Reus-Smit, *The Politics of International Law*, at 14, 16 (“[L]aw within states was a reflection of the ‘policy and interests of the dominant group in a given state at a given period.’ Consequently, law could not ‘be understood independently of the political foundation on which it rests and of the political interests which it serves’”).
- 21 *Id.* *Id.* (“By implication law is fundamentally political and in relations between states the content of international law is determined by dominant states and will not be upheld when it conflicts with their perceived political interests.”).
- 22 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 29 (“The rights of others determine the constraints upon your actions . . . The side constraint view forbids you to violate these moral constraints in the pursuit of your goals . . .”).
- 23 UDHR, *supra* note 3 (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”).
- 24 CAT, *supra* note 4, at art. 2.
- 25 Ryan Goodman and Derek Jinks, “Measuring the Effects of Human Rights Treaties,” 14 *European Journal of International Law* 171, 179, (2003) (“[J]oining a treaty would signal (as a formal legal matter) the State’s acceptance of the human rights principles embodied in the treaty”).
- 26 Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington: CQ Press, 1998), 10 (“[J]ustices may be primarily seekers of legal policy . . . [J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices they expect others to make, and the institutional context in which they act.”).
- 27 Vera Shikhelman, “Geopolitics and Culture in the United Nations Human Rights Committee,” *Hebrew University Law Faculty* 1, 37-38 (June 8, 2015), <http://law.huji.ac.il/upload/GeopoliticsHRC.pdf> (“As demonstrated, there is a very strong tendency of CMs [i.e., Committee Members] to vote in favor of their regional group . . . Also, there is some evidence for political biases . . . Therefore, to a certain degree CMs could be seen as following their country of origin’s foreign policy on the HRC.”). In the same vein, some key decisions on

- constitutional interpretation of the US Supreme Court appear to be correlated to the political affiliations of the President which appointed the justices writing the judgment. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002), 219 (“[W]e find fairly strong correlations between presidential preferences and the justices’ behavior . . .”).
- 28 Sienho Yee, *Towards an International Law of Co-progressiveness, Part II: Membership, Leadership and Responsibility* (Amsterdam: Brill Nijhoff, 2014), 110-11 (“[A] state’s concern about its reputation and the role of public opinion is even more prominent . . . The role of public opinion in promoting the enforcement of international law is even stronger in the context of human rights . . .”).
- 29 Shai Dothan, “Judicial Tactics in the European Court of Human Rights,” 12 *Chi. J. Int’l L.* 115, 122 (2011) (“A state will comply if the reputational payoff (the reputational gain for compliance plus the avoided reputational loss the state would have incurred for noncompliance) is higher than the material costs of complying with the judgment.”).
- 30 Jack Goldsmith, “Book Review: Sovereignty, International Relations Theory, and International Law,” 52 *Stan. L. Rev.* 959, 970 (2000) (“Many successful examples of human rights law, from the minority rights and antislave trade treaty provisions in the nineteenth-century to the successful sanctioning of South Africa in the late twentieth-century, involved elements of external coercion.”).
- 31 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), 256 (“The problem of adjusting the functioning of the law to the perpetual antinomy of change and stability, and of justice and security, is not one peculiar to international law. It is a general legal phenomenon common to every political society. It is one of the central problems of legal philosophy.”).
- 32 *Id. Id.*
- 33 Nigel Biggar, “Making Peace or Doing Justice,” in *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, ed. Nigel Biggar (Washington: Georgetown University Press, 2003), 16-17 (“Thinking of criminal justice primarily in terms not of retribution but of the vindication of victims significantly relaxes the tension between justice and the politics of making peace. This way of thinking recognizes that the ultimate goal of justice is also to make peace . . .”).
- 34 Cf. 1 Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap Harvard Press, 1991), 6-7.
- 35 UN Charter, *supra* note 2, at art. 2(1).
- 36 *Id.* at art. 1(2).
- 37 *Id.* at art. 1(3).
- 38 *Id.* at art. 2(4).
- 39 *Id.* at art. 2(4).
- 40 *Id.* at art. 2(7).
- 41 *Id.* at art. 23, 27.

