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STEVEN WHEATLEY

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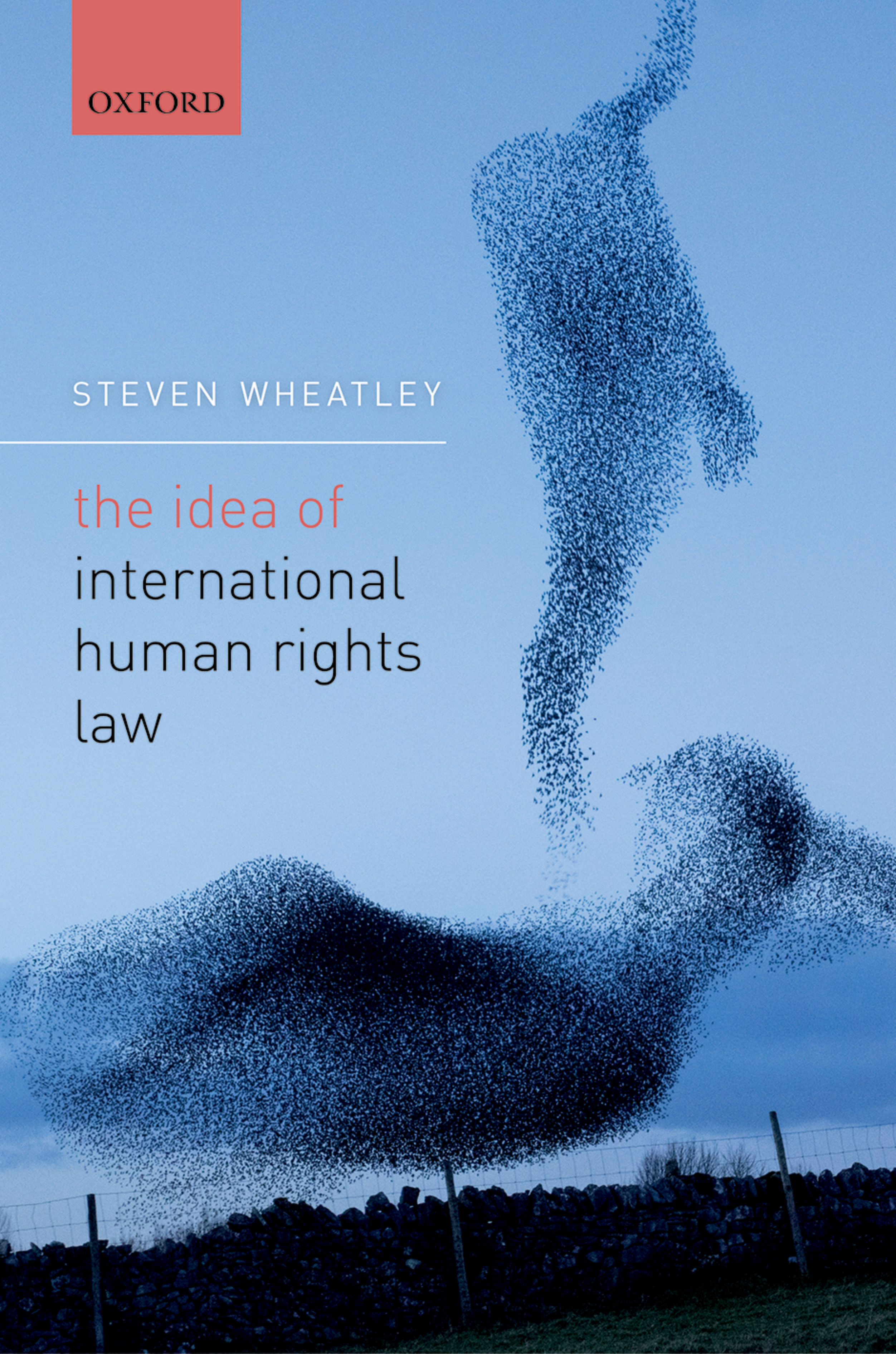

THE IDEA OF INTERNATIONAL HUMAN RIGHTS LAW

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STEVEN WHEATLEY

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For Michael William Emsley Wheatley

Preface

Having taught and written on international human rights law for two decades and seen it emerge as an academic subject in its own right, it was notable that, in the twenty-first century, heated and sometimes bad tempered, debates on the nature of 'human rights' emerged in a variety of academic disciplines, including law, philosophy, sociology, politics, international relations, and history. I was particularly interested in the philosophical writings of authors as diverse as Allen Buchanan, Charles Beitz, Costas Douzinas, James Griffin, and Gunther Teubner, although reading the literature, it seemed clear that, however impressive the intellectual arguments, much of the work was disconnected from actual legal practice and the principal objective often seemed to be to explain the muddle-headed thinking of international lawyers on human rights. Also, in the new millennium, international human rights lawyers found themselves assailed as 'human rightists' by the keepers of the faith of the purity of general international law. The complaint being that human rights scholars and practitioners too often let their hearts rule their heads, and, as a consequence, they are poor international lawyers.

At the same time as I began reflecting on the nature of international human rights law, I became interested in complexity theory. Whilst, in previous work, I had relied on the closed systems theory of autopoiesis to explain the emergence of law systems beyond the state,[1] the open systems theory of complexity seemed to offer the possibility of making sense of the influence of the moral concept of human rights on the legal practice by directing us to examine both system-level patterns of communications and the actions and interactions of those international law actors that produced the patterns of communications on human rights.

The starling murmuration on the front cover of this book is an example of a complex system. The murmuration is the result of the actions and interactions of individual birds. The murmuration will change as individual birds respond to external factors, like the appearance of a hawk, but in ways that cannot be predicted in advance because of the multitudinous possibilities of action and reaction. The argument here is that we can think of international law as a complex system, the emergent property of the actions and interactions of states and non-state actors. Doing so will enable us to make sense of the emergence and evolution of legal rules, as international law actors respond to new information, and a central claim in the book is that the body of international human rights law, as opposed to the moral concept of human rights, only emerged after the Sharpeville Massacre of 21 March 1960, when United Nations Member States introduced a series of measures to deal with the problem of apartheid in South Africa—and crucially justified their intervention in terms of the protection of human rights.

[1] Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010).

The key insight for me in the literature on generalized, or transdisciplinary, complexity theory was the importance of emergence: the notion that a system can be more than the sum of its parts, and at the same time the system can influence the parts. A complex system emerges from the actions and interactions of the component agents in the system, with the system having characteristics not found in the component agents. The complex system then influences the same component agents that brought it into being in the first place. All of this seemed familiar to someone researching and writing on international law, a paradigmatic complex system, which emerges and evolves without the requirement for a controlling sovereign power—although the insights from complexity can also be applied to law systems more generally.[2]

In many ways this is a book about how a philosophy of emergence can help international lawyers make sense of the ways international law norms emerge through the actions and interactions of states, along with certain non-state actors, and how a consensus on 'the law' can emerge through the communications of scholars and practitioners within an interpretive community. The work also shows how the 'idea' of human rights developed from the communication acts of states and human rights bodies, allowing us to say that torture is objectively (morally) 'wrong'.

There seemed an obvious way for complexity theory to be used to model and make sense of the legal practice of human rights—in the United Nations system, the core human rights treaties, and customary international law—by describing the characteristics of the emergent system and examining the changing behaviours of states and human rights bodies to give an account of the emergence and evolution of human rights law. The challenge remained to explain the influence of the moral concept of human rights on legal human rights.

There are no shortages of works giving an account of the moral or political notion of human rights. Whilst most certainly illuminated my thinking on the subject, none seemed to fully capture the way I, as an international lawyer, understood human rights and it is certainly the case that there is no one dominant approach in the literature. Moreover, most of the philosophical work focuses, if only implicitly, on explaining the existence of human rights within the state. This is not, however, the case with the interventionist accounts, associated primarily with the works of Charles Beitz and Joseph Raz, which suggest a different approach, one that looks to explain human rights by the practice of intervention. The problem, as any international lawyer knows, is that humanitarian intervention is only one small part of the practice of human rights—if indeed it is part of the legal practice of human rights at all, but the conceit that we should try and make sense of the term 'human rights' by its use in the international legal community seemed a good place to start.

The final piece of the jigsaw fell into place when I read, for a second time, John Searle's *Making the Social World* (2010). I was familiar with his earlier work on the way emergence can be used to explain the relationship between the brain and the

[2] See Jamie Murray, Tom Webb, and Steven Wheatley, 'Encountering Law's Complexity' in Jamie Murray, Tom Webb, and Steven Wheatley (eds), *Complexity Theory & Law: Mapping an Emergent Jurisprudence* (Routledge 2018) 3.

mind, but here Searle was showing how people can create concrete entities and abstract notions with (what he calls, rather unhelpfully) deontic powers, the ability to allocate rights and obligations. His standard example is money, with my £20 note (a piece of paper with no intrinsic value) giving me the right to pay for goods that are of demonstrable worth in any society (food, for example). Searle shows how we literally speak into being the social fact of 'money' and no one says that belief in the reality of money is a foolish thing. It is a short step, then, to make the argument that the moral concept of human rights is the result of the communication acts of states and human rights bodies, who literally speak 'human rights' into existence.

Working out what I think about the nature of International Human Rights Law and, more importantly, figuring out how I should go about working out what I think, has involved a long intellectual journey that would not have been possible without the support and encouragement of others. I have benefitted from two periods of study leave at Lancaster University and I want to thank staff in the Law School for their help in making that possible. I have also had the advantage of long conversations with colleagues at Lancaster (a hub of research excellence on complexity theory), both within and outside the School, especially Tom Webb, Jamie Murray, (the late) John Urry, Rob Geyer, and Sylvia Walby. Other academics who have encouraged me to think there might be something worth pursuing here included Jean D'Aspremont, Amanda Cahill-Ripley, Sionaidh Douglas-Scott, Ming Du, Agata Fijalkowski, Malgosia Fitzmaurice, Olivier de Frouville, Susan Marks, Christopher McCrudden, Dominic McGoldrick, Richard Nobles, Anna Peters, David Sugarman, Stephen Tierney, and Valentina Vadi, as well as the participants at a conference on 'A Jurisprudence of Complexity?' at Lancaster University in September 2015 and those attending a staff seminar at Queen Mary University of London in April 2016 where I presented my early thoughts on the issue. My gratitude also to Oxford University Press for their interest in the project, in particular Kimberly Marsh, Merel Alstein, Emma Andean-Mills, Jack McNichol, and John Louth, along with the various anonymous reviewers and readers, and copyeditor Nick Bromley. I would also like to thank my undergraduate and postgraduate students over the past few years, who have helped me clarify my thinking on International Human Rights Law.

No research project can be completed without the support, encouragement, and general displays of interest from family and friends, and, in this case, I am grateful to Michael Doherty, Anthony McNamara, Andrea McCulloch, Michael Wheatley, Rosleen Wheatley, and Simon Wheatley. Special mention to my wife, Katherine, for her continued love and support, as well as the grown-up children, Francesca and Ben and, of course, my English Pointer, Pixie, for helping to clear my head by taking me for a walk every day—although frankly she has shown very little interest in the project itself.

Contents

Introduction

In the past twenty years, International Human Rights Law has established itself as a distinct academic discipline, with University courses and the publication of textbooks and specialist academic journals. Before this, the subject of human rights was taught as one part of Public International Law and the international law textbooks invariably include a chapter on the topic. There is, though, widespread belief that international human rights law is different from, albeit related to, general international law. Dinah Shelton expresses the point this way: 'Clearly, human rights law does have some differences from other areas of international law[.] At the same time, human rights law is part of general international law.'[1] Areas where human rights law is said to differ include the processes of rule-creation,[2] the law on reservations,[3] state succession,[4] and the rules for the interpretation of treaties.[5] The divergence in practice is often explained in terms of the fragmentation of international law, which results from the fact that, in the words of Martti Koskenniemi and Päivi Leino, human rights 'comes with a political ethos—what Alain Pellet has labelled "*droit de l'hommisme*"—that not only deviates from but rejects aspects of general international law'.[6]

'Human rightism', Pellet contends, bears the same relationship to international law 'as theology or rather faith does to law in general: a virtue perhaps, but one that is alien to its object'.[7] His argument is that certain prominent international lawyers,

[1] Dinah Shelton, 'Introduction' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 1, 5.

[2] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli et al. (eds), *International Human Rights Law* (2nd edn, OUP 2010) 96, 97 (whilst international law is 'the slow maturing of ancient customary practice', human rights 'emerges from the proclamation of rights, usually in declaration[,] with a strong principled component').

[3] Sandesh Sivakumaran, 'The International Court of Justice and Human Rights' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) 299, 314.

[4] Menno T. Kamminga, 'Impact on State Succession in Respect of Treaties' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 99, 109.

[5] Scott Sheeran, 'The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 79, 101.

[6] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 569.

[7] Alain Pellet, '"Human Rightism" and International Law', Gilberto Amado Memorial Lecture (2000) 2 alainpellet.eu/bibliography/articles accessed 26 January 2018, 2.

including Rosalyn Higgins and Bruno Simma, 'sometimes let their generosity get the better of their legal expertise', leading to 'human rightist lapses of judgement'.[8] The concern relates to calls for the application of different legal techniques and the perceived tendency of human rightists 'to indulge in wishful thinking and take sketchily emerging trends or, worse still, trends that exist solely in the form of aspirations, as legal facts'.[9] The accusation is essentially that whilst many human rights scholars might be well intentioned, they are basically poor international lawyers, with, for example, Jörg Kammerhofer describing human rights as a 'virulent example where—implicit, non-theoretically reflected—scholarly claims to lawmaking have enormous influence, where a *normative* (i.e. norm setting) scholarship seeks to influence its objects for its own perception of "the global good" '.[10]

On the one hand, then, we have, as Samantha Besson observes, human rights lawyers 'pigeon-holed' by general international lawyers as 'natural lawyers' and, on the other, general international lawyers 'boxed as "positivist lawyers" by human rights lawyers'.[11] (Neither term is intended as a compliment.) These divergent perspectives can be explained by the different views on the function of the term 'human rights' in 'international human rights law'. For general international lawyers, 'human rights' is simply a descriptive label for one part of the system, in the same way as, for example, the 'international law of the sea'. The body of human rights law is part of general international law, with the same secondary rules concerning norm creation, interpretation, and application, and we could delete the term 'human rights' without any impact on the proper understanding of the subject ('international . . . law'). Human rights scholars take the opposite view, concluding that reference to 'international (human rights) law' captures the influence of human rights on general international law, otherwise the more specific formulation would be otiose.

The objective of this book is to see whether we can make sense of the distinctive nature of International Human Rights Law by examining the influence of the moral concept of human rights on general international law, in the same way we might look to explain the effect of the moon on the tides of the world's oceans.

Before we can do this, we need to be clear what we mean when we talk about 'human rights'. There has been renewed interest in this subject in the twenty-first century, following a period of relative inattention, because of the success of human rights in establishing itself, in Michael Ignatieff's well-known expression, as the 'lingua franca of global moral thought',[12] at least amongst elites,[13] with human rights becoming the common language of right and wrong after the 'death of God',

[8] Ibid. 4 (reference omitted). [9] Ibid. 5.

[10] Jörg Kammerhofer, 'Lawmaking by Scholars' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 305, 317 (emphasis in original).

[11] Samantha Besson, 'Sources of International Human Rights Law: How General is General International Law?' in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 837, 840–1.

[12] Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited and introduced by Amy Gutmann (Princeton UP 2001) 53.

[13] Michael Ignatieff, 'Human Rights, Global Ethics, and the Ordinary Virtues' (2017) 31 *Ethics & International Affairs* 3, 8.

pace Friedrich Nietzsche. At the same time, scholars have observed a disjuncture between the philosophy of human rights and the practice of human rights, with the inclusion of the right to periodic holidays with pay in the Universal Declaration of Human Rights given as the standard example of a legal right, which is not, according to the standard philosophical accounts, a human right, properly so-called.[14] There has also been a recognition of the importance of theorizing about the practice to ensure the fidelity of theory with the human rights project. Finally, it is clear there is no agreement on the subject, thus opening a space for intellectual enquiry. The moral philosopher, James Griffin, explains, for example, that he felt compelled to write his book *On Human Rights* 'by the not uncommon belief that we do not yet have a clear enough idea of what human rights are'.[15]

The existing philosophical literature on human rights can be divided into four broad streams of thought. Explanations of the rights we have simply 'by virtue of being human'; a focus on the political function of human rights in establishing the proper relationship between the state and the individual; accounts that concentrate on the interactions between the state and secondary agents of justice; and a recognition of the importance of international law to making sense of the moral concept of human rights. Whilst the various contributions all claim to be speaking about the same thing and indeed use an identical term ('human rights'), it is evident they are not always concerned with the same subject. This might be explained by the fact that different writers are addressing contrasting conceptions and seeking to define the intellectual terrain on their own terms; that human rights is an empty signifier, with no agreed definition, or an essentially contested concept, without a shared understanding of its meaning; or that scholars are examining different aspects of human rights, such as its ontological basis, political function, or the legal practice.

The irreconcilable differences in the philosophical writings have led a number of scholars to conclude that a more productive route would be to define the idea of human rights by reference to the practice of human rights, or some idealized version of the practice. The political theorist Charles Beitz argues, for example, that it is wrong to think about human rights as if it had an autonomous meaning in the moral order unrelated to the practice of human rights, which 'constrains our conception of a human right from the start'.[16]

This work sits within this new practice-based tradition and looks to explain the idea of human rights by examining the practice in the United Nations, the core human rights treaties, and customary international law. The reason for this is straightforward: from the invention of the term 'human rights' to the explanation of its meaning in the Universal Declaration of Human Rights, the adoption of resolutions and law-making treaties by the UN General Assembly, to the work of the treaty bodies and Universal Periodic Review, the practice of human rights has—for the most part—been the legal practice, with other forms of practice, including, for

[14] See for example, Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, trans. Jonathan Huston (CUP 2016) 439.

[15] James Griffin, *On Human Rights* (OUP 2008) 1.

[16] Charles R. Beitz, *The Idea of Human Rights* (OUP 2009) 103.

example, the 'naming and shaming' of governments by exposing, publicizing, and condemning violations, taking place in the shadow cast by international human rights law.[17]

The historian Samuel Moyn argues that, from the 1980s, international lawyers assumed prominence as 'the professionalized stewards of what human rights might mean beyond their use as a tool of moral resistance'.[18] The task of explaining the idea of human rights, according to the practice, falls then primarily to international lawyers, who must make sense of the patterns of communications on the subject, including General Assembly resolutions, law-making treaties, comments adopted by the human rights treaty bodies, recommendations made during the Universal Periodic Review, and the writings of academics. How we do this depends fundamentally on the methodology we use, with different scholars approaching the subject from varying perspectives, using diverse tools and resources, often for conflicting purposes.[19]

The issue is more complicated than the division between positivists and those outlining a normative vision of what human rights should be, or should not be. The dissimilarities between normative theorists are more readily observed, with discrete critical, feminist, and third world approaches, etc., but there are also important differences between those looking to describe the structure and content of international human rights law, including, for example, the contrasting approaches of sovereigntists, who see international law as the product of sovereign political wills, and constitutionalists, who consider certain core principles to be, as a matter of legal fact, part of the international law system. The standard approach of many writers looking to describe the international law system is to ignore the issue of methodology, proceeding on the assumption that we are all speaking about the same thing. But the way we develop our analysis, the materials we rely on, how we use those materials and what we count as good arguments, all depend on the methodology we use, and we should be clear about our own approach; otherwise, all we international law scholars are left with is our powers of rhetorical persuasion.[20]

Complexity Theory

The argument here is that we should look to complexity theory to develop a more complete understanding of the international law system and that, by doing so, we will be able to make better sense of the influence of the moral concept of human rights on general international law. Complexity is concerned with finding and explaining patterns in the actions and interactions of component agents to explain the

[17] Emilie M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 *International Organization* 689, 689.

[18] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 219.

[19] For a good introduction to international law methodologies, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016).

[20] See, generally, Lyndel V. Prott, 'Argumentation in International Law' (1991) 5(3) *Argumentation* 299, 299.

workings of a 'complex' system. It is manifested, for example, in starling murmurations above city centre landscapes.[21] These self-organized displays are the result of the actions and interactions of individual birds and they can change rapidly and dramatically as individuals react to information in the form of internal movements or external threats, but in ways that cannot be predicted, given the multitudinous possibilities of action and reaction.

Complexity theory developed in the natural sciences as a way of explaining how patterned order could emerge without a guiding hand or central controller. Transdisciplinary, or generalized, complexity theory is firmly established in the natural sciences and has been used, for example, to explain the workings of insect colonies, the way the immune system functions, and the relationship between the mind and the brain. Its insights have also been relied on in the social sciences to elucidate the workings of the global financial system, the World Wide Web, the phenomenon of the standing ovation in the concert hall, and the organization of the nation state. Whilst it is increasingly recognized that law, as an academic discipline, should also take on board the insights from complexity,[22] there has, thus far, been limited reliance on the theory in international law scholarship,[23] notwithstanding the fact that 'Confronting Complexity' was the theme of the 2012 Annual Meeting of the American Society of International Law, and most of the papers in the Proceedings

[21] See H. Hildenbrandt et al., 'Self-Organized Aerial Displays of Thousands of Starlings: A Model' (2010) 21 *Behavioral Ecology* 1349.

[22] J.B. Ruhl et al., 'Harnessing Legal Complexity' (2017) 355 (6332) *Science* 1377. On the uses of complexity theory in law, see, for example, J.B. Ruhl, 'Law's Complexity: A Primer' (2007–2008) 24 *Georgia State University Law Review* 885, 897; J.B. Ruhl, 'Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State' (1995–6) 45 *Duke Law Journal* 849; Hope M. Babcock, 'Democracy's Discontent in a Complex World: Cab Avalanches Sandpiles, and Finches Optimize Michael Sandel's Civic Republican Community?' (1996–7) 85 *Georgetown Law Journal* 2085; Gregory Todd Jones, 'Dynamical Jurisprudence: Law as a Complex System' (2008) 24 *Georgia State University Law Review* 873; Julian Webb, 'Law, Ethics, and Complexity: Complexity Theory & the Normative Reconstruction of Law' (2005) 52 *Cleveland State Law Review* 227; and Thomas E. Webb, 'Tracing an Outline of Legal Complexity' (2014) 27 *Ratio Juris* 477.

[23] Notable exceptions include Dominic McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity* (Hart 2004); Anna Carline and Zoe Pearson, 'Complexity and Queer Theory Approaches to International Law and Feminist Politics: Perspectives on Trafficking' (2007) 19 *Canadian Journal of Women and the Law* 73; Joost Pauwelyn, 'At the Edge of Chaos? Emergence and Change in International Investment Law' (2014) 29(2) *ICSID Review* 372; Jean Frédéric Morin, Joost Pauwelyn, and James Hollway, 'The Trade Regime as a Complex Adaptive System: Exploration and Exploitation of Environmental Norms in Trade Agreements' (2017) 20 *Journal of International Economic Law* 365; Mark Chinen, 'Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility' (2014) 25 *European Journal of International Law* 703; Tahnee Lisa Prior, 'Engaging Complexity: Legalizing International Arctic Environmental Governance' in Holly Cullen et al., *Experts, Networks, and International Law* (CUP 2017) 154; Jutta Brunnée, 'The Rule of International (Environmental) Law and Complex Problems' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080458 accessed 20 February 2018; Steven Wheatley, 'The Emergence of New States in International Law: The Insights from Complexity Theory' (2016) 15(3) *Chinese Journal of International Law* 579; and Steven Wheatley, 'Explaining Change in the United Nations System: The Curious Status of UN Security Council Resolution 80 (1950)' in Jamie Murray, Tom Webb, and Steven Wheatley (eds), *Complexity Theory & Law: Mapping an Emergent Jurisprudence* (Routledge 2018) 91.

did not engage with complexity theory.[24] This is the first work to examine its implications for human rights law.

Complexity Theory and Law

There are numerous references to 'complexity' in legal scholarship. The Heinonline Law Journal Library, for example, contains nearly a quarter of a million papers that reference 'complexity' and over half a million with the term 'complex'. Most use the words colloquially,[25] although increasingly scholars are relying on the language of complexity to convey a particular understanding, albeit meaning differing things.

Much of the legal literature equates complexity with complicatedness—the notion that the law system is simply too complicated, or complex, for any mortal lawyer to comprehend.[26] The arguments highlight the difficulties of capturing every combination and permutation of legal rules and practices, but do not draw on the transdisciplinary science of complexity, with the consequence that the use of the language of complexity adds little to the analysis, which remains focused on the problem of complicatedness, the fact that the law consists of a combination of parts or elements, which is 'not easy to unravel or separate'.[27]

Related to complicatedness is the idea of computational complexity, which draws on the mathematical theory of complexity developed by computer scientists to produce computational models of law systems.[28] There is no doubt these models, and their related insights, will have significant implications for the future practice of law,[29] including international law. Technological advances in the world of Big Data, for example, now make it possible to analyse large amounts of information, opening the possibility of mapping the patterns of international law communications to capture the emergence and evolution of customary international law norms in real time,[30] in the same way Google Maps highlights changing conditions on the road.[31]

[24] A notable exception is David D. Caron, 'Confronting Complexity' (2012) 106 *Proceedings of the Annual Meeting* (American Society of International Law) 211.

[25] The Oxford English Dictionary defines complexity as the condition of 'being complex', with 'complex' defined as 'a whole comprehending in its compass a number of parts, esp. (in later use) of interconnected parts'; its etymology of the word lies in the Latin term 'complexus', meaning surrounding, encompassing, or encircling: OED Online. Oxford University Press, June 2016.

[26] Peter H. Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 3.

[27] OED Online. June 2017. Oxford University Press.

[28] See, for example, Eric Kades, 'The Laws Of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law' (1996–7) 49 *Rutgers Law Review* 403.

[29] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Edward Elgar 2015); also Mireille Hildebrandt, 'Law as Information in the Era of Data-Driven Agency' (2016) 79 *Modern Law Review* 1. For an application to international law, see Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 *European Journal of International Law* 83.

[30] See, generally, Frank Fagan, 'Big Data Legal Scholarship: Toward a Research Program and Practitioner's Guide' (2016) 20(1) *Virginia Journal of Law and Technology* 1.

[31] See, on this point, J.B. Ruhl and Daniel Martin Katz, 'Measuring, Monitoring, and Managing Legal Complexity' (2015) 101 *Iowa Law Review* 191.

The focus remains, though, on trying to make sense of complicated legal rules and practices, rather than the looking to the insights from the workings of complex systems in the natural world to improve the way we understand law systems.

Next, there is the body of writings on general or postmodern complexity, first identified by the philosopher and sociologist Edgar Morin to distinguish between, what he called, restricted or modern work that aimed to discover mathematically formulated rules and general, or postmodern, scholarship, that regarded all attempts to produce laws of complexity as a negation of the central insight that some systems cannot be modelled perfectly because they are complex systems.[32] Paul Cilliers is the best known writer who looks to postmodern complexity for insights into the nature of law and legal scholarship. His basic point is that because we can never fully understand a complex system, our models always involve an element of selection and choice, with the result that all descriptions of complex systems, including complex law systems, necessarily carry a requirement for 'responsible judgment', by which he means, *inter alia*, the need to gather as much information as possible and to revise our models as soon as their imperfections become clear.[33]

The difficulty with the postmodern accounts is that one of the lessons from complexity is that, whilst the working of complex systems cannot be predicted with absolute certainty, complex systems are not entirely unpredictable.[34] Complexity thinking involves, then, both a rejection of the ambition of modernity to explain everything and the contention of postmodernity, or at least its characterization, that everything is contingent and nothing can be completely understood.[35] What we can take from general, or postmodern, complexity is the realization that, because we cannot model complex systems with complete accuracy and must use our judgement to some extent, this suggests a requirement for ethical responsibility when modelling and explaining complex systems, including complex law systems.

Finally, there is the literature that sees emergence, the idea of 'the whole being more than the sum of the parts', as the distinguishing feature of complexity, thus drawing a clear division between this approach and arguments focused on complexity as

[32] Edgar Morin, 'Restricted Complexity, General Complexity' in Carlos Gershenson, Diederik Aerts, and Bruce Edmonds (eds), *Worldviews, Science and Us: Philosophy and Complexity* (World Scientific 2007) 5, 10.

[33] Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (Routledge 1998) 139–40. See also Matthew Abraham, 'What Is Complexity Science? Toward the End of Ethics and Law Parading as Justice' (2001) 3(1) *Emergence* 169; and Francis Heylighen, Paul Cilliers, and Carlos Gershenson, 'Philosophy and Complexity' in Jan Bogg and Robert Geyer (eds), *Complexity, Science and Society* (Radcliffe 2007) 117. Elsewhere, with Minka Woermann, Cilliers outlines a more clearly postmodern account, concluding that the ethics of complexity imply a commitment to provisionality, the notion we have yet to have identified the correct ethical position; transgressivity, which is the refusal to be limited by the accepted or imposed boundaries of the here-and-now; irony and self-deprecation, highlighting the inconsistencies of positions; imagination, which is the ability to generate new ideas; and toleration of others and the failures of others: Minka Woermann and Paul Cilliers, 'The Ethics of Complexity and the Complexity of Ethics' (2012) 31 *South African Journal of Philosophy* 447, 453–9.

[34] John H. Holland, 'Using Classifier Systems to Study Adaptive Nonlinear Networks' in Daniel L. Stein (ed.), *Lectures in the Sciences of Complexity* (Addison-Wesley 1989) 463, 463.

[35] Marais Kobus, *Translation Theory and Development Studies: A Complexity Theory Approach* (Routledge 2014) 17.

complicatedness, computational complexity and postmodern complexity on the basis that the latter are not centrally concerned with emergent phenomena.[36] In other words, it is the presence of emergent characteristics that distinguishes complex systems, properly so-called, from other systems. The existence of a complex system is evidenced by the fact something new emerges from below. Where the component elements in a complex system are decision-making agents, even simple decision-making actors, like ants, the system will be adaptive, in the sense of being able to evolve as the component agents respond to the actions of others and to events in the outside environment.

For reasons that will become clear, it is this fourth conception of complexity, concerned with emergence and adaption, which is most appropriate when trying to make sense of international law, as system rules are seen to emerge from the actions and interactions of international law actors, and then to change as states and non-state actors respond to developments in the outside world.

Complexity as a Methodology in International Law

The contention of this work is that we can productively think about international law as a complex system, the emergent property of the actions and interactions of states, along with certain non-state actors. In taking this approach, it follows a long tradition in international law scholarship of looking to the natural sciences for methodological insights.[37] This should not, though, be taken as a claim to 'scientism', that we should explain international law by using the scientific method.[38] In the natural sciences, work that accurately describes observable phenomena and which is capable of predicting future behaviours is regarded as good scholarship.[39] International law, on the other hand, often looks to an older methodology, based largely on logical argumentation.[40] Given this cannot produce theories that can be tested empirically, there is often a nagging doubt that international law writings are nothing more than 'mere subjective opinions'.[41]

But it would be a mistake to assume that the methodologies of the natural sciences are inherently superior to those of international law, not least because the questions that international lawyers are interested in are specific to our discipline. Thus, whilst

[36] John H. Holland, *Complexity: A Very Short Introduction* (OUP 2014) 4.

[37] Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 *Cornell Law Review* 61, 117; see also Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1, 18.

[38] See, on this point, David Feldman, 'The Nature of Legal Scholarship' (1989) 52 *Modern Law Review* 498, 502.

[39] Edward L. Rubin, 'On Beyond Truth: A Theory for Evaluating Legal Scholarship' (1992) 80 *California Law Review* 889, 902.

[40] See, on this point, Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632, 633.

[41] Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 *European Law Journal* 20, 22.

a climate scientist might focus on the rate of global warming, we could be curious about the legal responsibility of countries with large carbon emissions to low-lying island countries.

More importantly, we should remember that both the natural sciences and international law rely on methods of inductive reasoning, with the result that generally accepted 'truths' are not 'proved',[42] but agreed within epistemic communities. Inductive reasoning is central to scientific thought. A biologist cannot, for example, say that 'All swans are white', because there might be black swans—even if she has never seen one. Although, the more often she sees only white swans, the more confident she can be that what she thinks is *probably* true—the so-called Bayesian hypothesis, after Reverend Thomas Bayes (1702–61).[43] For a proposition to be accepted as definitely true, it must be recognized as being true within a scientific community.[44] In other words, the production of knowledge in the natural sciences depends on the establishment of a shared understanding within a discipline or one of its schools.[45]

Scholarship in the natural sciences is, then, no different to that in international law, where we also rely on inductive methodologies, abstracting general rules from observable practices and then trying and make sense of the relevant behaviours. Consequently, for the same reason that our colleagues in the natural sciences cannot be certain that generally accepted propositions are accurate, descriptions of the international law system can, by definition, only probably be true, in the sense of being in line with the actual practices of states and non-state actors, although the more evidence we have to support a doctrinal position, the more reason to consider what we think is correct as a matter of law.

Moreover, as with the physical sciences, the production of knowledge in international law takes place within an epistemic community, depending not only on our ability to convince ourselves, following sustained thought, that we have the correct solution, but also our capacity to convince the other members of the 'invisible college',[46] comprised of those who have learnt the grammar of international law,[47]

[42] R.D. Rosenkrantz, 'Does the Philosophy of Induction Rest on a Mistake?' (1982) 79(2) *Journal of Philosophy* 78, 78. The problem of establishing scientific truths by way of inductive reasoning led Karl Popper to propose replacing verification with falsification as the primary scientific method, i.e. to argue that a claim is only scientifically meaningful if it can be proved to be wrong: Karl Popper, *The Logic of Scientific Discovery* (Routledge 1959) 82.

[43] Bayes used the example of working out the probability of the sun rising with each passing day. On the first day, the assumption must be that the chances are 50:50. To signify this, we put two marbles, one black and one white, into a bag. The following day the sun rises again, and so we can put another white marble into the bag. The probability of picking a white marble, i.e. the chance the sun will rise tomorrow, increases from one-half to two-thirds. The next day we put another white marble into the bag, etc. After a few days, we can be confident the statement 'the sun will rise tomorrow' is probably true. See Jonathon W. Moses and Torbjørn L. Knutsen, *Ways of Knowing: Competing Methodologies and Methods in Social and Political Research* (Palgrave Macmillan 2007) 260–1.

[44] See Mathias M. Siems, 'Legal Originality' (2008) 28 *Oxford Journal of Legal Studies* 147, 156; also Thomas S. Ulen, 'A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law' (2002) *University Of Illinois Law Review* 875, 909.

[45] Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, Chicago UP 1970) 175.

[46] Oscar Schachter, 'Invisible College of International Lawyers' (1977–8) 72 *Northwestern University Law Review* 217, 217.

[47] Jean d'Aspremont, *Epistemic Forces in International Law* (Edward Elgar 2015) 203.

and who see the world through 'distinct glasses',[48] that we have the right answer.[49] Martti Koskenniemi is clear on this point: 'International law is an argumentative practice … But it is the consensus in the profession … that determines, at any moment, whether a particular argument is or is not persuasive.'[50] A mainstream position emerges where the conclusions of a majority writing on a subject coalesce around a certain position,[51] with the mainstream position providing the starting point for any discussion about the correct way of apprehending—and describing—the workings, structure, and content of the international law system.

The Argument from Complexity

Whilst many scholars use the term, there is no agreed definition of the scientific or philosophical notion of 'complexity'.[52] Melanie Mitchell, a well-known writer on the subject, reports that when she asked an expert panel, 'How do you define complexity?' everyone laughed, because the question was so straightforward, but then each panel member proceeded to give a different definition.[53]

Notwithstanding the fact there is no paradigmatic understanding of complexity, we can draw on the work of our colleagues in the natural and social sciences to better understand the ways certain 'complex' systems, including the international law system, emerge, adapt, and evolve. The first point is that complex systems are self-organizing, arising from the actions and reactions of component agents, which also interact with the world outside. Second, the system then influences the same component agents that brought it into being—what complexity theorists call downward causation. Third, component agents will not change their behaviours, unless there is some reason for them to change, an idea explained in terms of path dependence. Once the component agents have settled down into a predictable pattern of activity, they will only change in response to some new piece of information, with that alteration then provoking a change that cascades through the system. This can follow the unexpected actions of another component agent, or some occurrence in the outside environment, explaining the power of events in complex systems. Where a significant transformation occurs, the system can take a completely different evolutionary path: what scientists refer to as a system bifurcation, as it develops a new structure. Change is contingent and context-dependent and there is no guarantee

[48] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi et al. (eds), *Interpretation in International Law* (OUP 2015) 147, 150.

[49] Edward L. Rubin, 'On Beyond Truth: A Theory for Evaluating Legal Scholarship' (1992) 80 *California Law Review* 889, 915.

[50] Martti Koskenniemi, 'Methodology of International Law' (2007) *Max Planck Encyclopedia of Public International Law*, para. 1 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[51] Lianne J.M. Boer, '"The Greater Part of Jurisconsults": On Consensus Claims and their Footnotes in Legal Scholarship' (2016) 29 *Leiden Journal of International Law* 1021, 1029–30.

[52] Cliff Hooker, 'Introduction to Philosophy of Complex Systems: A' in Cliff Hooker (ed.), *Philosophy of Complex Systems* (North Holland 2011) 3, 7. For a typology, see Nicholas Rescher, *Complexity: A Philosophical Overview* (Transaction 1998) 9.

[53] Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009) 94.

the system would take the same path again in identical circumstances, meaning there is an arrow of time in complex systems. Finally, complex systems are seen to evolve under the influence of unseen forces, what theorists call attractors, which pull the system away from its expected evolutionary trajectory.

This book takes the language and insights from complexity—notions of self-organization, emergence, downward causation, problem-solving and path dependence, the power of events, the possibility of system bifurcations and the arrow of time, and the influence of attractors—to make better sense of the workings of the international law system, specifically to understand the influence of the unseen force of human rights on international law.

The idea that the international law system is emergent, developing from the behaviours of states, should not be controversial. There is, as all undergraduates are aware, no sovereign power legislating international law norms. These are the result of the actions and interactions of states. Emergent international law rules then regulate the same countries that brought them into existence in the first place, what complexity theories call downward causation. The system evolves with changes in the behaviours of states, but there is no reason for them to adjust their behaviours in the absence of some new piece of information, including the unexpected actions of other countries or some occurrence in the outside world, highlighting the power of events in international law. Finally, as we will see, the international law system can evolve under the influence of the unseen force of ideas, what complexity theories call attractors, including the notions of 'sovereignty', 'self-determination of peoples', and 'human rights'.

International human rights law is not the product of the actions of any one sovereign power, but the outcome of the un-coordinated actions and interactions of states in the international community, with the legal rules then binding the same countries that produced them in the first place. States created the notion of human rights when they established the Charter of the United Nations in 1945 and they explained its meaning in 1948 with the adoption of the Universal Declaration of Human Rights. Whilst the legal practice has evolved over the last seventy years, it has done so in line with the foundational principles underpinning the Universal Declaration, reflecting the importance of equal status, physical and psychological integrity, personhood, participation, and minimum welfare rights. When the Universal Declaration was adopted, it was a non-binding moral code that established the requirements of good government within a country, with no role for secondary agents of justice. Things changed in the aftermath of the Sharpeville Massacre of 21 March 1960, when sixty-nine unarmed civilians were killed by armed South African police. Following the event of the Sharpeville Massacre, UN Member States transformed human rights into a network of legally binding obligations, establishing new procedures and institutional arrangements to monitor the human rights performance of states, sending human rights on a new path, and allowing for the emergence of a distinctive body of international human rights law. The legal practice explained the idea of human rights, and, as the behaviours of states and human rights bodies changed over time, so did the moral concept. Through their discursive practices, states created, maintained, and explained the idea of human rights, which, in turn,

influenced the legal practice, that is human rights functioned as an attractor, in the language of complexity theory, pulling international human rights law away from general international law.

The Structure of the Book

This book explains the distinctive nature of International Human Rights Law by looking at the influence of the moral concept of human rights on general international law, with the idea of human rights understood as the emergent property of the practice of human rights. The aim is to explore the mutual influences and interdependencies of 'international law' and 'human rights' and, in undertaking this task, the work looks to the insights from complexity theory.

The focus is on those human rights we would hope that all persons alive today would enjoy: the rights established by the United Nations system, the provisions of the core human rights treaties, and the human rights norms recognized under customary international law. For obvious reasons, regional instruments, especially the European Convention on Human Rights, along with the extensive jurisprudence of the European Court of Human Rights, are not considered, except where they illuminate global human rights.

Some readers might be surprised by the omission of a chapter on general principles,[54] given that a number of writers, notably Bruno Simma and Philip Alston, have argued that human rights should be conceptualized in terms of 'a "modern" method of articulating and accepting general principles of law'.[55] The problem with this approach is that general principles then becomes a synonym for natural law,[56] whereas reference to the idea in Article 38(1)(c) of the Statute of the International Court of Justice, on the sources of international law, is normally taken to refer to those principles which are common to law systems, revealed by an examination of domestic legal orders.[57] Whilst fundamental rights can be found in the constitutional systems of many states, it is difficult to conclude that this is a general principle of law. Moreover, as Michael O'Boyle and Michelle Lafferty point out, the International Court of Justice 'has displayed a certain reluctance to invoke general principles of law in cases in which human rights issues arise',[58] and the General

[54] See Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law' in R. Pisillo Mazzeschi and P. De Sena (eds), *Global Justice, Human Rights, and the Modernization of International Law* (Springer, 2018) 163 .

[55] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1989) 12 *Australian Year Book of International Law* 82, 107. See also American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 701.

[56] Alexander Orakhelashvili, 'Natural Law and Justice' (2007) *Max Planck Encyclopedia of Public International Law*, paras 36–37 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[57] Hugh Thirlway, *The Sources of International Law* (OUP 2014) 180.

[58] Michael O'Boyle and Michelle Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 194, 209.

Assembly has made clear that, in its view, general principles are not a source of human rights law.[59]

The focus then is on the practice in the United Nations, the core human rights treaties, and customary law. The analysis highlights the contingent nature of human rights and the way the legal practice developed without any grand plan or in a manner that could be predicted in advance, with Philip Alston making the point that 'the international human rights system has developed to an extent that was inconceivable by the vast majority of observers in 1945'.[60]

This work calls attention to the power of events in the story of human rights, from oblique reference to the concept in Franklin D. Roosevelt's State of the Union message to Congress in 1941; to the battles for the inclusion of human rights in the UN Charter; to the adoption of the Universal Declaration of Human Rights; the expansion of the UN membership in the 1960s to encompass newly independent African countries and their determination to bring an end to racial discrimination in southern Africa, especially after the Sharpeville Massacre of 21 March 1960; the decision of a majority of judges on the European Court of Human Rights in *Golder v United Kingdom* in 1975 to favour a *pro homine* ('in favour of the individual') approach to interpretation; and the introduction of a comprehensive system of monitoring, in the form of the Universal Periodic Review, following the collapse in the standing of the UN Commission on Human Rights. By isolating these pivotal events and tracking the evolution of human rights over time, we can make sense of the legal practice to explain the emergent moral concept of human rights.