- 42 *Id.* at art. 39.
- 43 One exceptional power of the Security Council to enforce legal norms that may be reflective of principles of justice is the authority to enforce decisions of the International Court of Justice. UN Charter, *supra* note 2, at art. 94(2).
- 44 Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, 347 (“The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are . . . of such paramount importance to world order, that the Court should not fail to assist a subsidiary body of the United Nations General Assembly in putting its operation upon a firm and secure foundation.”).
- 45 *See e.g.*, UN Press Release, “Out of Date and Out of Touch,’ Security Council Requires Urgent Reform, Assembly President Says, Urging Delegations to Move Swiftly to End Impasse,” Nov. 18. 2008, <http://www.un.org/press/en/2008/ga10786.doc.htm>.
- 46 “[T]o promote . . . larger freedom . . .” UN Charter, *supra* note 2; “[A]s a common standard of achievements for all peoples and all nations. . .” UDHR, *supra* note 3; “[T]o strive for the promotion and observance of the rights . . .” ICCPR, *supra* note 4; “[I]f conditions are created whereby everyone may enjoy his . . . rights . . .” ICESCR, *supra* note 4.
- 47 Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” 54 *Int’l Org.* 217, 228 (2000) (“[H]uman rights norms are expressions of the self-interest of democratic governments in ‘locking in’ democratic rule through the enforcement of human rights.”).
- 48 “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights . . .” ICCPR, *supra* note 4, at art. 3; “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights . . .” ICESCR, *supra* note 4, at art. 3; “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women . . .” CEDAW, *supra* note 4, at art. 2.
- 49 CRC, *supra* note 4, at art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind . . .”).
- 50 CRPD, *supra* note 4, at art. 1 (“The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”)
- 51 ICCPR, *supra* note 4, at art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”); Declaration on the Rights of Persons Belonging to National

- or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135 U.N. Doc. A/RES/47/135 (Dec. 18, 1992) (“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”); Framework Convention for the Protection of National Minorities art. 1, *opened for signature* Feb. 1, 1995, E.T.S. 157 (“The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.”); European Charter for Regional or Minority Languages art. 2, *opened for signature* Nov. 5, 1992, E.T.S. 148 (“Each Party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1.”).
- 52 ICCPR, *supra* note 4, at art. 25 (“Every citizen shall have the right and the opportunity . . . To vote and to be elected . . .”).
- 53 International Convention for the Protection of all Persons from Enforced Disappearance art. 1, *opened for signature* Feb. 6, 2007, 2716 U.N.T.S. 3 (“No one shall be subjected to enforced disappearance. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”).
- 54 ICESCR, *supra* note 4, at art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”).
- 55 *Oliari and Others v. Italy*, Eur. Ct. H.R. at 56 (2015) (“In conclusion . . . the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.”); *Case of Atala Riffo and Daughters v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 239, para. 222 (Feb. 24, 2012) (“Therefore, since differentiation in a disciplinary inquiry based on sexual orientation is discriminatory, the Court concludes that the State violated Article 24 in conjunction with Article 1(1) of the American Convention to the detriment of Karen Atala Riffo”).
- 56 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 at art. 1 (Sept. 13, 2007) (“Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law”).
- 57 Comm’n on Human Rights Res. 2005/66, UN doc. E/CN.4/Res/2005/66, at 2 (Apr. 20, 2005) (“Recognizes the importance of respecting and ensuring

- the right to the truth so as to contribute to ending impunity and to promote and protect human rights . . .”); Case of Ignacio Ellacri’a et al., Case 10.488, Inter-Am. Comm’n H.R., Report No. 136/99, para. 221 (1999) (“The right to know the truth with respect to the facts that gave rise to the serious human rights violations that occurred in El Salvador, and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims’ relatives and society in general”).
- 58 Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Northampton: Edward Elgar Pub., 2012), 134-35 (“The overall success of the Council is debatable given that its finding and recommendations are not binding . . .”).
- 59 Yuval Shany, “The Effectiveness of the Human Rights Committee and the Treaty Body Reform,” in *Der Staat im Recht. Festschrift für Eckart Klein Zum*, ed. Marten Breuer (Berlin: Duncker & Humblot, 2013), 1307, 1322-1323.
- 60 Ryan Goodman & Derek Jinks, “How to Influence States: Socialization and International Human Rights Law,” 54 *Duke L.J.* 621, 635 (2004) (“The second mechanism of social influence is persuasion—the active, often strategic, inculcation of norms. Persuasion theory suggests that international law influences state behavior through processes of social ‘learning’ and other forms of information conveyance”).
- 61 Oran R. Young, “The Effectiveness of International Institutions: Hard Cases and Critical Variables,” in *Governance Without Government: Order and Change in World Politics*, ed. James N. Rosenau and Ernst-Otto Czempiel (Cambridge: Cambridge University Press, 1992), 177 (“There are, in other words, many situations in which those contemplating violations will refrain from breaking the rules if they expect their non-compliant behavior to be exposed . . . They are, in short, motivated by a desire to avoid the sense of shame . . .”).
- 62 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 17 (“International law matters most where domestic institutions raise the expected value of mobilization, that is, where domestic groups have the motive and the means to demand the protection of their rights as reflected in ratified treaties”).
- 63 Eric A. Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014), 115 (“The world lacks authoritative institutions through which people or governments can impose a political check on the powerful states that enforce human rights law.”).
- 64 Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge: Cambridge University Press, 2015), 296 (“If the court starts out with a low reputation, which means the community of states expects states would not comply with its judgments, states may indeed fail to comply, lowering the court’s reputation even further and rendering it irrelevant.”).
- 65 Sonia Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (Philadelphia: University of Pennsylvania Press, 2007), 5 (“David

- Forsythe has cautioned that ‘calculations of relative power remain decisive’ in how states respond to international human rights pressure . . .”).
- 66 Simmons, *Mobilizing for Human Rights*, at 125-26 (“[E]xternal enforcement mechanisms . . . are likely to be undersupplied and quite weak in securing compliance with international human rights accords . . . The real politics of change is likely to occur at the domestic level.”).
- 67 UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Czech Republic, UN Doc. CCPR/C/CZE/CO/3 at para. 8 (Aug. 22, 2013); Associated Press, “Czech Republic to Move Pig Farm from Location of Former Nazi Concentration Camp,” *Haaretz*, Sept. 6, 2016, www.haaretz.com/world-news/europe/1.740538.
- 68 UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Republic of Korea, UN Doc. CCPR/C/KOR/CO/3 at para. 16 (Nov. 28, 2006); Republic of Korea, Fourth Periodic Report to the Human Rights Committee, UN Doc. CCPR/C/KOR/4 at para. 162-164, Aug. 19, 2013.
- 69 Mary C. Hurley and Tonina Simeone, Legislative Summary of Bill C-3: Gender Equity in Indian Registration Act (prepared for 40th Parliament, 3rd Session, 2010), http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=c3&Parl=40&Ses=3&source=library_prb.
- 70 UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Ghana, UN Doc. CCPR/C/GHA/CO/1 at para. 19-20 (Aug. 9, 2016).
- 71 UN Human Rights Committee, Report on Follow-Up to the Concluding Observations of the Human Rights Committee, UN Doc, CCPR/C/114/2 at 8-9 (Aug. 24, 2015).
- 72 UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/4 at para. 20 (Aug. 19, 2014).
- 73 Debra L. DeLaet, *The Global Struggle for Human Rights* (2d ed., California: Wadsworth Publishing Company, 2015), 4 (“This gap between rhetoric and reality is built into the system of international human rights law . . . [S]tates with egregious human rights records are often parties to major human rights documents, so critics points to this hypocrisy as evidence that international human right law is an idealistic aspiration . . .”).
- 74 Cf. Report of the Group of Wise Persons to the Committee of Ministers, Nov. 15, 2006, COE Doc. CM(2006)203 at para. 25 (“The Group stresses that the credibility of the human rights protection system depends to a great extent on execution of the Court’s judgments. Full execution of judgments helps to enhance the Court’s prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it”).
- 75 CEDAW, *supra* note 4, at art. 2 (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women . . .”).