Chapter 1 begins by looking at the heated discussions about the history of human rights, making the point that disagreement is about the meaning of the term 'human rights', rather than dissensus about what happened when. Looking to the philosophical literature, we see four main themes: human rights as a modern idiom for natural rights, establishing a moral code for the treatment of human beings; human rights as defining the proper relationship between the state and the individual; human rights as explaining the circumstances when secondary agents of justice can intervene in the internal affairs of a state; and human rights as a discrete area of international law practice. The clearest fault line is between those subjective normative arguments that look to explain what human rights should be and descriptive accounts that try and make sense of the actual practice, or some idealized version of that practice. This work takes the second approach, explaining the notion of human rights by reference to the practice. The objective is not to uncover the hidden stories of the paths not taken or precedents forgotten, or to rediscover the voices of subaltern victims of injustices; nor, in contrast to much of the contemporary writing, does it seek to justify the model presented here. This is a practice-based account that explains the idea of

[59] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 Dec 2005) (adopted without a vote), Principle I(1): the obligation to respect, ensure respect for and implement international human rights law 'emanates from: (a) Treaties to which a State is a party; (b) Customary international law'.

[60] Philip Alston, 'The UN's Human Rights Record: From San Francisco to Vienna and Beyond' (1994) 16 *Human Rights Quarterly* 375, 377.

human rights by reference to the legal practice, which, in turn, creates its own vision of the value of the human person in political societies and there is no reason we should accept that vision as reflecting a universal moral truth or precluding critical comment.

Chapter 2 explains how we can use complexity theory to make sense of international law. Drawing on the insights of our colleagues in the natural sciences, it shows how we can conceptualize the international law system as the emergent property of the actions and interactions of states, as they respond to unexpected alterations in the behaviours of other states or occurrences in the outside world. The work takes the key insights from complexity—self-organization, emergence and downward causation, problem-solving, synchronic evolution, bifurcations, path dependence, events and attractors—and shows how these can be applied to international law. The objective is to provide the intellectual scaffolding to better make sense of the legal practice of global human rights examined in Chapters 3, 4, and 5, before drawing on the philosophy of emergence implied by complexity theory to develop an account of the moral concept of human rights in Chapter 6.

Chapter 3 tells the story of human rights in the United Nations, from a reference to the notion in Franklin D. Roosevelt's 'Four Freedoms' address, to the inclusion of human rights in the Charter, to the explanation of its content in the Universal Declaration of Human Rights, the targeting of systematic racial discrimination in southern Africa and wider measures dealing with 'gross and systematic' violations, and, finally, the Universal Periodic Review of all Member States' human rights performances against the standards in the Universal Declaration, shifting the emphasis to the promotion of 'all human rights for all'. The work shows how we can understand the United Nations as a complex system of regulatory authority, which evolves with changes in the behaviours of the Member States and UN bodies as they respond to new information. The analysis demonstrates that, up until the 1960s, human rights provided a set of moral guidelines only, informing states how they should treat those individuals subject to their jurisdiction and control. That was until the newly independent African countries joined the World Organization and turned their attention to the problem of systematic racial discrimination in southern Africa, especially after the 1960 Sharpeville Massacre, when UN measures targeting South Africa and South West Africa (Namibia) transformed the non-binding moral code represented by the Universal Declaration into a body of international human rights law, with the development explained by the importance of subsequent agreements and practices in the evolution of the regulatory authority of the United Nations Organization.

Chapter 4 examines the core UN human rights treaties, showing how we can think of these as complex systems, the result of the interactions of the states parties and the treaty bodies. Framing the treaties as complex systems helps make sense of the regime on opposability and the ways a treaty system can evolve with changes in the behaviours of parties and the supervisory body, as well as changes in wider international law and developments in societal attitudes and regulatory approaches outside the treaties. The work first explains the regime on opposability and denunciation, which establishes the binding nature of the conventions, before

considering the law on reservations, noting how this differs from the scheme under general international law. The chapter then turns to the interpretation of convention rights, detailing the distinctive *pro homine* ('in favour of the individual') approach applied to human rights treaties, which first emerged in *Golder v United Kingdom* (1975), against strong opposition from a minority of judges on the European Court of Human Rights, establishing a precedent that was adopted by other human rights bodies. Whilst the text of the treaty will always provide the starting point for discussion, the law on interpretation requires that we also examine the subsequent practice of states parties, as well as the communications of the supervisory bodies established under the treaties, especially in the form of General Comments and Recommendations, allowing the possibility that the meaning of convention rights can change over time, as the parties introduce measures to implement their treaty obligations and the treaty bodies comment on these measures. The doctrine of evolutionary interpretation explains how the 'ordinary meaning to be given to the terms of the treaty' can evolve with developments in technical and scientific knowledge, variations in societal understandings, and wider modifications in regulatory approaches outside of the human rights treaty system.

Chapter 5 looks at customary international law. It first considers the problem of establishing customary human rights, given the traditional view that custom develops by way of inter-state claim and counter-claim. The work explains how we can think of custom as a self-organizing system that emerges from the performative acts of states and which evolves as they respond to new information. To demonstrate the existence of custom there must be evidence of a pattern of state practice showing the existence of a rule and evidence of a pattern of communications evidencing a belief the rule is part of the international law system (opinio juris). Custom is, then, an emergent property of the performative acts of states, who literally 'speak' custom into existence; customary international law then binds the same countries that brought it into existence, exhibiting the characteristics of a complex system, with complexity reminding us of the importance of path dependence, the power of events and possibilities of change as states respond to new information. The work shows how the measures targeting apartheid South Africa after the Sharpeville Massacre resulted in the first customary human right, the prohibition on racial discrimination, as well as an evolution in the methodology for custom-formation, allowing reference to General Assembly resolutions and law-making treaties. The chapter further demonstrates how the status of persistent objector was denied to apartheid South Africa, changing the nature of the consent-based international law system, and confirming the non-negotiable character of fundamental rights and the possibility of intervention by secondary agents of justice, including states and international organizations.

Chapter 6 draws on the legal practice of human rights in the United Nations system, the core human rights treaties, and customary law to develop a practice-based account of the idea of human rights as a concept capable of allocating moral obligations to states and human rights to individuals. It looks first to the work of the philosopher John Searle to explain the objective reality of human rights, showing how states, through their discursive legal practices, created a notion of human rights that affirmed the importance of equal status, physical and psychological integrity,

personhood, participation, and minimum welfare rights. In the first decade and a half of the existence of human rights, it was for each state alone to decide on the necessary measures, if any, to give effect to the rights recognized in the Universal Declaration of Human Rights. All that changed after the 1960 Sharpeville Massacre, when UN Member States transformed the moral code of human rights into a network of binding international law obligations, with a role for secondary agents of justice that included both dystopia avoidance measures, such as the '1235' and '1503' procedures of the United Nations Commission on Human Rights, focused on gross and systematic violations, and the promotion of the utopia of 'all human rights for all', especially by way of Universal Periodic Review in the United Nations Human Rights Council. A focus on the practice highlights the ways human rights can evolve with changes in the discursive practices of states and human rights bodies, acknowledging, in the words of the philosopher Cristina Lafont, 'the essentially *dynamic* nature of human rights norms, and thus reject[ing] as wrongheaded the static assumption behind the traditional project of trying to derive a definitive list of human rights from some fundamental value or principle that stands upon the basis of moral reasoning alone'.[61]

Chapter 7 summarizes and clarifies the argument, explaining the distinctive nature of International Human Rights Law. It reminds us that states invented human rights in 1945 with the inauguration of the United Nations Charter and explained its meaning three years later with the adoption of the Universal Declaration of Human Rights, and that human rights evolved in a radically different direction as states responded to events in southern Africa, with an initial focus on gross and systematic violations, evolving again with the introduction of a system of Universal Periodic Review. The core human rights treaties codified the rights in the Universal Declaration and dealt with problems of implementation, with the treaty bodies playing an important role in explaining, and even changing, the meaning of human rights. The development of a body of customary human rights law established a minimum core of protection for all persons, in all states. The central insight of the final chapter is that the moral concept of human rights, which emerges from the legal practice, then influences that legal practice. We see this with the introduction, without debate, of the system of Universal Periodic Review, in the *pro homine* approach to the interpretation of human rights treaties, and in the modern methodology for customary law formation, which looks first to the communication acts of the UN General Assembly. The book concludes by showing how the influence of the moral concept of human rights on the legal practices can explain the fragmentation of international law and relatedly the special nature of International Human Rights Law.

[61] Cristina Lafont, *Global Governance and Human Rights* [Spinoza Lecture] (van Gorcum, 2012) 33 (emphasis in original).

1

What We Mean When We Talk about 'Human Rights'

The purpose of this chapter is to review the literature on the idea of human rights in order to highlight the differences of opinion on the subject. It first observes the debates on the history of human rights, noting that the arguments are not really about the genesis of human rights practice, but the meaning we attach to the term. Looking to philosophical writings, we see four main streams of thought. First, traditional, or orthodox, explanations that understand human rights as a moral code that tells us how we should treat each other—usually expressed in terms of natural rights. Second, accounts which see human rights as outlining the proper relationship between the state and the individual, by defining the objectives of good government (seen in natural law theories) or placing limits on bad government (Lockean social contract theory). Third, interventionist versions that focus on the function of human rights in the international community, particularly in terms of justifying outside interest and intervention in the domestic affairs of a country. Finally, work that highlights the importance of international law to any conceptualization of human rights. The chapter concludes that the differences of opinion on the subject of 'human rights' suggest we cannot explain its meaning by looking to moral or political theory, and that we should instead look to develop a practice-based account, on the conviction we can better make sense of the term 'human rights' by reference to its use.

The Debate on the History of Human Rights

The most energetic debate on human rights is taking place within the discipline of history, including work on the history of international law.[1] There is, in Phillip Alston's words, 'a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy'.[2] Until recently, the accepted narrative was that human rights developed in response to events in Nazi Germany

[1] For a good introduction, see Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2016) 58(2) *Harvard International Law Journal* 301.

[2] Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043, 2077 (hereafter Alston, 'Does the Past Matter?').

between 1933 and 1945, specifically the genocide of European Jews. Former UN Secretary General, Kofi Anan has stated, for example, that 'the United Nations emerged from the ashes of the Holocaust … Worldwide revulsion at this terrible genocide was the driving force behind the Universal Declaration of Human Rights'.[3] This position is widely shared. The historian, William Hitchcock, maintains that the reason human rights emerged in the 1940s 'would seem obvious. The slaughter of millions of people by a genocidal Nazi regime'.[4] Louis Henkin concurs: human rights were 'born in, and out of, World War II',[5] with the post-War era ushering in 'the age of rights'.[6] Thomas Buergenthal explains the point this way: 'international human rights law is a post–World War II creation … The Holocaust and the many other monstrous violations of human rights of the Hitler era provided the impetus for the development of an international system capable of preventing the recurrence of similar human tragedies.'[7]

The historian Daniel Cohen has, though, questioned whether the Jewish genocide did, in fact, provide the motivation for the introduction of human rights in the 1940s, arguing that the central place of the Holocaust in the origins story only emerged in the 1960s. He points out that a United Nations pamphlet published in 1950 devoted only a few lines to Nazi anti-Semitic violence. The primary concern, the UN Department of Public Information explained, was the 'absolute power of the state' and the disappearance of political freedom under fascism and Nazism.[8] The legal historian, Samuel Moyn, agrees, noting that 'across weeks of debate around the Universal Declaration [on Human Rights] in the UN General Assembly, the genocide of the Jews went unmentioned'.[9]

Moyn invigorated the genesis debate with his claim that human rights only emerged in the 1970s. His argument is that when the term entered the English language in the 1940s, there was little clarity as to its meaning, but that Western powers quickly succeeded in capturing the language of human rights for use in their ideological battle against the Soviet Union. Human rights became associated with anti-communism, specifically with freedom of religion in communist countries. It also became a global social movement and Amnesty International was central to this development with its approach of saving the world one person at a time, allowing a focus on Soviet dissidents like Andrei Sakharov and Aleksandr Solzhenitsyn. Moyn claims that, in the 1970s, human rights

[3] UN Secretary-General, Kofi Annan, 'Opening Remarks at the Department of Public Information (DPI) Seminar on Anti-Semitism', UN Doc. SG/SM/9375-HR/4774-PI/1590, 21 June 2004 http://www.un.org/press/en/2004/sgsm9375.doc.htm accessed 20 February 2018.

[4] William I. Hitchcock, 'The Rise and Fall of Human Rights: Searching for a Narrative from the Cold War to the 9/11 Era' (2015) 37 *Human Rights Quarterly* 80, 87.

[5] Louis Henkin, *The Rights of Man Today* (Westview 1978) 92.

[6] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 *Annals of the American Academy of Political and Social Science* 10, 13.

[7] Thomas Buergenthal, 'Human Rights' (2007) *Max Planck Encyclopedia of Public International Law*, para. 8 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[8] G. Daniel Cohen, 'The Holocaust and the "Human Rights Revolution"' in Akira Iriye et al. (eds), *The Human Rights Revolution: An International History* (OUP 2012) 53, 54.

[9] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 82.

finally replaced other transnational political utopias, such as anti-colonialist nationalism and communism, to establish itself as the common vocabulary of global justice. The human rights revolution was confirmed in the 1980s, 'when a variety of groups around the world, and all governments, learned to speak [its] language'.[10]

Whilst Moyn insists that the idea of human rights is a recent invention, others look further back in time. The British Museum, for example, describes the Cyrus Cylinder, an account of the conquest of Babylon by Cyrus the Great in 539 BCE, as 'the First Charter of Human Rights'.[11] Others date the emergence of human rights to the 1215 Magna Carta and the 1689 English Bill of Rights;[12] the Haitian revolution of 1791;[13] protests against the mistreatment of religious minorities in the eighteenth and nineteenth centuries;[14] the Latin American practice of constitutional rights in the nineteenth century;[15] developments in global communication technologies in the late nineteenth century, which allowed knowledge of the suffering of others in distant places;[16] and the emergence of international laws protecting the human person around the turn of the twentieth century and recognition of humanitarian rights.[17]

The approval by the National Assembly of France of the *Declaration of the Rights of Man and the Citizen* on 26 August 1789 is often cited as a key moment in the story of human rights.[18] The objective of the Declaration was to explain the purpose and direction of the French Revolution, which saw the Monarchy replaced in a popular uprising. Article 1 proclaimed that 'Men are born and remain free and equal in rights'; Article 2 that 'The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.'[19] Responding to the Declaration, the English philosopher and jurist, Jeremy Bentham, concluded that the idea of natural rights anterior to government was 'rhetorical nonsense—nonsense upon stilts'. Rights,

[10] Ibid. 218.

[11] The British Museum Collection, 'The Cyrus Cylinder', Curator's comments [online]. On human rights in early history, see Paul Gordon Lauren, 'The Foundations of Justice and Human Rights in Early Legal Texts and Thought' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 163.

[12] Francesca Klug, *A Magna Carta for All Humanity: Homing in on Human Rights* (Routledge 2015) 111.

[13] Franklin W. Knight, 'The Haitian Revolution and the Notion of Human Rights' (2005) V (3) *The Journal of the Historical Society* 391, 410–11.

[14] Antje von Ungern-Sternberg, 'Religion and Religious Intervention' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 294, 311.

[15] Peter N. Stearns, *Human Rights in World History* (Taylor and Francis 2012) 91.

[16] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (2nd edn, Pennsylvania UP 2003) 38.

[17] Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924* (CUP 2014) 6.

[18] Maya Hertig Randall, 'The History of International Human Rights Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 3, 9.

[19] Declaration of the Rights of Man and the Citizen, 1789 http://avalon.law.yale.edu/18th_century/rightsof.asp accessed 26 January 2018.

he contended, owed their existence to government and without government there could be 'no laws, and thence no such things as rights—no security—no property'.[20]

The *Declaration of the Rights of Man and the Citizen* represented an important shift from the notion that religion provided the basis for the right to rule, often expressed in terms of the Divine Right of Kings, with scholars and activists in the eighteenth century increasingly turning to natural rights to explain the limits on the power of the state. Particularly important was Jean-Jacques Rousseau's *The Social Contract* [1762], which opens with the line: 'Man is born free, and everywhere he is in chains.'[21] Rousseau explained that the political authority of the state was limited by those natural rights—such as freedom of conscience and religion—which the individual retained in a civil society under sovereign authority.

The historian, Lynn Hunt, claims that rights-talk emerged around this time because individuals began to develop a sense of sympathy with the victims of state power, specifically in relation to torture. Judicially supervised torture to extract confessions had been common in most European nations from the thirteenth century, when it was reintroduced because of the revival of Roman law and the Catholic Inquisition, but popular opinion turned against the practice in the 1760s, leading to its abolition in many countries. Hunt links the abolitionist movement in France to the event of the stretching and waterboarding of the 64-year-old Jean Calas in the southern city of Toulouse in 1762. The affair gained notoriety when Voltaire published his *Treatise on Tolerance on the Occasion of the Death of Calas* [1763]. Hunt argues that moves to abolish torture were the result of the growth of empathy, as people began to put themselves in the place of the torture victim and to imagine what they might feel. This followed the development of the notion of the human person as an individual, whose bodily integrity had to be respected. Torture ended in Europe, Hunt contends, because the traditional understanding of pain and personhood was replaced by a new conception in which 'individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognised in other people the same passions, sentiments and sympathies as in themselves'.[22]

After some initial enthusiasm for natural rights following the French and American revolutions in the late eighteenth century and the romantic nationalist revolutions in France and Belgium in 1830, rights-talk was replaced in European societies by the competing ideology of political self-determination and related notion of constitutional rights. Each country could develop its own version of rights, but there were no generalized arguments for the *Rights of Man*, or indeed *Rights of Woman*,[23] and no rights-based justification for individuals to take an interest in the suffering of fellow human beings across national borders.

[20] Jeremy Bentham, 'Anarchical Fallacies' in Jeremy Waldron (ed.), *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Methuen 1987) 29, 53.

[21] Jean-Jacques Rousseau, *The Social Contract* [1762], translated by H.J. Tozer (Wordsworth Editions 1998) 5.

[22] Lynn Hunt, *Inventing Human Rights: A History* (Norton 2007) 112.

[23] The playwright and political activist Olympe de Gouges issued her *Declaration of the Rights of Women* [1791] in response to the Declaration of the Rights of Man and the Citizen www.britannica.com/topic/Declaration-of-the-Rights-of-Women accessed 26 January 2018.

Rather than focus on the adoption of a Declaration or Bill of Rights, law professor Jenny Martinez argues that we can see the first manifestation of human rights in the moves by the British government against the transatlantic slave trade, which involved efforts to improve the lives of individuals outside the jurisdiction of the British state, along with the enforcement of humanitarian norms through international tribunals. Following the abolition of slavery in the British Empire in 1807 and responding to civil society activists, the British government made the abolition of the slave trade part of its foreign policy. It then persuaded other governments to join a network of bilateral treaties banning the trade and created international courts to enforce the agreements. This, Martinez contends, was the first time international conventions had been introduced for the protection of individuals on the basis that what was being done to them should not be done to anyone, and that international courts were used to enforce such ideas. She concludes that the moves to end the transatlantic slave trade contained the component elements of modern human rights: transnational norms for the protection of the natural rights of individuals, and the enforcement of those norms by formal institutions.[24] But, as Philip Alston points out, it is not clear that the abolitionists used the language of human rights or had the same idea in mind as contemporary activists.[25] Moreover, the measures introduced by the British government had a limited focus: they concerned the transatlantic slave trade only,[26] and it was not until the adoption of the 1926 Slavery Convention that states—and then only the states parties—committed themselves to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms'.[27]

On the Meaning(s) of 'Human Rights'

Until recently, then, the standard account located the genesis of human rights in the genocide of European Jews by the Nazi regime in Germany. As the historian Micheline Ishay observes, the rallying cry after World War II was 'Auschwitz: Never Again!'[28] This narrative has though been challenged, with, for example, Samuel Moyn holding that human rights only emerged in the 1970s, with the establishment of an effective social movement organized around this idea of global justice; Lynn Hunt arguing that human rights is about empathy for the suffering of others and we see this first in eighteenth-century France; and with Jenny Martinez claiming

[24] Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP 2012) 134–5.

[25] Alston, 'Does the Past Matter?' (n. 2) 2049. See, also, Reza Afshari, 'On Historiography of Human Rights Reflections on Paul Gordon Lauren's The Evolution of International Human Rights: Visions Seen' (2007) 29 *Human Rights Quarterly* 1, 12.

[26] See L. Oppenheim, *International Law: A Treatise, Vol. I. Peace* [1st edn] (Longmans 1905) 608.

[27] Article 2(b), Slavery Convention, International Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 46 Stat. 2183.

[28] Micheline R. Ishay, *The History of Human Rights from Ancient Times to the Globalization Era* (California UP 2008) 218.

the subject of human rights is concerned with the global regulation of avoidable human suffering and this can be observed first in the moves against the transatlantic slave trade.

Whilst the arguments are all different, there is one thing they are agreed on: there is now something we can call 'human rights'. Historians define what they see as the core characteristics of the notion and then look for evidence of its earliest expression. The debate on the history of human rights is not, then, a debate about history. None of the facts are disputed, nor is the timeline of events. This is a debate about the meaning of the term 'human rights', whether we should conceptualize it as a global social movement, as empathy with the avoidable suffering of others, or the transnational regulation of humanitarian concerns. But there is no explanation in the writings on the history of human rights as to why one understanding should be preferred to another. Rather than look to historical writings to clarify the notion,[29] we might be better examining the philosophical literature concerned with explaining the meaning of the term 'human rights'.

Moral Human Rights

The traditional, or orthodox, way of thinking about human rights has been to develop a reasoned argument to explain what rights we need in order to protect our most important interests as human beings,[30] with those interests often expressed in terms of our agency or capabilities, or the distinctive nature of human existence. Once we are clear what rights we should have, we can then identify those actors with correlative obligations, whether they are other individuals, the state, an international organization, or transnational corporation. The moral code of human rights can then be expressed in terms that *A has a human right to X against B by virtue of her . . . 'agency', or 'capabilities', or simply 'by virtue of being human', etc*.

The most important recent contribution along these lines can be found in James Griffin's *On Human Rights*, in which the moral philosopher argues that human rights should be understood as a secular expression of natural rights. Griffin develops his conception from what he sees as the distinctive nature of human existence (distinct from the lives of other animals), which 'centres on our being agents—deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves'.[31]

[29] There are two main dangers in looking to explain the evolution of the history of human rights over time. First, whether the different individuals speaking and writing about 'human rights' (or what we take to be an equivalent term) were really talking about the same thing in the same way. See on this point, Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8 *History and Theory* 3, 38. Second, whether we can actually trace the evolution of an idea through time. Michel Foucault, for example, cautions against any approach to history that 'aims at dissolving a singular event into an ideal continuity—as a teleological movement or a natural process': Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed.), *The Foucault Reader* (Penguin 1984) 76, 88.

[30] Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed.), *Theories of Rights* (OUP 1984) 21, 25. (A common feature is that natural rights follow the intrinsic or essential nature of man: 'Thus they are known by reason.')

[31] James Griffin, *On Human Rights* (OUP 2008) 32 (hereafter Griffin, *On Human Rights*).

He expresses this distinctive nature in terms of personhood, that is *A has a human right to X against B, by virtue of their personhood*. Personhood is a synonym for meaningful agency, with Griffin concluding that, to be an agent, an individual must not only choose her path through life (and therefore have the right to agency), but must also enjoy the minimum provision of resources and capabilities necessary to allow her to act on those choices (minimum welfare rights), and that others must not forcibly prevent her from pursuing what she regards as a worthwhile life (the right to liberty).[32] These foundational principles—autonomy, minimum provision, and liberty—underpin his conception of human rights.

Griffin is not concerned whether human rights, as he understands them, are recognized in international law, because moral rights do not depend for their existence or validity on the law-making activities of states. Some human rights might be found in the Universal Declaration of Human Rights, but this does not, he argues, make them human rights, properly so-called. Indeed, as Samantha Besson and Alain Zysset point out, Griffin is not really interested in human rights, but in the Enlightenment conception of natural rights.[33]

Arguments for natural rights invariably depend on a two-stage process of analytical reasoning. First, moral philosophers explain what they see as the distinctive nature of human existence, often without reference to insights from anthropology, biology, psychology or sociology, etc. Second, they proceed, by a process of deductive reasoning, to explain the natural rights necessary to protect those essential qualities. The problem is that either, or both, of these suppositions can be the subject of reasonable disagreement and in the absence of consensus on the distinctive nature of human existence and the necessary measures to protect that characteristic nature, it is difficult to argue that we should prefer the position of one philosopher to another, or the position of moral philosophy to the actual practice of human rights.

Griffin's notion of human rights is a case in point, as it depends on his conceptualization of the distinctive nature of human existence. By 'human', he means a functioning human agent,[34] a definition that necessary excludes members of the species *Homo sapiens* who are not functioning agents, including babies, those with dementia and people with profound learning impairments. These individuals do not enjoy the benefits of human rights—a point accepted by Griffin: 'I am inclined to conclude that human rights should not be extended to infants, to patients in an irreversible coma or with advanced dementia, or to the severely mentally defective.'[35] But consider the practice of torturing an infant child in front of her parents. For Griffin, the parent can be a victim of a human rights violation, but the uncomprehending child cannot, even though she suffers.

The notion that the torture of babies, or mistreatment of those with dementia or profound learning impairments, cannot be a human rights violation because these individuals are not, in some way, fully human highlights the problems with the

[32] Ibid. 33.

[33] Samantha Besson and Alain Zysset, 'Human Rights History and Human Rights Theory: A Tale of Two Odd Bedfellows' (2012) *Ancilla Juris* (anci.ch) 204, 209, at https://www.anci.ch.

[34] Griffin, *On Human Rights* (n. 31) 35. [35] Ibid. 95.

traditional, or orthodox, accounts that look to explain human rights by reference to some rationalized conception of the distinctive nature of human existence. First, they depend on the subjective opinion of this or that philosopher of what it means to be fully human; second, our response to the torture of a child, or mistreatment of those with dementia or learning impairments, does not always depend on rational consideration of the issue, but often an intuitive and essentially emotional reaction to certain forms of avoidable suffering.[36] In other words, we do not always see human rights as propositions about philosophical truths, but as an argument for justice in the face of injustice.[37]

The legal philosopher, Klaus Günther, expresses the difference between the human rights tradition that looks to rationality and the giving and testing of reasoned argument, and the one that refers to the need to avoid pain and suffering in the following way: if you want to know what is meant by human rights, you can look to learned writings on the subject, 'or you can think of the German Gestapo torturing a political opponent'.[38] Günther prefers the latter approach, concluding that human rights discourse involves the identification of pain and humiliation at the hands of the state as an injustice.[39] Upendra Baxi expresses the point this way: 'I take it as axiomatic that the historic mission of "contemporary" human rights is to give voice to human suffering.'[40]

Writers that locate the ontological basis of human rights in the pain and suffering of others often look to the work of the philosopher Emmanuel Lévinas, whose starting point is that the development of moral obligations proceeds from the Other, with the objective of avoiding, what he regards as, the primary error of Western philosophy, of conceptualizing the Other by reference to Self, an approach that leads to a human rights grounded in empathy, but which proceeds from the assumption that the Other is basically like me. But, as Lévinas points out, the Other is not necessarily like me and he argues that we owe an ethical duty to the Other to take responsibility for their suffering, without the requirement to empathize—what he calls the ethics of alterity.[41]

[36] Human rights do not speak to the suffering caused by natural disasters, nor do they concern the humanitarian obligations of charity. See, on this point, Allen Buchanan, 'Moral Progress and Human Rights' in David Reidy and Cindy Holder (eds), *Human Rights: The Hard Questions* (CUP 2013) 399, 408.

[37] Günter Frankenberg, 'Human Rights and the Belief in a Just World' (2014) 12 *International Journal of Constitutional Law* 35, 36. The political scientist Alison Brysk maintains, for example, that by narrating the concrete suffering of individuals, human rights tells us what it means to be human: Alison Brysk, *Speaking Rights to Power: Constructing Political Will* (OUP 2013) 25. The philosopher Jean-François Lyotard observes a paradox in human rights, whereby rights follow situations of *not* being treated like a fellow human; only then does an individual have rights, and only then are they treated by others as being human: Jean-François Lyotard, 'The Other's Rights' in Stephen Shute and Susan Hurley (eds), *On Human Rights* (The Oxford Amnesty Lectures 1993) 135, 136.

[38] Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture' in Philip Alston et al. (eds), *The EU and Human Rights* (OUP 1999) 117, 126.

[39] Ibid. 134.

[40] Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law & Contemporary Problems* 125, 127.

[41] Emmanuel Lévinas, *Totality and Infinity: An Essay on Exteriority*, translated by Alphonso Lingis (Kluwer 1991) 199.

Costas Douzinas is the best known of the writers who look to Lévinas. Douzinas' postmodern account holds that natural human rights are mainly concerned with the denunciation of injustice, which is to forget that humanity exists in the face of each person. The basis of human rights, he argues, is the ethical demands the face of the Other places on me, including the demands of the face of the child whose back is burning from napalm, that of the young man stood in front of a tank, or the face of a women with an emaciated body stood behind the fence of a concentration camp. For Douzinas, the foundation of human rights is not reasoned argument, but our emotional response to avoidable suffering and a commitment to recognize 'the unique needs of the concrete other'.[42]

The Political Conception of Human Rights I: The State and the Individual

The traditional, or orthodox, approach to explaining the idea of human rights has been for scholars to outline what they see as the distinctive nature of human existence and then work out what (natural) rights are required to protect our humanity. The scholarly literature looks either to reasoned argument (as in the case of James Griffin) or to our emotional responses to the suffering of others (Costas Douzinas). Whilst the state often provides the context for discussion or constitutes the primary threat to individual well-being,[43] arguments for moral human rights do not see natural rights and the state as being conceptually conjoined. Natural rights establish a code that applies to all of us individually, whether we are government officials, including judges and members of parliament, or not. If someone has a right not to be tortured, or a right to food, then I have a moral obligation not to torture them, and to ensure they are fed, whether I am a government minister, or a professor of international law.

This is not the case with political conceptions of rights, which focus, in the first instance, on the relationship between the individual and the state.[44] The objective is to explain the proper relationship between the government and the individual in terms of rights.[45] The literature can be divided into three: human rights as limits on bad governments; as explaining the requirements of good government; or detailing the obligations that flow from the fact of political association.

[42] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart 2000) 351.

[43] The legal philosopher James Nickel develops a prudential argument that sees human rights protecting the individual from the predictable threats that come from the state in the form of torture, arbitrary detention, etc.: James W. Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 55.

[44] Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 *Annals of the American Academy of Political and Social Science* 10, 11.

[45] For a good introduction, see Kenneth Baynes, 'Discourse Ethics and the Political Conception of Human Rights' (2009) 2(1) *Ethics & Global Politics* 1; also, Laura Valentini, 'In What Sense are Human Rights Political? A Preliminary Exploration' (2012) 60 *Political Studies* 180.

Whilst the political conceptions focus on the relationship between the government and the individual, the discussion often begins in the pre-political state of nature, those imagined conditions where there is no state or other form of organized political community. The argument being that, if we enjoyed certain rights in the state of nature, we should continue to enjoy those rights when subject to the coercive authority of the state. The legal and political philosopher Norberto Bobbio contends, for example, that human rights 'originated from the philosophy of natural law, based on the theory of a state of nature where human rights were few and fundamental'.[46] Natural rights are those freedoms that individuals should enjoy at all times, and in all places. Consequently, whilst it might be possible to talk about the caveman's natural right to life, it makes no sense to talk about his right to a fair trial, with the consequence that, as the philosopher Rex Martin points out, the concept has little in common with the Universal Declaration of Human Rights, which contains 'rights of persons in society, specifically in organized societies'.[47]

The argument that natural rights are those freedoms we would have enjoyed in the state of nature is a central element in the social contract tradition, which sees fundamental rights in terms of inherent limits on the political power of the state. During the seventeenth century, the right to rule in Western political thought came to be understood almost exclusively in terms of sovereign authority, which was justified by the exigencies of the human condition. Originally, so the social contract narrative goes, the species *Homo sapiens* lived in a state of nature in which the natural condition was, in Thomas Hobbes' memorable phrase, a 'Warre of every man against every man'.[48] In the state of nature, individuals would enjoy the inherent rights to life, physical integrity, freedom, and property, but they also accepted that their rational self-interest required the establishment of a political community to protect those rights. Given that the authority of the government depended on the consent of its subjects, it necessarily followed, John Locke argued, that its power was limited by the purposes for which it was established, that is the preservation of property rights, defined broadly to include 'Lives, Liberties and Estates'.[49]

Whereas Thomas Hobbes' *Leviathan* was the sole judge of the interests of the people, with that judgment held to be infallible, Locke argued that it was for citizens to decide when the government had breached the trust placed in it and they retained the right to repudiate the social contact.[50] This idea can be seen in the 1776 Virginia Declaration of Rights, which established that 'all men are by nature equally free and independent, and have certain inherent rights [life and liberty, and the means of acquiring and possessing property]' (Section 1). The Virginia Declaration went on to affirm that where a government is found 'inadequate or contrary to these purposes, a majority of the community hath [the] right to reform, alter, or abolish it'

[46] Norberto Bobbio, *The Age of Rights* (Polity 1996) 52.

[47] Rex Martin, 'Are Human Rights Universal?' in David Reidy and Cindy Holder, *Human Rights: The Hard Questions* (CUP 2013) 59, 59.

[48] Thomas Hobbes, *Leviathan* [1651], edited by C.B. MacPherson (Penguin 1968) 185.

[49] John Locke, *Two Treatises of Government* [1689] edited with an introduction by Peter Laslett (CUP 1960) Bk. II § 123.

[50] Ibid. Bk. II § 221.

(Section 3).[51] The 1948 Universal Declaration of Human Rights, adopted some 250 years after the first publication of Locke's *Two Treatises of Government*, contains the same ideas, with Article 1 providing that 'All human beings are born free and equal in dignity and rights', whilst the preamble confirms that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.[52]

Under the Lockean social contract tradition, natural rights both justified the exercise of sovereign authority and explained its limits. The tradition underpins, if only implicitly, the notion of human rights as a constraint on the power of the state. As the political philosopher, Thomas Pogge, points out, when we talk about rights, we tend to draw a distinction between the actions of the state and those of private individuals, giving the example of the taking of a car: if the vehicle is removed by a private person, we label that theft; if by a government official, we call it a violation of the right to property.[53] Human rights are not, then, seen as a moral code that explains the way we should treat each other, but as a body of rules that outlines the limits of the coercive powers of the state in relation to the individual.[54]

A second strand of the political conception, strongly influenced by the Catholic natural law tradition, sees human rights as a guide for good government. The approach is political because it is primarily focused on the relationship between the state and the individual. The best-known contemporary version is found in the work of the neo-Thomist, after Thomas Aquinas, John Finnis, who argues that all forms of law-making, whether by legislative, judicial or other means, should be guided by our shared understanding of the requirements of the good society and that, by way of practical reasoning, we can work out the basic forms of human good. Finnis sees human rights as a contemporary idiom for natural rights and the Universal Declaration on Human Rights as an attempt to outline the idea of the common good for all political communities.[55] In developing his argument, as with many traditional, or orthodox, accounts, Finnis contends that we must first acknowledge there is something distinctive about the species *Homo sapiens* and that all human animals share some basic conception of the good life. This conception then informs our understanding of the function of government, which is to promote the basic forms of human good shared by all societies: life, which includes bodily health;

[51] Virginia Declaration of Rights, adopted 12 June 1776 by the Virginia Convention of Delegates http://avalon.law.yale.edu/18th_century/virginia.asp accessed 26 January 20.

[52] Universal Declaration of Human Rights, UNGA Res 217(III)A (10 Dec 1948).

[53] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edn, Polity 2008) 63.

[54] Mark Goodale, 'Human Rights and the Politics of Contestation' in Mark Goodale (ed.), *Human Rights at the Crossroads* (OUP 2012) 31, 37.

[55] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 214 (hereafter Finnis, *Natural Law*). Finnis is not alone in this conclusion. Jack Donnelly, for example, argues that the rights in the Universal Declaration 'are conceptualized as being universal and held equally by all; that is, as natural rights [to be enjoyed] without distinctions of any kind because they are based on human nature': Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391, 401; Jacques Maritain also saw the 1948 Universal Declaration as a statement of the idea of natural rights today, reflecting practical truths, grounded in rational justification and practical reasoning: Jacques Maritain, *Man and the State* (Chicago UP 1951).

knowledge; play; aesthetic experience; sociability; religion; and practical reasonableness, that is being able to bring our intelligence to bear on the problems of choosing our actions and lifestyle and shaping our character.[56]

A third stream of the political conception understands rights to be a consequence of the fact of political association. This can be seen as a modern variant of the Lockean social contract tradition, explaining the legitimate political authority of the state. The political theorist, Joshua Cohen, contends, for example, that failure to recognize and protect basic rights 'is tantamount to treating [fellow citizens] as outsiders',[57] and thus a violation of the obligations we owe each other as co-members of the political community.

The downside with this analysis is that we normally refer to the rights of individuals within the state as constitutional rights, drawing a distinction between insiders and outsiders. Thus, the right to bear arms in the Second Amendment of the United States Constitution is a domestic constitutional right, but not a global human right; the same with the right to free health care in the United Kingdom. The philosopher, Thomas Nagel, argues that the justification for constitutional rights lies in the fact of co-membership with the consequence that citizens are, in theory, responsible for the outcomes of decision-making processes, and therefore for any injustices committed in the name of the political community. Nagel maintains that these circumstance do not exist at the global level, given the absence of world governmental institutions with coercive powers, leading him to conclude that, whilst there might be minimum humanitarian demands that govern our relations with all other human persons, these can only justify the most basic rights against violence, enslavement and coercion,[58] and not, for example, the range of socio-economic rights in the Universal Declaration of Human Rights—and the correlative obligation on wealthy states to support poor states.[59] Others come to a different conclusion, with Thomas Pogge arguing that we are responsible for injustices to the extent we are involved knowingly, or with passive compliance, in the conditions that result in violations of rights and this will always be the case where we have the possibility of influencing those domestic and global institutions directly responsible for the suffering of others.[60]

Global Rights as a Secondary Concern

The dominant themes in the philosophical literature see human rights as either a moral code that explains how we should treat each other, expressed in the language of natural rights, or in terms of explaining the proper relationship between the state

[56] Finnis, *Natural Law* (n. 55) 86–9.

[57] Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope for?' (2004) 12 *Journal of Political Philosophy* 190, 198.

[58] Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113, 131.

[59] Ibid. 140.

[60] Thomas Pogge, 'Are We Violating the Human Rights of the World's Poor?' (2011) 14 *Yale Human Rights & Development Law Journal* 1, 19.

and the individual, often framed in terms of natural law, or constitutional, or fundamental rights.

Hersch Lauterpacht is the best-known proponent of the view that international law should, and indeed does, reflect the values of natural law. In his 1945 publication, *An International Bill of the Rights of Man*, he claimed that 'The rights of man cannot, in the long run, be effectively secured except by the twin operation of the law of nature and the law of nations—both conceived as a power superior to the supreme power of the State'.[61] For Lauterpacht, the basis for the rights of man lay in the law of nature, which explained the objectives of good government in terms of the protection of the individual, 'the ultimate unit of all law'.[62] In his 1946 essay on the Grotian tradition, Lauterpacht maintained that, whilst international law was primarily concerned with rules governing relations between states, this did not remove its moral content and he regarded the law of nature as a distinct source of international law, concluding that 'the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law'.[63]

Most international lawyers are uncomfortable with the notion that the function of international law is to give expression to antecedent moral values,[64] not least because of the lack of consensus on the basis and content of natural law and natural rights. For this reason, the political conception that frames human rights in terms of the relationship between the state and the individual has found greater support within the discipline. Louis Henkin, for example, argues that the function of human rights is to guarantee a minimum level of protection for constitutional rights,[65] and that its content can be established by examining the domestic practices of constitutional rights.[66]

[61] Hersch Lauterpacht, *An International Bill of the Rights of Man* [1945] (OUP 2013) 28.

[62] Ibid. 7.

[63] H. Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Year Book of International Law* 1, 27. Grotius is important to the natural law tradition for his rejection of the Aristotelian method that sought to develop a conception of what is right based on a political or ethical conception of the good life. See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (CUP 1979) Chapter 3.

[64] There are notable exceptions. Martti Koskenniemi, for example, argues that 'the certainty we have of the illegality of genocide, or of torture … is *by itself sufficient reason* to include those norms in international law': Martti Koskenniemi, 'The Pull of the Mainstream' (1990) 88 *Michigan Law Review* 1946, 1952 (emphasis in original). The International Court of Justice came close to endorsing moral values in the *Corfu Channel* case, when it listed the 'elementary considerations of humanity' as one of the sources of international law: *Corfu Channel Case* (UK v Albania) (Merits) [1949] ICJ Rep 4, 22. In its advisory opinion on *Reservations to the Convention on Genocide*, the Court concluded that the prohibition against genocide was 'binding on States, even without any conventional obligation': *Reservations to the Convention on Genocide* [1951] ICJ Rep 15, 23. Whilst the passage is normally understood to refer to the obligations of states under customary international law, Jan Klabbers argues that it 'makes a lot more sense as an affirmation by the Court that some things are simply improper, regardless of whether or not a rule of law exists to that effect': Jan Klabbers, 'The Curious Condition of Custom' (2002) 8 *International Legal Theory* 29, 33.

[65] Louis Henkin, *The Rights of Man Today* (Westview 1978) 95.

[66] Louis Henkin, 'Human Rights and State "Sovereignty" ' (1995–6) 25 *Georgia Journal of International and Comparative Law* 31, 40. For a critical evaluation, see Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995–6) 25 *Georgia Journal of International and Comparative Law* 47, 56.

The difficulty with claims that human rights are the result of the globalization of natural law (Hersch Lauterpacht) or a back-stop to domestic constitutional rights (Louis Henkin) is that the arguments are parasitic on conceptions of rights developed at the level of the state and fail to capture a distinctive aspect of the practice, which is that the victims of human rights violations may be inside my political community ('here') or outside ('there'), that is, it makes no difference whether an act of torture is committed by a police constable in my village in the United Kingdom or an officer in another country.

An important body of work has emerged that shifts the focus of analysis from the state to the international community, with its genesis traced back to the political philosopher John Rawls' *The Law of Peoples* (1999), in which he sought to develop an account of human rights that did not depend on 'any particular comprehensive religious doctrine or philosophical doctrine about human nature'.[67] Rawls' wider aim was to outline a foreign policy for a reasonably just liberal people within the boundaries of reasonable pluralism and he concluded that liberal states should not intervene militarily to improve the lives of people in non-liberal states, except in cases of severe abuses, involving violations of the rights to life, liberty, property and formal equality, and the protection of ethnic groups from mass murder and genocide.[68] Whilst the book was subject to unfavourable critical comment, Rawls' focus on the function of human rights in international relations prompted other scholars to think again about how we theorize the notion.

The Political Conception of Human Rights II: The State and Secondary Agents of Justice

The legal philosopher Joseph Raz builds on Rawls' insight to develop an empirical interventionist account of human rights. He starts from the premise that human rights are 'those rights respect for which can be demanded by anyone'. It makes no difference, then, whether a human rights violation is committed in this state or another ('here' or 'there'), and it is not, therefore, possible for a government to say to an outsider 'this is none of your business'.[69] Raz maintains that we should frame human rights as delimiting the circumstances in which outsiders can take an interest in the domestic affairs of the state, disabling any claim that the notion of sovereignty should protect those with political power from outside interest and intervention. Human rights are not, though, to be confused with the notion of legitimate political authority and there will be circumstances when outsiders are precluded from interfering in the internal affairs of the state, 'even when the State is in the wrong'.[70] In

[67] John Rawls, *The Law of Peoples* (Harvard UP 1999) 68. See Charles R. Beitz, 'Rawls's Law of Peoples' (2000) 110 *Ethics* 669.