- 76 UDHR, *supra* note 3, at art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).
- 77 UN Charter, *supra* note 2, at art. 1(3) “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .”; *Id.* at art. 55(c) (“[U]niversal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).
- 78 Rikki Holtmaat, “The CEDAW: A Holistic Approach to Women’s Equality and Freedom,” in *Women’s Human Rights: CEDAW in International, Regional and National Law*, ed. Anne Hellum and Henriette Sindig Aasen (Cambridge: Cambridge University Press, 2013), 97-98.
- 79 *See e.g.*, “Working Group on Discrimination against Women in Law and in Practice,” United Nations Human Rights Office of the High Commissioner, accessed Dec. 6, 2016, <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx>.
- 80 *See e.g.* Saudi Arabia (Amani Hamdan, “Women and Education in Saudi Arabia: Challenges and Achievements,” 6 *International Education Journal* 42, 55 (2005).
- 81 US failure to ratify CEDAW (Lisa Baldez, “U.S. Drops the Ball on Women’s Rights,” *CNN*, March 9, 2013, <http://edition.cnn.com/2013/03/08/opinion/baldez-womens-equality-treaty/>); China’s failure to ratify ICCPR (“China: Ratify Key International Human Rights Treaty,” Human Rights Watch, Oct. 8, 2013, <https://www.hrw.org/news/2013/10/08/china-ratify-key-international-human-rights-treaty>).
- 82 *See e.g.*, Saudi Arabia’s reservation to CEDAW (“Declarations, Reservations and Objections to CEDAW,” United Nations, accessed Dec. 10, 2016, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>); United States’ reservation to the ICCPR (“Status of Ratification,” United Nations Human Rights Office of the High Commissioner, accessed Dec. 10, 2016, <http://indicators.ohchr.org>).
- 83 *See e.g.*, CEDAW, Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/2 at para. 13-14 (Apr. 8, 2008).
- 84 Yvonne M. Dutton, “Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms,” 34 *U. Pa. J. Int’l L.* 1, 28 (2012) (“The six main international human rights treaties contain . . . the very weakest enforcement mechanisms: they only require the state to submit regular reports to a committee . . . [T]he committees cannot even ensure that the required reports are submitted on time.”).
- 85 *See e.g.*, Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001), 170.

- 86 Meir Dan-Cohen, "Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law," 97 *Harv. L. Rev.* 625, 630-31 (1984) ("Imagine a universe consisting of two groups of people . . . The general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public. Imagine further that each of the two groups occupies a different, acoustically sealed chamber. This condition I shall call 'acoustic separation.' Now think of the law as a set of normative messages directed to both groups. In such a universe, the law necessarily contains two sets of messages. One set is directed at the general public and provides guidelines for conduct. These guidelines are what I have called 'conduct rules.' The other set of messages is directed at the officials and provides guidelines for their decisions. These are 'decision rules' . . . A fundamental difference exists, however, between the imagined universe and the real world: the condition of acoustic separation, which obtained in the former by definition, seems to be absent from the latter. In the real world, the public and officialdom are not in fact locked into acoustically sealed chambers, and consequently each group may 'hear' the normative messages the law transmits to the other group.").
- 87 Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 17 ("A law which would lack distance from State behavior, will or interest would amount to a non-normative apology . . . A law which would base itself on principles, which are unrelated to state behavior, will or interest, would seem utopian . . . To show that an international law exists...the modern lawyer needs to show that the law is simultaneously both normative and concrete . . .").
- 88 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2d ed., Chicago: University of Chicago Press, 2008).
- 89 For a discussion, see Yuval Shany, "Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions," in *Legitimacy and International Courts*, ed. Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal and Geir Ulfstein (2016 Forthcoming).
- 90 Dothan, *Reputation and Judicial Tactics*, 296.
- 91 Koskeniemi, *From Apology to Utopia*, 17.
- 92 Richard W. Mansbach and Kirsten L Rafferty, *Introduction to Global Politics* (London: Routledge, 2008), 10.
- 93 See Dan Bilefsky, "France's Burkini Debate Reverberates around the World," *NEW YORK TIMES*, Aug. 8, 2016.
- 94 HCJ 3752/10 Rubinstein v. the Knesset 14(77) PD 753 [2014] (Isr.); HCJ 746/07 Regan v. Ministry of Transportation 64(2) PD 530 [2011] (Isr.).
- 95 Von Hannover v. Germany (No. 2), App. No. 40660/08, Eur. Ct. H.R. (2012).
- 96 Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2005).
- 97 See e.g., Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," 31 *N.Y.U. J. Int'l L. & Pol.* 843, 843 (1999); James A. Sweeney, "Margins of Appreciation: Cultural Relativity and the European Court of Human