[68] Ibid. 65 and 79.

[69] Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31, 42.

[70] Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 321, 328.

other words, not all injustices justify intervention, because many of the important principles that govern social relations depend on contingent practices at the level of the state, a fact that explains the value of sovereignty and the independence and autonomy of the state.

But how do we tell what is a human rights issue and therefore the business of outsiders, and what remains within the domestic affairs of the sovereign state? Raz concludes that we should define the idea of human rights by looking at the practice of human rights intervention, in other words, human rights are those rights 'whose violation is a reason for action against States in the international arena'.[71] This represents an important shift in the thinking on the philosophical notion, which is no longer defined by some a priori conception of natural law or fundamental rights, but by the actual practice of intervention in the name of human rights.

A more normative reading of the interventionist account is developed by the political theorist, Charles Beitz, who argues that the objective of human rights is to protect urgent individual interests against certain predictable dangers or standard threats that we are all vulnerable to in a world of sovereign states. An urgent interest is defined as one that would be recognized as important in most contemporary societies, including our interests in personal security and liberty, adequate nutrition and some degree of protection against the arbitrary use of power by the state. Beitz's model operates at two levels: a set of norms that that apply in the first instance to states, and an international regime that establishes *pro tanto* reasons for intervention where a country fails to comply with its obligations, or is incapable of doing so.[72] States have the primary responsibility for the protection of human rights, but where they are unwilling or unable to do so, the international community can step in to ensure their guarantee. Beitz maintains that the fact that external actors may have *pro tanto* reasons for intervention (*pro tanto* reasons are reasons for action, but they do not necessarily overwrite competing reasons) is 'perhaps the most distinctive feature, of contemporary human rights practice'.[73]

The interventionist accounts represent a significant development in the theory of human rights, not least because of the shift in focus from rights practice in the state to a more global context. There are, though, several problems. First, intervention in the name of human rights must presume the prior existence of something called human rights, otherwise why would countries say they were intervening in the name of 'human rights'? Second, it is difficult to accept that we should define human rights by the practice of intervention without reference to any normative standards and Raz accepts the need to develop 'criteria by which the practice should be judged'.[74] Finally, intervention in the name of human rights is often conceived in terms of

[71] Ibid. 329.
[72] Charles R. Beitz, *The Idea of Human Rights* (OUP 2009) 109–10.
[73] Ibid. 115.
[74] Joseph Raz, 'On Waldron's Critique of Raz on Human Rights' (2013) Oxford Legal Studies Research Paper No. 80/2013, 6 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307471, accessed 20 February 2018.

military intervention,[75] and international law does not recognize a right of forcible human rights intervention.

Under the United Nations Charter, unless a state is acting in self-defence,[76] military action must be authorized by the UN Security Council and the Council can only act where there is a threat to international peace and security.[77] Whilst violations of human rights may entail such a threat, they do not necessarily do so, and the Security Council's practice in this area has been somewhat inconsistent.[78] The problem has not been resolved by talk of a Responsibility to Protect,[79] which establishes that the Council should take action in cases of large scale loss of life or ethnic cleansing.[80] Whilst some writers claim there is a right of humanitarian intervention,[81] there is no agreement as to when such a right would be triggered, with scholars variously citing violations of the right to life,[82] in particular where committed on a massive scale;[83] acts of genocide, slavery, or widespread torture;[84] and the arbitrary and systematic abuse of rights.[85] All proponents of humanitarian intervention agree, however, that, if such a right existed, it would be limited to the most serious cases. Simply put, if we define human rights by the practice of lawful military intervention in the name of human rights, we would have to conclude there are no human rights or the notion is limited to the most extreme violations of the physical integrity of the human person when committed on a massive scale.

[75] Jeremy Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach' (2013) NYU School of Law, Public Law Research Paper No. 13-32, 4 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745, accessed 20 February 2018.

[76] Article 51, Charter of the United Nations. [77] Article 39.

[78] See Bruno Stagno Ugarte and Jared Genser, 'Evolution of the Security Council's Engagement on Human Rights' in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014) 3.

[79] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001), paras 4.10 and 6.14. See generally Ramesh Thakur, 'The Use of International Force to Prevent or Halt Atrocities: From Humanitarian Intervention to the Responsibility to Protect' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 815; also, Andreas S. Kolb, *The UN Security Council Members' Responsibility to Protect: A Legal Analysis* (Springer 2018).

[80] The 'Responsibility to Protect' doctrine has been approved by the UN Member States. See para. 139, 'World Summit Outcome', UNGA Res 60/1 (16 Sept 2005) (adopted without a vote): 'The international community, through the United Nations, also has the responsibility … to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis.'

[81] See generally Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' (2011), *Max Planck Encyclopedia of Public International Law* http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018. For my view, see Steven Wheatley, 'The NATO Action Against the Federal Republic of Yugoslavia: Humanitarian Intervention in the Post-Cold War Era' (1999) 50 *Northern Ireland Legal Quarterly* 478.

[82] Wil D. Verwey, 'Humanitarian Intervention' in Antonio Cassese (ed.), *The Current Regulation of the Use of Force* (Martinus Nijhoff 1986) 57, 59.

[83] Michael J. Bazyler, 'Reexamining the Doctrine of Humanitarian Intervention in the Light of Atrocities in Kampuchea and Ethiopia' (1987) 23 *Stanford Journal of International Law* 547, 598–601.

[84] Anthony D'Amato, *International Law: Process and Prospect* (Transnational Publishers 1987) 351.

[85] Jack Donnelly, 'Human Rights, Humanitarian Intervention and American Foreign Policy' (1984) 37 *Journal of International Affairs* 311, 313.

The works of Joseph Raz and Charles Beitz represent valuable additions to the literature on human rights. They take seriously the importance of sovereignty, which as Jean Cohen points out, protects the state from foreign military intervention and the harm of paternalism, that is the denial of the right of the members of a political community to decide for themselves on the requirements of justice.[86] Most importantly, the contributions introduce a third party into the hitherto dominant dyadic model, with the recognition of the need for, what the philosopher Onora O'Neill calls, 'secondary agents of justice'[87] to guarantee the protection of human rights. The downside is the focus on the practice of intervention and by implication forcible or military intervention, which is only one part of the picture.

The Importance of International Law

Rather than focus on forcible interventions, other scholars contend that we should look to make sense of human rights by reference to the legal practice. The most important of these contributions can be found in Samantha Besson's papers on the subject,[88] and in the philosopher Allen Buchanan's book, *The Heart of Human Rights*, in which he argues: 'International human rights law is central to human rights practice. Therefore, any assessment of the moral status of human rights practice must acknowledge the importance of international human rights law in the practice.'[89]

Buchanan rejects, what he calls, the Mirroring View, the idea that legal human rights are the embodiments of corresponding moral rights and that justifying human rights law involves showing there is a corresponding moral human right. Rather, he concludes, legal human rights 'are what they are: legal rights; and legal rights need not be embodiments of corresponding moral rights'.[90] Buchanan argues that the basic function of human rights law is 'to provide universal standards for regulating the behavior of states toward those under their jurisdiction, for the sake of those individuals themselves'.[91] He follows Charles Beitz in establishing a clear division of labour between the state and secondary agents of justice: legal human rights are opposable to the state and it is only when a state is unable or unwilling to fulfil its obligations that external actors have some form of responsibility.

Buchanan's reading of human rights law leads him to conclude that 'most of the rights included in the various treaties can be seen as either affirming and protecting equal basic status of all individuals, or as helping to ensure that all individuals

[86] Jean L. Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36 *Political Theory* 578, 591. Cohen argues that foreign military intervention should be limited to the most exceptional conditions of 'absolute nonbelonging', circumstances of mass extermination, expulsion, ethnic cleansing, and enslavement, when the government abrogates the political relationship between the rulers and the ruled and says to a group that 'you are not one of us, you are no longer a member of this political/cultural community': ibid. 586–7.

[87] Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* 180, 181.

[88] See, for example, Samantha Besson, 'The Law in Human Rights Theory' (2013) 7 *Zeitschrift für Menschenrechte* [*Journal for Human Rights*] 120.

[89] Allen E. Buchanan, *The Heart of Human Rights* (OUP 2014) 3.

[90] Ibid. 11.

[91] Ibid. 27.

have the opportunity to lead a minimally good or decent life'.[92] Buchanan maintains that these foundational moral principles underpin the existing international human rights law system. His objective is to explain how the system that has actually emerged can be justified, concluding that 'existing international human rights practice . . . should be the focus of philosophical theorizing'.[93] Buchanan's argument for human rights law rests on its benefits for domestic constitutional rights regimes, and the ways human rights legitimize sovereign and independent states and the international law system itself.[94]

Buchanan presents a convincing case that legal human rights are not defined by posterior moral standards, but he does not accept that anything is a human right simply because of its inclusion in the Universal Declaration of Human Rights. Any account must, he argues, be in line with the foundational principles that, in his view, underpin the extant system, that is the commitments to the equal basic moral status of all individuals and to human well-being, which requires providing the protections and resources necessary to allow each person to lead a minimally good or decent life. However, as the moral philosopher John Tasioulas points out, by limiting the meaning of human rights to notions of equality and human well-being, Buchanan imposes a moral conception of rights onto the legal practice.[95] The primary objective of Buchanan's work is not, though, to explain the content of legal human rights, but to see whether 'the existing international legal human rights system, or something rather like it, is morally justifiable'.[96] But, as Samantha Besson observes, the fact Buchanan's objective is to develop a moral justification, means his argument 'remains largely moral and external to the law'.[97]

Conclusion

This chapter has shown a lack of consensus on the term 'human rights'. For some, it is a moral code, a modern idiom for natural rights, that can be worked out by reasoned argument to explain the conditions of justice. For others, the term 'human rights' gives a name to our emotional responses to avoidable suffering. For many writers, the concept of human rights is necessarily political because it explains the proper relationship between the state and the individual, either by detailing the nature and purpose of good government or the limits on bad government. For interventionist scholars, the function of human rights is to justify and explain external

[92] Ibid. 37. [93] Ibid. 81.

[94] Ibid. 44. On the role of human rights in legitimating international law, see also Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 65.

[95] John Tasioulas, 'Exiting the Hall of Mirrors: Morality and Law in Human Rights' (2017) *King's College London Law School Research Paper* No. 2017-19 (SSRN) 18.

[96] Allen Buchanan, 'Human Rights: A Plea for Taking the Law and Institutions Seriously' (2016) 30 *Ethics & International Affairs* 501, 508.

[97] Samantha Besson, 'Legal Human Rights Theory' in Kasper Lippert-Rasmussen et al. (eds), *A Companion to Applied Philosophy* (Wiley 2017) 328, 335.

interest and intervention in the domestic affairs of a state. More recently, the centrality of international law to the moral concept of human rights has become a dominant theme in the literature.

Reading the scholarly works, it seems that each of the contributions has something to offer, but none has succeeded in providing a definitive statement on how we should understand the idea of human rights.[98] The traditional, or orthodox, accounts explain that we have certain rights simply by virtue of being human, but the analysis seems unconnected to the actual practice. The dominant strands of the political conception outline the ways human rights delimit the proper relationship between the state and the individual, and between the state and secondary agents of justice, but fail to capture the full complexities of the practice. The work on legal human rights argues that human rights law constrains the moral concept of human rights, but without a close reading of the doctrine and practice, or explaining what the notion of 'human rights' is, or where it comes from.

Rather than impose a subjective understanding on the term 'human rights', the argument here is that we should look to explain its meaning by the way the expression is employed, specifically its usage in international law. The interventionist accounts of Joseph Raz and Charles Beitz showed that we can develop a theory of human rights by examining the practice, in their case by defining 'human rights' by the practice of intervention in the name of human rights. By way of contrast, this work looks to the wider practice of human rights in the United Nations, in the core human rights treaties, and in customary international law, on the understanding, in the words of the analytical philosopher Paul Horwich, that a term means what it does 'in virtue of its basic use'.[99]

Drawing on Ludwig Wittgenstein's *Philosophical Investigations* [1889], Horwich argues that a word or phrase 'expresses a "concept", an abstract entity from which beliefs, desires, and other states of mind are composed'.[100] Consequently, 'when we specify the meaning of a word, we are claiming that someone's use of the word would provide a good reason to expect the occurrence in his mental state of a certain concept'.[101] The meaning of a word or phrase is the result of a shared understanding of its meaning in a language community. When we use the expression 'human rights', then, we expect that others will have the same concept in mind that we do. Given that 'human rights' is first and foremost a term of art in international law, it falls primarily to international lawyers to explain its meaning by examining

[98] John Tasioulas observes that philosophers of human rights often succumb to the allure of 'foundationalism and functionalism'. The allure of foundationalism is seen in attempts to establish the ontological basis of human rights in a single idea, such as autonomy, dignity, or personhood, etc. The allure of functionalism is to explain human rights in terms of their role in setting benchmarks of governmental legitimacy or triggering forcible intervention. Tasioulas concludes that 'Liberation is to be found in adopting a more pluralistic view': John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1, 25–6.

[99] Paul Horwich, 'A Use Theory of Meaning' (2004) 68 *Philosophy and Phenomenological Research* 351, 355.

[100] Paul Horwich, *Meaning* (OUP 1998) 44.

[101] Ibid. 47.

the communication acts of states and non-state actors. By making sense of the patterns of international law communications on human rights in international law, we can explain the idea of human rights, before going on to demonstrate how this emergent abstract moral concept can influence the legal practice of human rights.[102]

[102] The word 'moral' here is used in its ordinary sense of 'relating to human character or behaviour considered as good or bad; of or relating to the distinction between right and wrong'. 'moral, adj.' OED Online. Oxford University Press, June 2018.

2

Complexity as a Methodology in International Law

> A system builder by vocation, the jurist cannot dispense with a minimum of conceptual scaffolding. (Prosper Weil)[1]

The conclusion of the previous chapter was that we should look to explain 'human rights' by examining the way the term is used in practice. The purpose of this one is to spell out the way we will make sense of the legal practice by organizing our human rights materials by looking to complexity theory.

Generalized complexity theory explains the emergence and evolution of complex systems without the need for a controlling power or guiding hand, emphasizing the importance of the interactions between the system and the component elements that brought the system into existence. The reason for relying on complexity is, as we will see, that international law exhibits the characteristics of a complex system: it is the emergent property of the interactions of independent states, with the system then regulating the behaviours of the same countries that brought it into being in the first place.

The chapter begins by outlining the tradition of systems theory thinking in international law, including the hitherto dominant approach suggested by the closed theory of autopoiesis, relied on, amongst others, by Anthony D'Amato, Niklas Luhmann, and Gunther Teubner. The analysis demonstrates the limits of autopoiesis, particularly in developing an argument for human rights, before explaining the notion of complexity and showing how the insights from generalized complexity theory can help us to better make sense of the international law system. The work takes the language and key insights from complexity—notions of self-organization, emergence, downward causation, problem-solving and path dependence, the power of events, the possibility of bifurcations and the arrow of time, and the influence of attractors—and shows how they can be applied to international law. These understandings then provide the intellectual scaffolding for the analysis of the legal doctrine and practice in the next three chapters, from which we will abstract the moral concept of human rights.

[1] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 440.

Systems Theory Thinking in International Law

Complexity is a variant of systems theory, which establishes, in the words of the organizational scientists, Robert Flood and Ewart Carson, 'a framework of thought that helps us deal with complex things in a holistic way'.[2] Systems theory looks to make sense of the relationships between the component elements in a system, whether that be the sun, the planets, the asteroids, and comets in the solar system; or the police, lawyers, judges, courts, and prisons in the criminal justice system. The justification for looking to systems theory is that, in the words of the International Law Commission, 'International law is a legal system … As a legal system, international law is not a random collection of [legal] norms'.[3] The objective here is to develop a conceptual model to explain the emergence, structure, content, and evolution of the international law system and, as Alex Kiss and Dinah Shelton point out, a reliance on systems theory, is likely to lead to 'a more realistic and better understanding of present international law'.[4]

An early example of the systems theory approach can be seen in Wesley Gould and Michael Barkun's *International Law and the Social Sciences*, published in 1970, which drew on James Miller's notion of the living system to conceptualize international law as a pattern of communications between states and non-state actors, with those communications treated as stored memories in treaty collections, court reports, and textbooks.[5] More recently, Paul Diehl and Charlotte Ku have argued we should understand international law as an open system comprising two interrelated sub-systems: a normative system containing the primary rules and an operating system establishing the secondary rules about rules. Each system, they contend, influences the evolution of the other and, in optimal conditions, the sub-systems change in harmony, although the operating system adapts more slowly than the normative system. Diehl and Ku conclude that international law only develops in significant ways in response to external political shocks, 'such as world wars, acts of terrorism, or horrific human rights abuses',[6] although when the system does evolve, it does so rapidly.[7]

Anthony D'Amato also looks to systems theory in his paper on 'Groundwork for International Law'. Drawing on the insight of the Chilean biologists Humberto

[2] Robert L. Flood and Ewart R. Carson, *Dealing with Complexity: An Introduction to the Theory and Applications of Systems Science* (Plenum 1988) 4.

[3] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Conclusions of the Work of the Study Group, Ybk ILC 2006, Vol. II(2) 177, para. 1.

[4] A.Ch. Kiss and D. Shelton, 'Systems Analysis of International Law: A Methodological Inquiry' (1986) 17 *Netherlands Yearbook of International Law* 45, 68.

[5] Wesley L. Gould and Michael Barkun, *International Law and the Social Sciences* (Princeton UP 1970) 136, relying on James G. Miller, 'Living Systems: Basic Concepts' (1965) 10 *Behavioural Science* 193.

[6] Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law* (CUP 2010) 79.

[7] Ibid. 155.

Maturana and Francisco Varela that an autopoietic system is its own product,[8] D'Amato sees international law as a self-creating and self-defining autopoietic system that resembles the biological systems we see in nature. This leads him to propose four underlying axioms to explain international law. First, the primary purpose of international law, like that of all autopoietic systems, is self-preservation. Second, given the greatest threat to the system is global anarchy, it will tend to adopt rules that reduce conflicts between countries, to ensure its own survival. Third, when disputes arise, international law will be inclined to favour those actors whose position seems to have the greatest possibility of promoting peace and stability. Finally, the content of the international law system will be disposed to reflect the actual practices of the states the system seeks to regulate.[9]

Whilst noteworthy for looking to scientific methodologies, D'Amato analysis is problematic for at least three reasons. First, it does not engage with the sophisticated (and admittedly difficult) application of autopoiesis to law developed by Niklas Luhmann and Gunther Teubner. Second, whilst D'Amato describes international law as a closed autopoietic system,[10] there are times when he appears to regard it as an open complex system,[11] and in earlier writings this was definitely the case.[12] These differences are not merely semantic, as the systems theories of autopoiesis and complexity conceptualize systems in different ways: in autopoiesis, the system defines itself and the world around it, and the only relevant perspective is that of the system; in complexity, the system is seen to emerge from the actions and interactions of relatively autonomous component agents. Finally, and most relevant here, D'Amato's analysis has nothing to say about human rights. His international law system is modelled as a closed, self-producing system that decides for itself what laws to introduce. Human rights might be recognized, but only, in D'Amato's words, to the extent this 'fosters increased stability instead of increased disorder'.[13] Given the choice between stability and justice, D'Amato's international law system would choose stability, as its primary objective is self-preservation.

The Closed Systems Theory of Autopoiesis

D'Amato's analysis depends on a relatively straightforward reading of Maturana and Varela, making no reference to writings that build on their work, particularly

[8] Humberto R. Maturana and Francisco J. Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding* (Shambhala 1987) 49.

[9] Anthony D'Amato, 'Groundwork for International Law' (2014) 108 *American Journal of International Law* 650, 652–7 (hereafter, D'Amato, 'Groundwork').

[10] Ibid. 650. See also Anthony D'Amato, 'International Law as an Autopoietic System' in Rudiger Wolfrum and Volker Roben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 335.

[11] Ibid. 661–2.

[12] Anthony D'Amato, 'Evolution of International Law: Two Thresholds, Maybe a Third', AAAI Fall Symposium Series, North America, October 2009, 29 ('[international law] is a complex adaptive system').

[13] D'Amato, 'Groundwork' (n. 9) 679.

those of the sociologist Niklas Luhmann and the lawyer Gunther Teubner, both of which have proved highly influential in socio-legal studies and the philosophy of law. Luhmann, for example, draws on Maturana and Varela to propose a radically different way of understanding society, one focused on self-creating, self-organizing, and self-reproducing communication systems that literally speak themselves into existence.[14] Society is not understood to be comprised of individuals or institutions, but autopoietic communication systems with their own functional specialism. Examples including the politics system, which makes collectively binding decisions; the economics system that allocates resources; the science system, which produces knowledge; the education system that teaches and tests; the media system, which produces new and entertaining information; and the law system, which stabilizes expectations. Thus, when I enter into an agreement with a taxi company to take me to the airport, I expect this to happen, because of the existence of a legally binding contract.

Autopoietic systems assemble themselves from their own communications; they are, in Luhmann's terms, 'historical machines [that] use self-referential operations to refer to their present state to decide what to do next'.[15] The law system builds itself by reference to previous law communications—this is the notion of an operationally closed system—and, in doing so, it connects the present with the past, and looks to the future. We should not, Luhmann contends, try and make sense of the law system by describing its institutions and personnel, but by examining the communications of parliament, in the form of legislation, or those of the courts, in the form of judgments, etc. Like all function systems, law sees the world exclusively in its own terms, in this case, through the operation of the binary code 'lawful/unlawful'.[16] The law does not care, for example, whether the commercial sale of human kidneys would improve the lives of patients on dialysis or be profitable, only whether the transaction would 'lawful' or 'unlawful'.

The self-evident problem of autopoietic systems looking at issues exclusively from their own perspective is clear in relation to the politics system. Gunther Teubner argues that, since Niccolò Machiavelli, politics has become detached from morality and religion. Understood as the use of coercive power to carry out collectively binding decisions, the politics system will develop its own way of thinking about problems, often with deleterious consequences for flesh and blood human beings.[17]

In *Modernity and the Holocaust*, the sociologist Zygmunt Bauman explains how the choice of the final solution 'was a product of routine bureaucratic procedures'. Once alternative proposals had been considered and rejected, including the relocation of Jewish populations to the lands around Nisko, a Polish territory

[14] Luhmann draws an analogy with the emergence of biochemical systems; his standard example is the biological cell: Niklas Luhmann, 'System as Difference' (2006) 13 *Organization* 37, 46–7.

[15] Niklas Luhmann, 'Deconstruction as Second-Order Observing' (1993) 24 *New Literary History* 763, 771.

[16] Niklas Luhmann, *Law as a Social System*, translated by Klaus Ziegert (OUP 2004) 102 (hereafter, Luhmann, *Law as a Social System*).

[17] Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69 *The Modern Law Review* 327, 335.

under German occupation, or to the island of Madagascar, off the southeast coast of Africa, the physical extermination of Jewish men, women and children in areas under the control of the German state appeared—to the German politics system—a 'rational solution' to the 'problem' of establishing a 'Reich judenfrei' in the changing circumstances.[18]

Autopoiesis scholars have introduced the notion of fundamental rights to explain how individuals can be protected from the politics system—and indeed other systems.[19] The primary functions of fundamental rights are to resist the claim of the politics system that all issues within society are political questions, that is to protect other social systems (law, economics, science) from the politics system; to guarantee the physical and psychological integrity of flesh and blood individuals; and to ensure the participation of individuals in all relevant social systems.

There are, though, significant problems with the argument for rights in autopoiesis, not least because autopoietic systems are closed systems that make all decisions for themselves, without direct influence from outside—the system might be irritated, surprised, or disturbed by external factors,[20] but it remains for the system alone to decide whether and how to introduce fundamental rights.[21] Moreover, it is difficult to explain why an autonomous politics system would choose to introduce significant limits on its power. Gunther Teubner argues that this will only happen at moments of 'imminent catastrophe', when the system recognizes the destructive potential of its own 'pathological tendencies'.[22] The crisis is, though, one for the system, which must accept the dangers to its own existence and, like a drug addict who has hit bottom, make a last-minute decision for a radical change of course.[23]

Why Not Autopoiesis?

In autopoiesis, the only relevant perspective is that of the system, which makes sense of the world entirely in its own terms.[24] There is no possibility of an objective evaluation of the way the system operates; there is, in Luhmann's own words, no 'moral super-code' in closed systems theory,[25] and autopoiesis has nothing to say about

[18] Zygmunt Bauman, *Modernity and the Holocaust* (Polity 2000) 17.

[19] Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 *Journal of Law and Society* 258, 272–3.

[20] Luhmann, *Law as a Social System* (n. 16) 383. [21] Ibid. 119.

[22] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated by Gareth Norbury (OUP 2012) 82 (hereafter, Teubner, *Constitutional Fragments*).

[23] Gunther Teubner, 'A Constitutional Moment? The Logics of "Hit the Bottom" ' in Poul F. Kjaer et al. (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011) 3, 11.

[24] Niklas Luhmann, 'System as Difference' (2006) 13 *Organization* 37, 50.

[25] Niklas Luhmann, *Theory of Society*, Vol. 2, translated by Rhodes Barrett (Stanford UP 2013) 281 (hereafter, Luhmann, *Theory of Society*). Where he has written on 'human rights' (as most people would understand the term), the concern has been to explain the emergence of global law: Luhmann, *Law as a Social System* (n. 16) 482. For Luhmann, human rights are the result of scandalization following the identification of 'particularly severe' violations of human rights: officially sanctioned disappearances, deportations, expulsions, killings, arrests, and torture: ibid. 485. For a critical appraisal, see Teubner, *Constitutional Fragments* (n. 22) 127–8. Teubner also uses the term 'human rights', but only as a subset

the morality of the laws of the Nazi regime.[26] Luhmann and Teubner accept that human rights activists can 'irritate' the law and politics systems, but it remains for each system alone to decide whether, and to what extent, to recognize fundamental rights.

Autopoiesis develops a dystopian, and depressing, reading of modernity, understood as the functional differentiation of society, with Luhmann concluding 'We have to come to terms, once and for all, with a society without human happiness'.[27] A narrative is developed in which pre-modern life was simple and straightforward, with individual identity constituted by membership in a family, social group or feudal class, with social status giving a fixed meaning to the life of the individual, for good or bad. All of this came to an end with the centralization of power by the state, the development of capitalist economic systems, and the wider functional differentiation of society into education, science, and media systems, etc. Selfhood was no longer the product of social position, but a consequence of the choices made by the individual as she participated in the various social systems (law, the media, economics, politics, etc.) to construct her identity.[28]

The functional differentiation of society means that where an individual is excluded from participation in a social system, she is denied the opportunity to fully realize her personality and potential. One purpose of fundamental rights, then, is to ensure that the individual can participate in all the relevant systems that give meaning to her life:[29] as a citizen in the politics system, worker in the economic system, student or professor in the education system, consumer or producer in the media system, or doctor or patient in the health system, etc. Exclusion is not always problematic, provided a system differentiates between individuals on bases relevant to the system.[30] Non-citizens may be excluded from the politics system and children from the economics system, without this always being troublesome. We would, though, anticipate that all those with same capacities would enjoy the same rights of participation, that adult women would be treated the same as adult men by the politics and economics systems, for example. But, in autopoiesis, it is for the system to decide whether an individual can participate or not.

Luhmann makes the point that exclusion from one social system is likely to lead to exclusion from others: debarment from the politics system and the status of citizen will, for example, often to lead to exclusion from the economics system, as in the case of undocumented migrants. The most basic denial is that of participation in any social system, and Luhmann understands the lives of people in the *favelas*, or shanty towns, in Brazil to be the exemplar case. He sees a dystopian future in which

of fundamental rights, focused on protecting the physical and psychological integrity of the human person: ibid. 145.

[26] Luhmann, *Law as a Social System* (n. 16) 110.

[27] Niklas Luhmann, 'Globalization or World Society: How to Conceive of Modern Society?' (1997) 7 *International Review of Sociology* 67, 69 (hereafter, Luhmann, 'Globalization or World Society').

[28] Luhmann, *Theory of Society* (n. 25) 20.

[29] Luhmann, *Law as a Social System* (n. 16) 135.

[30] Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 *Journal of Law and Society* 258, 279.

many human persons will 'count only as bodies' in these spaces of exclusion.[31] In a significant divergence from earlier work, Luhmann argues that the solution is to recognize a new meta-code of 'inclusion/exclusion',[32] which would have the function of deciding whether an individual had been properly excluded from a social system or not; it might, for example, be appropriate to exclude younger children from the economic system, but not the education system.

But herein lies the problem: the closed systems theory of autopoiesis is a theory about self-creating and self-defining systems. Autopoietic systems are, by definition, self-determining: if they are not, they are not autopoietic. The introduction of an external code to decide whether a system has properly excluded individuals would mean that the system was no longer autonomous, it would not be an autopoietic system. As the social and political philosopher, Antoon Braeckman, observes, it 'is not so easy to locate such a meta-code within the design of Luhmann's theory of society'.[33] The argument for a new meta-code of 'inclusion/exclusion' only makes sense if we regard the fact that some individuals are placed outside of social systems as being morally *wrong*, rather than simply an observation about the way some social systems function. The need for the new meta-code of 'inclusion/exclusion' seems to be an acceptance by Niklas Luhmann that it is a deficiency of the theory of autopoiesis that it has nothing to say about injustice.

Rather than rely on the closed systems theory of autopoiesis, the contention here is that we should look to the open theory of complexity, which does allow us to develop an account of the objective reality of human rights, with the moral concept directly influencing the workings of law and politics systems—including the international law system.

Why Complexity?

The closed systems theory of autopoiesis forms part of what the psychologist Keith Sawyer calls the second wave of systems theory thinking, based on biological models of the natural world—the first wave includes Talcott Parson's structural functionalism, which Luhmann's work, in part, builds on.[34] Sawyer concludes that the second wave has been of limited utility in explaining the social world, but that a third wave developed since the 1990s has proved more useful. This third wave includes complexity theory and it is focused on the behaviours of micro-level agents and the notion of emergence.[35]

[31] Luhmann, *Theory of Society* (n. 25) 26.

[32] Luhmann, 'Globalization or World Society' (n. 27) 76.

[33] Antoon Braeckman, 'Niklas Luhmann's Systems Theoretical Redescription of the Inclusion/Exclusion Debate' (2006) 32 *Philosophy & Social Criticism* 65, 82.

[34] For an introduction to Parsons, see A. Javier Treviño, 'Introduction: The Theory and Legacy of Talcott Parsons' in A. Javier Treviño (ed.), *Talcott Parsons Today: His Theory and Legacy in Contemporary Sociology* (Rowman and Littlefield 2001) xv.

[35] R. Keith Sawyer, *Social Emergence: Societies as Complex Systems* (CUP 2005) 10 (hereafter, Sawyer, *Social Emergence*).

For some writers, autopoiesis is one tributary to complexity,[36] and it is certainly the case that Niklas Luhmann has influenced complexity thinking in the social sciences. Of particular importance are his conceptualization of society in terms of function systems; the focus on communications, which means we do not have to define law by reference to coercive institutions;[37] and the observation that all systems develop their own rationales over time. Autopoiesis and complexity involve, however, fundamentally different approaches to thinking about social systems. For autopoiesis, a social system is the result of system communications building on communications, nothing more is required. In complexity, the system emerges from the communications of component agents. In autopoiesis, the focus is the system, which is self-creating, self-organizing, and self-defining; whereas, in complexity, we must examine both the system and the component agents. The second and third waves of system theory thinking—autopoiesis and complexity—suggest certain commonalities but, ultimately, radically different methodologies.

The preference for complexity reflects three factors. First, complexity theory is better science. There is little reliance on autopoiesis in the hard sciences, and the journal *Science*, published by the American Association for the Advancement of Science, includes only one reference to autopoiesis, and that is to the work of Niklas Luhmann. By way of contrast, there are numerous references to complexity and complexity theory. The literature on autopoiesis draws narrowly on the work of Maturana and Varela, although Luhmann and those after him develop a highly sophisticated, internally coherent theory of autopoiesis. Complexity, on the other hand, is well established in physics, chemistry, and biology, with the literature on complexity theory drawing from a wide range of sources in these disciplines.

Second, the science of complexity has been more influential in developing metaphors in popular discourses, such as 'butterfly effects' and 'tipping points',[38] and the philosopher Richard Rorty makes the point that metaphors are important in changing the ways we think and theorize about the world.[39] The trick, as Vaughan Lowe observes, 'is finding the right metaphor'.[40]

Finally, complexity makes more sense in terms of the ways international lawyers conceptualize the international law system. Autopoiesis asks us to think in terms of

[36] See, generally, Eve Mitleton-Kelly, 'Ten Principles of Complexity and Enabling Infrastructures' in Eve Mitleton-Kelly (ed.), *Complex Systems and Evolutionary Perspectives on Organisations: The Application of Complexity Theory to Organisations* (Pergamon 2003) 23.

[37] Luhmann and Teubner's work contains important insights for anyone interested in the ways that system theory can help us understand law, particularly in relation to law beyond that state, which emerges and evolves without formal institutions, like courts or parliaments, building law communications on law communications. I have relied on autopoiesis in earlier writings to make sense of the plurality of law systems beyond the state: Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 280ff.

[38] See generally Nigel Thrift, 'The Place of Complexity' (1999) 16(3) *Theory, Culture & Society* 31. The function of metaphor is to make difficult issues easier to understand by comparing one concept to another in a different domain we are more familiar with, making the first easier to understand: George Lakoff, 'The Contemporary Theory of Metaphor' in Anthony Ortony (ed.), *Metaphor and Thought* (2nd edn, CUP 1993) 202, 243.

[39] Richard Rorty, *Essays on Heidegger and Others* (CUP 1991) 12.

[40] Vaughan Lowe, *International Law* (OUP 2007) 50.

communication systems we cannot see, touch or hear; we must accept, as a matter of faith, the existence of autopoietic law systems. Complexity, on the other hand, requires us to make sense of the emergent patterns of communications of component agents. Writing on the method of international law, Philip Allott makes the point that 'The process of finding patterns in heterogeneous material is a distinctive faculty of the brain', involving the selection, arrangement, and integration of materials, 'as a result of which *the pattern may be more than the sum of the parts*'.[41] The notion that 'the whole can be more than the sum of the parts' is the central tenet of complexity theory, usually described in terms of emergence.[42] Consequently, whilst the language of complexity might be new to international lawyers, the methodology suggested should be familiar because we also look to abstract general rules from international law communications, in the form, for example, of diplomatic correspondence, General Assembly resolutions, and decisions of the International Court of Justice.

Complexity Theory

Complexity theory is one of the three 'C's to have entered the public imagination in the second half of the twentieth century, along with chaos and catastrophe theory. Catastrophe theory explains how systems can change abruptly and dramatically—sometimes with devastating consequences. The 'collapse' of the Maya civilization is the standard example.[43] Chaos theory observes that the elements of some systems can combine with unpredictable consequences and that small inputs can have disproportionately large outputs—often referred to as the 'butterfly effect', after the title of a paper by Edward Lorenz, whereby the flapping of the wings of a butterfly in Brazil is said to cause a tornado in Texas.[44] Both chaos and complexity have in common the idea that patterned behaviour can be the result of a large number of agents following a relatively simple set of laws. In chaos theory, these laws produce unpredictable outcomes and the system is highly sensitive to its original conditions. In complexity, the actions and interactions of agents produce complex patterns of behaviour at the edge of chaos: the place between entropy, where the order of the system decreases over time, and chaos, where there is too much activity.

Complexity theory emerged in the second half of the twentieth century as a further challenge to the Newtonian model of a 'clockwork universe' that could be taken apart and subjected to analysis, the presumption being that all systems, even highly complicated systems, were 'the sum of their parts' and the future shape and form

[41] Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *British Yearbook of International Law* 79, 104 (emphasis added).

[42] Donald C. Mikulecky, 'Complexity Science as an Aspect of the Complexity of Science' in Carlos Gershenson et al. (eds), *Worldviews, Science and Us: Philosophy and Complexity* (World Scientific 2007) 30, 32.

[43] Joseph Tainter, *The Collapse of Complex Societies* (CUP 1988) 12. See also R. Keown, 'Catastrophe Theory and Law' (1980) 1(4) *Mathematical Modelling* 319.

[44] See, generally, James Gleik, *Chaos: The Amazing Science of the Unpredictable* (Vintage 1997).

of any system could, in principle, be predicted—think of the ways that orreries, or mechanical models, represented the motions of the earth, the moon, and the planets around the sun in the Solar System. The insight from scientists working on the weather, the brain, and ecosystems, etc. was that some systems could not be understood in this reductionist way. The properties of these complex systems were seen to be the result of the actions of the individual component elements *and* their interactions with each other, *and* their reactions to events in the outside environment. As the complexity theorists, John Miller and Scott Page, observe: 'The ability to collect and pin to a board all of the insects that live in the garden does little to lend insight into the ecosystem contained therein.'[45]

Complexity explains how patterned order can develop in the natural world as a consequence of the actions and interactions of component agents in a networked relationship, without the need for a guiding hand or central controller.[46] Take the example of ants of the genus *Temnothorax*, who live in small preformed cavities. In the laboratory, a colony whose nest has been damaged will move to a new cavity within a few hours, reliably choosing the best option from as many as five different possibilities. So how does this happen? When an individual ant searching for a new nest finds a possible site, she will carry out an assessment of its suitability, considering factors such as cavity area and height, entrance size, and light level. If satisfied, she will then fetch other ants, one at a time, to show them the new site. The recruited ants, in turn, make their own assessment of its suitability. Once a threshold number are agreed, the ants will move quickly to the new nest.[47] The ability of the colony to choose the best site does not depend on the cognitive skills of any one agent, but on the outcome of a collective decision-making process by the colony/system.

To study a complex system, we need first to separate it from the wider environment—think of the way biologists might study an ant colony within a rainforest ecosystem. This is no easy task, however, because the component agents interact directly with actors and elements outside the system, [48] with the result that it can be difficult to tell what is 'system' and what is 'non-system'. Complex systems are then open systems,[49] which, moreover, depend on interactions with the outside world to provide the necessary energy for them to evolve, as the component agents change their behaviours in response to new information. The term 'agent' here refers to any actor capable of reacting to information by following the rules of the system, but also operating, to some extent, independently.[50] Given that the characteristics of complex systems emerge from the actions of component agents, we can think of

[45] John H. Miller and Scott E. Page, *Complex Adaptive Systems: An Introduction to Computational Models of Social Life* (Princeton UP 2007) 10.

[46] Cliff Hooker, 'Introduction to Philosophy of Complex Systems: A' in Cliff Hooker (ed.), *Philosophy of Complex Systems* (North Holland 2011) 3, 42.

[47] D.J.T. Sumpter, 'The Principles of Collective Animal Behaviour' (2006) 361 (1465) *Philosophical Transactions of the Royal Society of London. Series B, Biological Sciences* 5, 13.

[48] Paul Cilliers, 'What Can We Learn from a Theory of Complexity?' (2000) 2 *Emergence* 23, 24.

[49] G. Rzevshi, 'Harnessing the Power of Self-Organization' in G. Rzevski and C.A. Brebbia (eds), *Complex Systems: Theory and Applications* (WIT 2017) 1, 1.

[50] M. Mitchell Waldrop, *Complexity: The Emerging Science at the Edge of Order and Chaos* (Penguin 1992) 11.

complex systems as problem-solving systems that possess some form of collective intelligence, as it is the system, rather than the individual agents, which solves the problems. There is no requirement for agents to solve each problem anew, consider the fact that even a simply social animal like an ant must be able to distinguish friend from foe, and in deciding what to do next, component agents can draw on the system-memory,[51] which, given the absence of a central processing unit or brain, will be stored and dispersed throughout the system.[52]

To make sense of complex systems, we need to know the identity of the component agents; the rules the agents follow; the relationships between the component agents; and their relationships with external actors and elements outside the system. We must be aware that, in a complex system, 'the whole is more than the sum of the parts'. An ant colony, for example, is more than a collection of individual ants. Through social co-operation, as the complexity scientist Melanie Mitchell points out, these 'rather simple creatures [build] astoundingly complex structures', such as nests with underground passages and temperature-controlled brooding chambers, which are 'clearly of great importance for the survival of the colony as a whole'.[53]

The ant colony also influences the behaviours of the individual ants. Left alone to look for food, ants make random decisions about which path to follow. Once a new source has been located, however, ants choose the path with the most accumulated pheromone deposited by other ants, leading them to the new food supply in the shortest possible time.[54] The colony (the system) provides feedback to individual ants (the component agents) about what path to take, with the result that ants can move quickly in the direction of a new source of nourishment. In the words of Peter Miller of the *National Geographic* magazine: 'Ants aren't smart . . . Ant colonies are.'[55]

The term emergence is used to describe the fact there will be system-level characteristics not found at the level of the component agents. Complex systems are said to be strongly emergent because their features cannot be deduced, even in principle, by a detailed examination of the lower-level agents.[56] The emergent whole then influences the behaviours of the component agents that brought it into existence in the first place. This is referred to as 'downward causation', a term coined by the social psychologist Donald Campbell in 1974 to explain the evolution, by natural selection, of the jaws of some soldier ants, which are perfectly adapted for piercing enemy ants, but cannot be used to feed the soldier ants themselves, who must be fed

[51] Neil Johnson, *Simply Complexity: A Clear Guide to Complexity Theory* (Oneworld 2009) 14.

[52] Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (Routledge 1998) 91–2.

[53] Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009) 4.

[54] Robert J. Schalkoff, *Intelligent Systems: Principles, Paradigms, and Pragmatics* (Jones and Bartlett 2011) 696.

[55] Peter Miller, 'The Genius of Swarms', *National Geographic* (July 2007). See generally Marco Dorigo et al., 'The Ant System: Optimization by a Colony of Cooperation Agents' (1996) *IEEE Transactions of Systems, Man, and Cybernetics*, Part B, 29.

[56] David J. Chalmers, 'Strong and Weak Emergence' in Philip Clayton and Paul Davies (eds), *The Re-Emergence of Emergence* (OUP 2006) 244, 244; also, Mark A. Bedau, 'Downward Causation and Autonomy in Weak Emergence' in Mark A. Bedau and Paul Humphreys (eds), *Emergence: Contemporary Readings in Philosophy and Science* (MIT 2008) 155, 158–60.

by other ants in the colony.[57] This evolutionary development only makes sense when seen from the perspective of the whole system.

Complex systems evolve because of alterations in the conduct of component agents. By describing the system at successive points in time we can track its evolution.[58] Because complex systems are the result of the actions and interactions of component agents, the future form and shape of a system will be determined, in large part, by the decisions made by agents as they reflect on past decisions and interact with other component agents and with actors and elements in the outside world. Given the multitudinous possibilities of action and interaction, we cannot predict with any certainty the future shape or form of the system, but that is not to suggest that complex systems are completely unpredictable.[59]

Three issues limit the state space, or phase space, of a complex system, that is, the possible ways the system might evolve over time.[60] The history of the system constrains its future, as the component agents become locked-in to ways of dealing with the problems facing the system—this is expressed in terms of path dependence. Complex systems must also adapt and evolve in the context they find themselves. Adaptation refers to the capacity to change in response to developments in the environment; evolution to the ability to change with the environment. Finally, where the possible future directions of the system do not include those trajectories that we would expect to see, given our knowledge of the system, this indicates the presence of attractors, that is, some unseen force that influences the ways the system can evolve over time within its state space, or room for development.[61]

The Application to International Law

Whilst complexity is often used to explain systems with large numbers of component agents—a rainforest ecosystem would be the standard example—it can also be applied to systems with relatively few actors, where 'the agents are complex and the communication language is complex'.[62] The argument here is that we can productively think about international law as a complex, self-organizing system that results from the communication acts of states and non-state actors in the form, for example, of diplomatic communications, the judgments of courts and tribunals, the texts of law-making treaties and General Assembly resolution, and the writings of publicists, and that by looking to the insights from complexity theory, we can make better sense of the workings of the international law system.