- Rights in the Post-Cold War Era,” 54 *Int'l & Comp. L.Q.* 459, 462-63 (2005). See also Robert Spano, “Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity,” 14 *Human Rights Law Review* 487, 491-92 (2014).
- 98 UN Human Rights Committee, General Comment 34: Freedoms of Expression and Opinion, U.N. Doc. CCPR/C/GC/34, para. 36 (Sept. 12, 2011) (“The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation” and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression”).
- 99 David P. Forsythe, *Human Rights in International Relations* (2d ed., Cambridge: Cambridge University Press, 2006), 3 (“Human rights are widely considered to be those fundamental moral rights of the person that are necessary for a life with human dignity”).
- 100 See e.g., UN Human Rights Committee, Communication No. 2155/2012: Views adopted by the Committee at its 110th session (10–28 March 2014), U.N. Doc. CCPR/C/110/D/2155/2012 at para. 7.4-7.6 (Apr. 29, 2014); UN Human Rights Committee, Communication No. 2474/2014: Views adopted by the Committee at its 115th session (19 October-6 November 2015), U.N. Doc. CCPR/C/115/D/2474/2014 at para. 7.5 (Dec. 11, 2015); UN Human Rights Committee, Communication No. 2284/2013: Views adopted by the Committee at its 115th session (19 October-6 November 2015), 6 U.N. Doc CCPR/C/115/D/2284/2013 at para. 9.5-9. (Dec. 9, 2015).
- 101 See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (state laws must have “some rational basis”).
- 102 UN Human Rights Committee, Communication No. 550/1993 Faurisson v. France: Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996).
- 103 UN Human Rights Committee, Communication No. 208/1986 Singhe Bhinder v. Canada: Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/37/D/208/1986 para. 6.2 (Nov. 9, 1989).
- 104 Replies of South African to the List of Issues in relation to the Initial Report, UN Doc. CCPR/C/ZAF/Q/1/Add. 1 at para. 15 (Dec. 3, 2015).
- 105 Judith Stacey, *Unhitched: Love, Marriage, and Family Values from West Hollywood to Western China* (New York: NYU Press, 2011), 96 (“For most of the twentieth century, South African civil law refused to recognize even monogamous Muslim marriages because of their ‘potential’ for polygamy.”).
- 106 UN Human Rights Committee, General Comment 28: Article 3 (The Equality

- of Rights between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 at para. 24 (Mar. 29, 2000) (“It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”).
- 107 UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Ghana, UN Doc. CCPR/C/GHA/CO/1 at para. 17 (Aug. 9, 2016).
- 108 *Id.*, at para. 18.
- 109 By contrast, one may note that the Committee does resort, at times, to the phrase “without delay” to convey urgency in attaining normative goals. *See e.g.*, UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Argentina, UN Doc. CCPR/C/ARG/CO/4 at para. 16, Mar. 31, 2010 (need to reduce, without delay, the number of pre-trial detainees); UN Human Rights Committee, Concluding Observations by the Human Rights Committee: Azerbaijan, UN Doc. CCPR/C/AZR/CO/4 at para. 35, Nov. 16, 2016 (need to afford, without delay, legal exception for conscientious objectors).
- 110 Human Rights Committee, Draft General Comment 36: The Right to Life (art. 6), as adopted in first reading in the Committee’s 116th Session (a copy with author).
- 111 *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (“For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician. For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”).
- 112 *See e.g.*, Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (New York: Springer Netherlands, 1987), 113-120.
- 113 Vienna Convention on the Law of Treaties art. 31(3)(b), *opened for signature* May 23, 1969, 1155 UNTS 331 (“There shall be taken into account, together with the context . . . Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . .”).
- 114 UNHCHR Press Release, “Human Rights Committee continues to discuss draft General Comment on the right to life,” March 18, 2016; UNHCHR Press Release, “Human Rights Committee continues to discuss draft General Comment on the right to life,” March 22, 2016.

- 115 UN Human Rights Committee, Rules of Procedure of the Human Rights Committee, rule. 51 U.N. Doc CCPR/C/3/Rev.10 (Jan. 11, 2012) (“Except as otherwise provided in the Covenant or elsewhere in these rules, decisions of the Committee shall be made by a majority of the members present.”); *Id.* at n.1 (“The members of the Committee generally expressed the view that its method of work normally should allow for attempts to reach decisions by consensus before voting . . .”).
- 116 *A, B and C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010) at 67 (“It concludes that there has been no violation of Article 8 of the Convention as regards the first and second applicants.”).
- 117 UN Human Rights Committee, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 at para. 7.8 (June 9, 2016) (“The Committee considers that the balance that the State party has chosen to strike between protection of the fetus and the rights of the woman in the present case cannot be justified.”).

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