[57] Donald T. Campbell, '"Downward Causation" in Hierarchically Organised Biological Systems' in Francisco Jose Ayala and Theodosius Dobzhansky (eds), *Studies in the Philosophy of Biology* (Macmillan 1974) 179, 180–1.

[58] David Byrne, *Complexity Theory and the Social Sciences* (Routledge 1998) 24 (hereafter, Byrne, *Complexity Theory*).

[59] Jeffrey Goldstein, 'Emergence as a Construct: History and Issues' (1999) 1 *Emergence* 49, 55–6.

[60] James Gleik, *Chaos: The Amazing Science of the Unpredictable* (Vintage 1997) 134.

[61] Byrne, *Complexity Theory* (n. 58) 26.

[62] Sawyer, *Social Emergence* (n. 35) 176.

The objectives of complexity theory are to explain how patterned behaviour can emerge without the requirement for a central controller or guiding hand, and then make clear how the emergent system influences the actions of the very same component agents that brought it into existence in the first place. Reference to complexity serves to remind us that international law is largely the product of the actions and interactions of sovereign and independent states, but that it has different properties from those component agents that brought it into existence. States remain the primary actors, but non-state actors also contribute directly to the patterns of international law communications. The judgments of the International Court of Justice are the best example of this. Where an actor contributes directly to the patterns of communications, that actor is a component agent within the system.[63] The international law system evolves with alterations in the conduct of states, although there is no reason for them to change their behaviours in the absence of some new information (path dependence). This can come in the form of the unexpected action of another country or some occurrence in the outside world (the power of events). Where significant change occurs, international law can take a different path and assume a new structure (the notion of system bifurcations). Finally, complexity tells us that international law can evolve under the influence of unseen forces (what theorists call attractors), which impact on the way the system develops over time.

These insights from complexity theory—self-organization, emergence, downward causation, problem-solving, and path dependence, the power of events, the possibility of bifurcations and the arrow of time, and the influence of attractors—not only give us a new language to describe the international law system, they can also help us make better sense of its workings.

The Self-Organization of the International Law System

Self-organization in complexity theory refers to the process by which the interactions of component agents result in the bottom-up emergence of a system, without the need for any external controller or guiding hand. When applied to the study of human societies, complexity tells us that complex systems emerge where the random interactions of actors settle down to create a stable network of relationships. Because of the need for co-ordination and co-operation, agents must be able to communicate about shared goals and a common understanding of good or appropriate behaviour will emerge, expressed in the language of norms, including sometimes legal norms.[64] Computer models of artificial societies have shown this to be the case.[65]

[63] For reasons of convenience, and because states retain a preeminent role, I will refer mainly to 'states' when talking about the component agents in the international law system, and not make constant reference to 'states, along with certain non-state actors'.

[64] Sawyer, *Social Emergence* (n. 35) 219.

[65] See, on this point, R. Keith Sawyer, 'Artificial Societies: Multiagent Systems and the Micro-Macro Link in Sociological Theory' (2003) 31 *Sociological Methods & Research* 325, 337; also, Joshua M. Epstein and Robert Axtell. *Growing Artificial Societies: Social Science from the Bottom Up* (Brookings Institution Press 1996) 6.

The notion of self-organization is clearly applicable to the international law system, which is established and maintained by states, without the need for a global sovereign power. International law emerged around the time of the 1648 Peace of Westphalia to facilitate co-ordination and co-operation between the newly sovereign and independent states of Western Europe.[66] Sovereignty was established by the fact that states did not recognize any superior authority, an idea first explained by Jean Bodin.[67] The formal equality of states developed by analogy with the equal status of human persons in the state of nature.[68] Over time, as states communicated about the requirements for successful co-ordination and co-operation, a shared understanding of appropriate behaviour emerged, and this was expressed in the language of international law.

The Emergence of International Law

Emergence is the key to making sense of complexity theory; it is concerned with explanations of how novel properties can develop through the interactions of component elements, that is, how something new can emerge from 'below'. The concept has a long history in scientific thought, with an early example provided by John Stuart Mill's observation that the properties of water (H_2O) are different from its component elements of hydrogen and oxygen.[69] The philosophical idea of emergence can be traced back to a movement in British Universities in the early part of the twentieth century, especially the work of the Cambridge philosopher Charlie Dunbar Broad, who described emergence as a situation in which 'the characteristic behaviour of the whole *could* not, even in theory, be deduced from the most complete knowledge of the behaviour of its components'.[70] In the 1960s, philosophers

[66] Various definitions of international law have been advanced, but two broad themes can be seen in the literature. First, that the term 'international law' can be applied to legal relations between all functionally independent political entities. If we accept this definition, international law emerged around the middle of the fifteenth century BCE in the ancient Middle East. See, Rüdiger Wolfrum, 'International Law' (2006) *Max Planck Encyclopedia of Public International Law*, para. 1 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018. The second approach links the emergence of international law to the development of nation states in Western Europe from the sixteenth century CE, following the rejection of the authority of the Pope and Holy Roman Emperor and the need to facilitate the co-existence of, and co-operation between, sovereign and independent political entities, but without the possibility of a world state. The histories of international law, by and large, follow the second understanding: Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56 *American Journal of Legal History* 104, 107. This reading is confirmed by an analysis of the ways in which the idea of sovereign authority was developed in the seventeenth century CE to explain the putative differences between European states and the populations of the Americas, and therefore to justify the taking of the lands of the indigenous populations: Steven Wheatley, 'Conceptualizing the Authority of the Sovereign State over Indigenous Peoples' (2014) 27 *Leiden Journal of International Law* 371.

[67] Jean Bodin, *Les Six Livres de la Republique* [1583] (Scientia 1977).

[68] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* [1797] (Liberty 2008), Preliminaries §18 ('a small republic is no less a sovereign state than the most powerful kingdom') http://oll.libertyfund.org/titles/2246, accessed 22 February 2018 (hereafter, Vattel, *The Law of Nations*)

[69] John Stuart Mill, *A System of Logic, Ratiocinative and Inductive* (Harper 1858) 255.

[70] C.D. Broad, *The Mind and its Place in Nature* [1925] (Routledge 2013) 59 (emphasis in original).

turned to emergence to explain the relationship between the brain and the mind,[71] with the mind understood to be an emergent property of the physical activity in the brain,[72] and, in the 1990s, emergence became one of the core concepts in the modelling of complex systems like traffic jams, colonies of social insects, and bird flocks.[73]

Contemporary philosophers of emergence, Mark Bedau and Paul Humphreys, make the point that emergent phenomena are generally understood to be 'irreducible, to be unpredictable or unexplainable, to require novel concepts, and to be holistic'.[74] These four descriptive elements—irreducibility, unpredictability, novelty, and holism—are readily seen in the international law system.

Irreducibility literally concerns the impossibility of describing emergent phenomena in more simple or fundamental terms. International law is irreducible in the sense that any description cannot include every judgment and manifestation of state practice, etc. In other words, any description of the international law system is necessarily incomplete. Irreducibility is also taken to refer to the fact complex systems must be autonomous from the more basic elements that give rise to their existence.[75] International law is irreducible in this sense in that whilst the development of system rules depends on the actions and interactions of states, the system exists independently from those component agents that brought it into being. The formation of customary international law relies, for example, on state practice, but it is not identified by simply amalgamating the various instances of that practice.

Unpredictability in the evolution of complex systems is a consequence of the multitudinous possibilities of action and reaction by the component agents. International law is unpredictable in that it is impossible to foresee the ways the system will evolve over time, as a result of the actions, reactions, and interactions of states and non-state actors. Andrea Bianchi expresses the point this way: 'Short of a crystal ball[,] nobody is really in a position to credibly predict the future of international law.'[76]

Novelty concerns the fact that emergent phenomena must have different characteristics from their component elements.[77] This is often evidenced by the need for new terms to describe emergent properties. The word 'wet', for example, is an attribute of water, but not of hydrogen or oxygen. Novelty in the international law system is readily seen in the use of the maxim *pacta sunt servanda*, reflecting the requirement for states to comply with treaty obligations. For early writers, the

[71] Antonella Corradini and Timothy O'Connor, *Emergence in Science and Philosophy* (Routledge 2010) 121.

[72] John Searle, *Minds, Brains and Science* (Harvard UP 2001) 21.

[73] R. Keith Sawyer, 'Emergence in Sociology: Contemporary Philosophy of Mind and Some Implications for Sociological Theory' (2001) 107 *American Journal of Sociology* 551, 554–5.

[74] Mark Bedau and Paul Humphreys, 'Introduction to Philosophical Perspectives on Emergence' in Mark Bedau and Paul Humphreys (eds), *Emergence: Contemporary Readings in Philosophy and Science* (MIT 2008) 9, 9.

[75] Ibid. 10.

[76] Andrea Bianchi, 'Looking Ahead: International Law's Main Challenges' in David Armstrong (ed.), *Routledge Handbook of International Law* (Routledge 2009) 392, 392.

[77] Nils A. Baas and Claus Emmeche, 'On Emergence and Explanation' (1997) 25(2) *Intellectica* 67, 70.

explanation for the rule lay in the analogy between the state and the person—if an individual, or indeed God, could be bound by her promises, why not the state?[78] Today, the authority for the proposition that treaty obligations are binding is found in Article 26 of the Vienna Convention on the Law of Treaties,[79] but Article 26 cannot provide the ultimate authority for the rule, because it cannot explain why the Vienna Convention is binding. The standard response is to locate the binding nature of the rule in custom,[80] but this simply relocates the problem by requiring us to explain the authority of custom.[81] The problem is one of infinite regress, of explaining the power of a rule by reference to another rule. Gerald Fitzmaurice concludes that, in these circumstances, international law should follow the lead of mathematics, and accept that we are 'battering against a boundary of *possible* human knowledge'. But, he continues, we should also recognize that, by the very fact of asking '*Why* is international law binding?', international lawyers presuppose the existence of a binding international law system.[82] *Cogitamus, ergo sumus*, to paraphrase René Descartes.[83]

Finally, emergent phenomena are said to be holistic in the sense that emergent properties cannot be deduced by simply adding together the properties of the component elements.[84] The maximum *pacta sunt servanda* points to the holistic nature of international law. Whilst consent can form the basis of agreement between State A and State B, it cannot explain why the agreement is binding; as James Brierly observes, 'To say that the rule pacta sunt servanda is founded on consent is to argue in a circle'.[85] We cannot simply add together the expressions of sovereign consent by State A and State B to create an unbreakable international agreement; there must something that makes the agreement inescapable, even at the point where one state no longer wishes to be bound. That something is the international law system, with its rules on the unbreakable nature of valid treaty obligations.

[78] Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations* [1625] (Walter Dunne 1901), Book I, Chapter XI, Para. IV.

[79] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[80] L. Oppenheim, *International Law: A Treatise, Vol. I. Peace* [1st edn] (Longmans 1905) 519.

[81] Some scholars argue that *pacta sunt servanda* is a constitutional rule of the international law system: Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) 290; Josef L. Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda' (1945) 39 *American Journal of International Law* 180, 181. Again, the problem is then to explain the idea and authority of these constitutional rules.

[82] G.G. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement Author' (1956) 19 *Modern Law Review* 1, 10–11.

[83] René Descartes, *Discourse on Method* [1637] ('Cogito ergo sum': 'I think, therefore I am').

[84] David J. Chalmers, 'Strong and Weak Emergence' in Philip Clayton and Paul Davies (eds), *The Re-Emergence of Emergence* (OUP 2006) 244, 244; see, also, Mark A. Bedau, 'Downward Causation and Autonomy in Weak Emergence' in Mark A. Bedau and Paul Humphreys (eds), *Emergence: Contemporary Readings in Philosophy and Science* (MIT 2008) 155, 158–60.

[85] J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, revised by Sir Humphrey Waldock (6th edn, Clarendon 1963) 53.

Downward Causation: System Rules

Complexity theory tells us that once a system has emerged from the interactions of component agents, it will then influence the conduct of the same actors that brought it into being. In the words of the natural philosopher Bernd-Olaf Küppers: '(1) The whole is more than the sum of its parts. (2) The whole determines the behaviour of its parts.'[86] The idea that the whole is more than the sum of the parts is expressed in terms of emergence; the notion the whole determines the behaviour of the parts is called downward causation, defined by the philosopher of cognition, Achim Stephan, as the 'causal influence exerted by the system itself (or by its structure) on the behaviour of the system's parts'.[87]

Emergence and downward causation are related phenomena.[88] In a complex system, 'not only is the behavior of the whole determined by the properties of its parts ("upwards causation"), but the behavior of the parts is to some degree constrained by the properties of the whole ["downward causation"]'.[89] Consider the way that social norms—the acceptability (or not) of spitting in public, for example—emerge from the conduct of the members of a community and then constrain the actions of those self-same persons. The point applies equally to international law norms, which are created through the actions and interactions of states ('emergence') and then regulate the future conduct of states ('downward causation'). Christian Tomuschat expresses the point this way: 'international law can be perfectly conceived as an autonomous régime, created by the same States that are at the same time its addressees'.[90] The emergent nature of international law means we must apply an inductive methodology to the identification of norms.[91] We must wait to see what patterns of international law communications emerge and then try and make sense of them, filling in the gaps where necessary.[92]

[86] Bernd-Olaf Küppers, 'Understanding Complexity' in Ansgar Beckermann et al. (eds), *Emergence or Reduction?* (Walter de Gruyter 1992) 241, 243.

[87] Achim Stephan, 'Emergentism, Irreducibility, and Downward Causation' (2002) 65 *Grazer Philosophische Studien* 77, 89 (hereafter, Stephan, 'Emergentism').

[88] Charbel Nino el-Hani and Antonio Marcos Pereira, 'Higher-Level Descriptions: Why Should We Preserve Them?' in Peter Bøgh Andersen et al. (eds), *Downward Causation: Minds, Bodies and Matter* (Aarhus UP 2000) 118, 133.

[89] Francis Heylighen, Paul Cilliers, and Carlos Gershenson, 'Philosophy and Complexity' in Jan Bogg and Robert Geyer (eds), *Complexity, Science and Society* (Radcliffe 2007) 117, 122 (hereafter, Heylighen et al., 'Philosophy and Complexity').

[90] Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours* 195, 235 (hereafter, Tomuschat, 'Obligations').

[91] Inductive methodologies can be contrasted with deductive (*if, then* …) accounts like that of Emer de Vattel, who argued that *if* sovereign states do not recognize any superior authority, *then* the rules of international law must necessarily be based on express consent (treaties) or implied consent (custom): Vattel, *The Law of Nations* (n. 68), Preliminaries, §§ 21–5. For a more recent example, see Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff 1995) 8.

[92] Charles de Visscher makes the same point when he observes that international law can only be understood 'by the habitual methods of observing and tabulating experience': Charles de Visscher, *Theory and Reality in Public International Law*, translated by P.E. Corbett (revised edn, Princeton UP 1968) 89.

In a celebrated 1947 paper, Georg Schwarzenberger argued that when international law emerged as a distinctive branch of law and scientific thought in the sixteenth and seventeenth centuries, scholars were free to develop either a deductive account, building logical arguments based on quotations from the Bible and the works of classical scholars, or they could rely on an inductive approach, examining the actual practices of states. Over time, and with the increase in materials documenting practice from which generalizations could be made, the inductive technique came to predominate and, by the end of the nineteenth century, came the realization of 'the newly-discovered truth that international law was the sum total of the rules actually considered law by the subjects of international law'.[93] Schwarzenberger later expanded his thesis into a book in which he comes close to the notion of emergence when he writes that 'each subject of international law is a potential element in a composite agency which generates international customary law'.[94]

Schwarzenberger's objective was to safeguard the discipline from what he saw as the 'subjectivism of deductive speculation'.[95] The job of the international lawyer, he contended, was to establish the content of international law by examining the actual practices of states. Speculation, along with 'intuition and other brainwaves', could be relied on, but 'only as hypotheses that, in every case, required to be tested by reference to the criteria laid down in Article 38 of the Statute of the World Court'.[96] This, however, is a deductive argument: *if* we accept that the sources of international law are found in Article 38, *then* we must follow an inductive methodology to identify the content of the primary norms. An inductive account, properly so-called, must, though, proceed, in its entirety, to explain system-rules by looking to the practices of states, along with certain non-state actors, and this includes the secondary rules about rules, including the law on sources.[97]

The standard reference on sources is Article 38 of the Statute of the World Court, drafted by an Advisory Committee of Jurists, under the presidency of Baron Descamps, established to work out the details of the new Permanent Court of International Justice provided for under Article 14 of the Covenant of the League of Nations. The Advisory Committee quickly accepted the place of treaty and custom amongst the sources of international law and later added, as a way of filling the gaps, where state practice was inconclusive or absent, 'the general principles of law recognized by civilised nations' and 'judicial decisions and the opinions of writers'.[98]

[93] Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harvard Law Review* 539, 544.

[94] Georg Schwarzenberger, *The Inductive Approach to International Law* (Stevens & Sons 1965) 19.

[95] Ibid. 6. [96] Ibid. 5.

[97] All systems of law have rules that apply directly to subjects and rules about rules—variously referred to in the case of international law as secondary rules, constitutional rules, or meta-rules. See, for example, Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 *Israel Law Review* 86, 89; Philip Allott, 'The Concept of International Law' in Michael Byers (ed.), *The Role of Law in International Politics* (OUP 2000) 69, 75; and Tomuschat, 'Obligations' (n. 90) 216. The primary rules depend for their authority on the secondary rules about rules. See H.L.A. Hart, *The Concept of Law* (2nd edn, OUP 1994) 94.

[98] Alain Pellet, 'Article 38' in Andreas Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2006) 731, 741 (hereafter, Pellet, 'Article 38').

Whereas previously there had been no agreement on sources, there was now a definitive statement on the subject and Article 38 rapidly became synonymous with the doctrine of the sources.[99] It is, though, important to be clear that the authority of Article 38 lies in the empirically observable fact that an overwhelming majority of states, international courts and tribunals, international organizations, as well as practitioners and scholars accept it as detailing the sources of international law—and not for any other reason.

Problem-Solving and Path Dependence in International Law

Complex systems are produced by the actions and interactions of their component agents. System-level change depends on alterations in the behaviours of agents as they respond to new information about the unexpected actions of other agents or occurrences in the outside world. In this sense, complex systems are problem-solving systems, the problem being how to respond to new information.[100] Writing in the early 1970s, James Hildebran observed that 'An adaptive system, such as the general system of public international law, must be capable of processing and evaluating information inputs to achieve stability in this dynamic and fluid universe.'[101] Judge Antônio Augusto Cançado Trindade makes the same point when he refers to 'the historical evolution of International Law as an open and dynamic system, capable of responding to the changing needs of the international community'.[102]

Change in international law is a result of an alteration in the behaviour of states, as they respond to new information about the actions of other states or events in world politics, science, and technology, etc. The emergent nature of the system means we need to be cautious when talking about its teleology or trajectory, as self-organization is not guided by system-level goals—it is the result of the actions and interactions of partly autonomous component agents.

Consider, for example, the development of the law on the continental shelf. The United States was the first country to claim rights over the relatively shallow maritime area bordering its continental land mass, following the discovery of large-scale petroleum deposits. There were no objections to the Truman Proclamation of 28 September 1945 and the US claim was quickly followed by others. In 1969, the International Court of Justice concluded that coastal states enjoyed an inherent right to their continental shelf. Whilst the Court justified the rule in terms of an

[99] Thomas Skouteris, 'The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law' in Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 69, 73.

[100] Francis Heylighen, 'Self-Organization in Communicating Groups: The Emergence of Coordination, Shared References and Collective Intelligence' in Àngels Massip-Bonet and Albert Bastardas-Boada, *Complexity Perspectives on Language, Communication and Society* (Springer 2013) 117, 130.

[101] James L. Hildebran, 'Complexity Analysis: A Preliminary Step Toward a General Systems Theory of International Law' (1973) 3 *Georgia Journal of International and Comparative Law* 271, 306.

[102] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2nd edn, Martinus Nijhoff 2013) 32.

extension of the 'land sovereignty of the coastal State [that is] of something already possessed',[103] this did not explain the emergence of the right to the shelf. The development of the law on the continental shelf depended on a change in the conduct of states in the form of claims to the shelf, and acceptance of those claims, and the adoption of the 1958 Convention on the Continental Shelf.[104]

Whilst complex systems are in a constant condition of evolution, they do not change unless there is some reason for the component agents to alter their behaviour. This is the phenomenon of path dependence, which cautions against looking for an overarching account to explain the existing design and structure of a system.[105] The term 'path dependence' was invented by the economic historian Paul David to describe situations in which present-day conditions can only be explained by decisions taken in the past. His example was the continued use of the QWERTY keyboard, designed by Remington in the 1880s, so that typists trained on one of their machines could use its other models and which soon become the industry standard.[106] But why do we continue to use the QWERTY layout today? After all, there is no longer a concern about the keys jamming, as there was on a manual 'typewriter'—a word that could be spelled out by Remington sales staff using only the top line of the keyboard, and there is good evidence there are more efficient ways of arranging the letters on a computer, mobile, or tablet keyboard. The answer is path dependence: we continue to use the QWERTY layout for typing because we have used it for over a hundred years—nothing more.

Path dependence reflects the influence of four related phenomena: increasing returns; self-reinforcement; positive feedback; and lock-in.[107] Increasing returns describes the fact that the more a choice is made, or action taken, the greater its benefits. Self-reinforcement means that making a choice will lead to the introduction of incentives for that choice to be sustained. Positive feedback encourages further change in the same direction.[108] Lock-in concerns the reality that once a choice has been made to go in a certain direction, it is very difficult to revisit that decision; paths not taken, cannot be taken later—in the words of the economist Brian Arthur: 'Once a "solution" is reached, it is difficult to exit from.'[109]

Path dependence helps explains the importance of history, as key decisions, taken at vital moments, establish the structures in which the international law game must

[103] *North Sea Continental Shelf* [1969] ICJ Rep 3, para. 43.

[104] See Article 2, Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

[105] Marie-Laure Djelic and Sigrid Quack, 'Overcoming Path Dependency: Path Generation in Open Systems' (2007) 36 *Theory and Society* 161, 167.

[106] Paul A. David, 'Clio and the Economics of QWERTY' (1985) 75(2) *The American Economic Review* 332, 334.

[107] Scott E. Page, 'Path Dependence' (2006) 1 *Quarterly Journal of Political Science* 87, 88.

[108] Richard Campbell, *The Metaphysics of Emergence* (Palgrave Macmillan 2015) 209 (hereafter, Campbell, *Metaphysics of Emergence*). Negative feedback encourages component agents to settle back into a stable set of behaviours; positive feedback, on the other hand, 'is self-reinforcing and results in one or more variables moving rapidly towards a point of no return': Steven M. Manson, 'Simplifying Complexity: A Review of Complexity Theory' (2001) 32 *Geoforum* 405, 407.

[109] W. Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (Michigan UP 1994) 112.

be played and a shared understanding about how it can be played.[110] When international lawyers consult the records of court decisions, international agreements, and General Assembly resolutions, etc. to solve present-day problems, the earlier decision influences the later argument (the notion of increasing returns). Moreover, where they refer to established rules, international lawyers do so in the knowledge their arguments will be stronger if they can provide supportive precedents (self-reinforcement). When successful arguments are based on existing rules, international law provides a further incentive for lawyers to structure their case in terms of established norms (positive feedback). Finally, path dependence explains why alternative approaches to existing rules become unthinkable,[111] or even unimagined, as legal paradigms become locked-in.[112] Consider, for example, the freedom of the high seas, first explained by Hugo Grotius in *Mare Liberum* [1609], in part to justify the Dutch East India Company's seizure of the Portuguese ship *Sta Catarina* in the Strait of Singapore,[113] and which remains the basic principle today, notwithstanding the fact it prevents the over-exploitation of fish stocks that seemed plentiful in Grotius' time.[114]

The Power of Events in International Law

Component agents in a complex system follow the emergent rules of the system, whilst retaining some discretion about how to respond to an alteration in the conduct of other agents or things that happen in the outside world.[115] The notion of an 'event' is used here to describe information from inside or outside the system that causes agents to alter their behaviour; an event can be a single act or a series of related occurrences that results in adjustments in the conduct of some or all of the component agents.

The international law system does not change unless states and significant non-state actors, like the International Court of Justice, see some reason to alter their way of behaving, either in response to the actions of another actor (think of the positive response of countries to the Truman Proclamation, leading to a new rule on the continental shelf) or some occurrence in the external environment. Significant reshaping of the system is often the result of momentous events in world politics,

[110] See, on this point, Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94 *American Political Science Review* 251, 260. On path dependence in law, see Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 *Iowa Law Review* 101.

[111] Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 *Annual Review of Political Science* 369, 387.

[112] Martina Eckardt, 'Legal Evolution between Stability and Change' in Peer Zumbansen and Gralf-Peter Calliess, *Law, Economics and Evolutional Theory* (Edward Elgar 2011) 202, 218.

[113] Andree Kirchner, 'Law of the Sea, History of' (2007) *Max Planck Encyclopedia of Public International Law*, para. 19 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[114] Rosemary Rayfuse and Robin Warner, 'Securing a Sustainable Future for the Oceans Beyond National Jurisdiction' (2008) 23 *International Journal of Marine and Coastal Law* 399, 402.

[115] Heylighen et al., 'Philosophy and Complexity' (n. 89) 125.

especially the global conflagrations in 1914–18 and 1939–45. Michael Scharf argues that at (what he calls) these 'Grotian moments' fundamental remodelling of the international law system can occur rapidly,[116] and he sees the Nuremberg Trial of the surviving Nazi leaders as one such instance, reflecting a paradigm-shift in the law on individual criminal responsibility, 'a novel solution to unprecedented atrocity in the context of history's most devastating war'.[117]

Change can also be prompted by seemingly minor events, including, for example, the development of international space law following the launch of Sputnik-1 in 1957.[118] The original paper on the subject, published in 1951, starts with the following observation: 'High altitude rocket flights have reopened an old question: How far upward in space does the territory of the State extend?'[119] The launch of Sputnik-1 required a new answer and a new body of rules. The influence of Sputnik-1 is explained by the non-linearity of the international law system, meaning that developments are not always directly proportional to the informational inputs that lead to the modification.[120] Here, the launch of one satellite resulted in a new area of international (space) law.

There is now an emerging body of work that explores the ways a single event can influence the development of international law.[121] A clear example is provided by the judgment of the Permanent Court of International Justice in *Case of the SS 'Lotus'*, where France challenged the right of Turkey to put a French citizen on trial following a collision in the High Seas—specifically the decision of the President of the Court, Max Huber, to cast his deciding vote (after six judges had voted in favour and six against) in favour of the principle that, in the absence of a rule prohibiting a certain conduct, states were free to act as they wished.[122] The dissenting minority took the opposite position, concluding: 'If the Turkish [action was] not authorized by international law, Turkey acted *en contradiction des principles du droit international.*'[123] The stance of the Court was characterized by the minority in terms that 'under international law everything which is not prohibited is permitted',[124] and that a state 'can do as she sees fit', unless there is a rule to the contrary.[125]

[116] Michael P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 *Cornell International Law Journal* 439, 450.

[117] Michael P. Scharf, 'Accelerated Formation of Customary International Law' (2014) 20(2) *ILSA Journal of International & Comparative Law* 305, 334.

[118] Frans von der Dunk, 'International Space Law' in Frans von der Dunk (ed.), *Handbook of Space Law* (Edward Elgar 2015) 29, 35.

[119] John C. Cooper, 'High Altitude Flight and National Sovereignty' (1951) 4 *International Law Quarterly* 411, 411.

[120] On non-linearity in complex systems, see David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The State of the Art* (Routledge 2014) 18.

[121] See Fleur Johns, Richard Joyce, and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011).

[122] *Case of the SS 'Lotus'*, PCIJ, Ser. A, No. 10, p. 32.

[123] Dissenting Opinion by Lord Finlay, p. 52.

[124] Dissenting Opinion by M. Loder, p. 34.

[125] Dissenting Opinion by M. Weiss, p. 42.

The *'Lotus'* judgment was the subject of immediate criticism, with J.L. Brierly arguing that its reasoning 'was based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States',[126] and a majority of writers at the time considered it to be a threat to a rule-based system capable of limiting sovereign power.[127] Nonetheless, the meta-principle of sovereign liberty—the 'Lotus principle'[128]—was subsequently so taken for granted that, for many writers, it functions as shorthand for the positivist system, representing, in the words of the ICJ judges Higgins, Kooijmans, and Buergenthal, 'the high water mark of laissez-faire in international relations'.[129]

Change in International Law

Complexity is fundamentally a theory of change; it is concerned, as the sociologist John Urry points out, with systems 'that adapt and evolve as they self-organize through time'.[130] The notion of synchronic emergence describes a situation where novel phenomena materialize from elements that exist at the same time as the thing which appears;[131] diachronic emergence refers to the development of novel phenomena from a predecessor and is seen, for example, in the evolution of species.[132] Complex systems are both synchronically and diachronically emergent.[133] They change as the component agents alter their behaviours (synchronic emergence), evolving by remodelling their internal structures (the notion of diachronic emergence), that is the system is not remade anew every time it undergoes a transformation.

To make sense of the 'continuous evolution of international law', in the words of the International Court of Justice,[134] we need to recognize that it evolves with changes in the conduct of states and non-state actors, being remodelled from one set of rules and structures to another. Take the example of human rights. The first edition of Oppenheim's *International Law* (1905) concludes that 'the so-called rights of mankind … do not in fact enjoy any guarantee whatever from the Law of Nations';[135] yet the eighth edition of *Brownlie's Principles of Public International Law* (2012) notes that 'It is now generally accepted that the fundamental principles of human rights form part of customary international law'.[136] From these two passages

[126] J.L. Brierly, 'The 'Lotus' Case (1928) 44 *Law Quarterly Review* 154, 155.
[127] Prosper Weil, '"The Court Cannot Definitively …": Non Liquet Revisited' (1998) 36 *Colombia Journal of Transnational Law* 109, 113.
[128] Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 13.
[129] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, p. 63, para. 51.
[130] John Urry, 'The Complexities of the Global' (2005) 22 *Theory, Culture & Society* 235, 237.
[131] Stephan, 'Emergentism' (n. 87) 78.
[132] Paul Humphreys, *Emergence* (OUP 2016) 43.
[133] Campbell, *Metaphysics of Emergence* (n. 108) 203.
[134] *Barcelona Traction, Light and Power Company, Limited,* Judgment [1970] ICJ Rep 3, para. 37.
[135] L. Oppenheim, *International Law: A Treatise, Vol. I. Peace* (1st edn, Longmans 1905) 346.
[136] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 642.

we know four things: that custom in the early part of the twentieth century did not include human rights; by the early part of the twenty-first century, it did so; that the law changed between 1908 and 2012; and that, by placing the textbooks in chronological order, we know the law altered from a position of non-recognition to acceptance, allowing us to tell a story about the development of international law over time.

Our understanding of change in international law depends on a fixed concept of time, that is we know what the law was on a given day, and a dynamic notion, we know the law changes over time,[137] a position reflected in the two branches of the doctrine of intertemporal law outlined by Judge Max Huber in the *Island of Palmas* case (1928). The first branch establishes that the legality or validity of an act is to be judged in accordance with the norms in force at the time the act takes place. The second confirms the possibility that the rules can change over time.[138] To make sense of international law we must reconcile, in the words of the *Institute de Droit International*, 'the dual requirement of development and stability',[139] recognizing that international law is always in a condition of 'being' and 'becoming', in the words of the physical chemist, Ilya Prigogine.[140] We can provide an accurate description of the rules in force on a given day ('being'), but in the certain knowledge the system will evolve to contain a different set of valid norms ('becoming').

Prigogine won the Nobel Prize for Chemistry in 1977 for his work which showed that complex systems follow the second law of thermodynamics.[141] The second law of thermodynamics establishes that, in some systems, entropy, or disorder, always increases, that is some processes only make sense in one direction: omelettes cannot be made into eggs, and the hot cup of coffee always cools. There is, then, an irreversible flow of time in complex systems (an arrow of time), which move from the past, through the present, into the future.[142] This time irreversibility is a consequence of the fact that bifurcations, or divisions of the system into two forks,[143] are the result of a combination of knowable, deterministic elements and unknowable, probabilistic factors. At the moment of bifurcation, it is not possible to tell which fork the system will take; it all depends, as Ilya Prigogine and Isabelle Stengers observe, on a

[137] J. Ellis McTaggart, 'The Unreality of Time' (1908) 17 *Mind* 457, 458.

[138] *Island of Palmas* (Netherlands v USA) (1928) 2 RIAA 829, 845.

[139] Preamble, Institut de Droit International, Resolution on 'The Intertemporal Problem in Public International Law', Session of Wiesbaden (1975) http://www.idi-iil.org/en/sessions/wiesbaden-1975 accessed 22 February 2018.

[140] Ilya Prigogine, *From Being to Becoming: Time and Complexity in the Physical Sciences* (W.H. Freeman 1980) 13.

[141] Prigogine was specifically interested in far from equilibrium systems, which are one form of complex system: Gao Yin and William Herfel, 'Constructing Post-Classical Ecosystems Ecology' in Cliff Hooker (ed.), *Philosophy of Complex Systems* (North Holland 2011) 389, 390–1.

[142] John Urry, 'Sociology of Time and Space' in Bryan S. Turner, *The Blackwell Companion to Social Theory* (2nd edn, Blackwell 2000) 416, 430. The standard example is the Rayleigh-Bénard convection. See Campbell, *Metaphysics of Emergence* (n. 108) 213–14.

[143] Göktug Morçöl, 'What Is Complexity Science? Postmodernist or Postpositivist?' (2001) 3 *Emergence* 104, 113.

mixture of 'necessity and chance',[144] as the system follows one path 'over a number of other equally possible paths'.[145]

Significant change has been a feature of the international law system and its history can be represented as a series of bifurcations, or forks, as international law took one path and then another, from Hugo Grotius' reimagining of the *jus gentium* in Roman law and medieval scholarship to outline a voluntary law of nations alongside natural law;[146] to Emer de Vattel's voluntary law of nations based on sovereign consent, albeit justified by natural law;[147] to Lassa Oppenheim's idea of a voluntary law of nations, established by the common consent of states, with no requirement for justification by natural law;[148] to the conclusion of the Advisory Committee of Jurists drafting the statute of the Permanent Court of International Justice that non-state actors had a role to play in law-making, specifically courts and academic writers;[149] to the last, or more accurately, latest bifurcation reflected in the adoption of the Charter of the United Nations.[150]

None of these developments could have been predicted in advance and we cannot be sure of the timing, or nature, of the next bifurcation in the international law system; it all depends, in Prigogine and Stengers' words, on a mixture of 'necessity and chance'. Given there will be times when international law undergoes significant change and these transformations cannot be foreseen, we must be aware of the irreversible flow of time through international law, which constantly moves from the past, through the present, to the future, as states and non-state actors respond to new information, but in unpredictable ways.

Attractors: The Power of Ideas in International Law

We have seen that the evolution of a complex system depends on its history, on the actions and interactions of the component agents, and on events in the external

[144] Ilya Prigogine and Isabelle Stengers, *Order Out Of Chaos: Man's New Dialogue With Nature* (Flamingo 1985) 170.

[145] Ibid. 176. Over time, there may be a succession of bifurcations, where the system evolves in a radically different direction. Prigogine later applied the concept to human societies, identifying the Neolithic bifurcation associated with the increased flow of energy coming from the discovery of agriculture and metallurgy and ultimately leading to a complex hierarchical society; the discovery and use of fossil energy (coal and oil) that led to the industrial society; and developments in information technology which led to the networked society: I. Prigogine, 'The Networked Society' (2000) VI (1) *Journal of World-Systems Research* 892, 896. For similar arguments, see Robert Artigiani, 'Revolution and Evolution: Applying Prigogine's Dissipative Structures Model' (1987) 10 *Journal of Social and Biological Structures* 249, 252; and Manuel De Landa, *A Thousand Years of Nonlinear History* (Zone 1997) 271.

[146] Hugo Grotius, *The Rights of War and Peace, Including the Law of Nature and of Nations* [1625] (Walter Dunne 1901).

[147] Vattel, *The Law of Nations* (n. 68), Bk II, Ch. XII, §192. See also Prelim. §21.

[148] L. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law* 313, 333.

[149] Pellet, 'Article 38' (n. 98) 741.

[150] The clearest expression of the argument that the adoption of the Charter of the United Nations reflected a new path for international law is found in Christian Tomuschat's Hague Lectures: Tomuschat, 'Obligations' (n. 90).

environment. On any given day, we can provide a reasonably accurate account of the system, but in the certain knowledge that it will change over time. By describing the system at successive moments, we can track its development and predict its future evolution, or at least the possible ways the system might evolve within its state space, or phase space. Sometime, however, the system will appear to be being pulled away from its expected trajectory by unseen forces, what mathematicians call attractors.[151] Attractors are described variously as magnetic forces that draw complex systems towards them,[152] or unseen powers that box the system into one part of its state space.[153]

In a complex social system, like international law, constructed first in the minds of its human participants,[154] the way individuals working within the system, those responsible for international law communications, think about the system will influence its evolution over time, and we can look for evidence of this in the communication acts of foreign ministers and members of the International Court of Justice, etc. In the language of complexity, ideas can function as attractors in the international law system. The clearest example can be seen in the influence of the concept of 'sovereignty'. Recall the dictum in the *Lotus* case: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will … Restrictions upon the independence of States cannot therefore be presumed.'[155] The passage cannot be explained without reference to a particular notion of sovereignty and we cannot make sense of the way international law evolved after the *Lotus* judgment, without understanding the influence of that idea. Other concepts that influence the system include the rule of law, which, as Shirley Scott observes, requires we accept 'the fact that ideas have power';[156] the self-determination of peoples, which saw the world political map redrawn after World War II, as United Nations membership expanded from the original 51 members to the present 193; and the idea of human rights.[157]

[151] Adrian Mackenzie, 'The Problem of the Attractor: A Singular Generality between Sciences and Social Theory' (2005) 22(5) *Theory, Culture & Society* 45, 46. For an introduction to attractors in complexity, see Byrne, *Complexity Theory* (n. 58) 168–9.

[152] Donald L. Gilstrap, 'Strange Attractors and Human Interaction: Leading Complex Organizations through the Use of Metaphors' (2005) 1 *Complicity* 55, 58.

[153] Stuart A. Kauffman, *The Origins of Order: Self-Organization and Selection in Evolution* (OUP 1993) 174.

[154] Thomas Schultz, 'Life Cycles of International Law as a Noetic Unity: The Various Times of Law-Thinking', King's College London Law School Research Paper No. 2017-09 (SSRN) 4.

[155] *Case of the SS 'Lotus'*, PCIJ, Ser. A, No. 10, p. 18.

[156] Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 313, 317.

[157] The term 'ideology' is often applied to ideas and belief systems intended to provide the underlying rationale and motivation for political action. See Teun A. Van Dijk, 'Ideology and Discourse Analysis' (2006) 11 *Journal of Political Ideologies* 115, 116; and Michael Freeden, 'Ideology, Political Theory and Political Philosophy' in Gerald F. Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (Sage 2004) 3, 11. The notion of human rights as an ideology is common in the literature. See, for example, James V. Schall, 'Human Rights as an Ideological Project' (1987) *American Journal of Jurisprudence* 47, 53; and Jean-Philippe Thérien and Philippe Joly. '"All Human Rights for All": The United Nations and Human Rights in the Post-Cold War Era' (2014) 36 *Human Rights Quarterly* 373, 391. The contested use of the term 'ideology' means that the more neutral term 'idea' is preferred here.

Generalized complexity theory has shown that there will often be many attractors, pulling a system in different directions.[158] If sovereignty were the only idea influencing international law, the system would be more predictable and there would be little reason for the recognition of human rights. Where there is one attractor, the system is likely to settle down to a steady condition—think of the example of a swinging pendulum that comes to rest at a single point under the influence of the unseen force of gravity, or a marble that settles in the bottom of a bowl. Likewise, if human rights were the only factor, we would expect to see the progressive development of human rights law, without any retrograde steps. Yet we know the path towards the recognition of 'all human rights for all' has not been straightforward and international lawyers continue to argue about the proper balance between the sovereign rights of states and the human rights of individuals.

Where a system is under the sway of two related attractors—here the ideas of 'sovereignty' and 'human rights'—the outcome is a three-dimensional torus, or a doughnut with a hole in the middle.[159] The system is understood to sit somewhere on the surface of the imaginary doughnut,[160] but its exact position at any point in time will not be clear, as it moves around under the influence of the two forces pulling it in different directions, with the movement of the system 'pictured as a line that winds around the torus'.[161] We know that the answers to questions on the doctrine and practice of human rights law lie somewhere on the torus, reflecting the pull of human rights in one direction and that of sovereignty in another, but we cannot be certain, at any given moment, which of these two ideas will exert the greater influence, making the future development of international human rights law difficult to predict with any certainty.

Conclusion

This chapter has shown that we can productively think about international law as a complex system and therefore apply the insights from, and language of, complexity to our analysis of the system, focusing on issues of self-organization, emergence, downward causation, problem-solving, and path dependence, the power of events, the possibility of bifurcations and the arrow of time, and the influence of attractors. International law is the result of the actions and interactions of sovereign and independent states, emerging with different characteristics from these component agents. The system then regulates the very same actors that brought it into existence, evolving as states respond to events in the outside world, such as innovations in science and technology (the launch of Sputnik-1, for example), an unexpected

[158] Stuart A. Kauffman, 'Principles of Adaption in Complex Systems' in Daniel L. Stein (ed.), *Lectures in the Sciences of Complexity* (Addison-Wesley 1989) 619, 628.

[159] Ibid. 630.

[160] Kelly Chapman, *Complexity and Creative Capacity: Rethinking Knowledge Transfer, Adaptive Management and Wicked Environmental Problems* (Routledge 2016) 84.

[161] John Briggs and F. David Peat, *Turbulent Mirror* (Harper & Row 1990) 40.

alterations in the behaviour of other states (the Truman Proclamation on the continental shelf), or the actions of non-state actors (Judge Huber's casting vote in the *Lotus* case). The system also evolves under the influence of unseen forces known as attractors. Sovereignty provides the most obvious example, but we should also be attentive to the impact of the moral concept of human rights.

The next three chapters apply these understandings to the United Nations human rights system, the core human rights treaty systems, and customary international law to explain the emergence and evolution of international human rights law, showing how it escaped the control of the sovereign states that established human rights in the first place. The analysis demonstrates the central influence of key decisions, taken at particular moments in time, including reference to the notion of human rights in Roosevelt's 'Four Freedoms' speech and in the declaration of the 26 United Nations, the incorporation of human rights clauses in the United Nations Charter, the response of UN Member States to the shock of the Sharpeville Massacre, and the judgment of the majority of the European Court of Human Rights in *Golder v. United Kingdom*. The objective of Chapters 3, 4, and 5 is to identify the cardinal features of human rights in the legal practice in order to explain the idea of human rights in Chapter 6, before outlining the influence of that moral concept, what complexity theorists might call the 'human rights attractor', on the legal practice and the distinctive nature of International Human Rights Law in Chapter 7.

3

United Nations Human Rights Law

This chapter examines the practice of human rights in the United Nations, looking to the insights from complexity theory to give an account of UN human rights law. It shows how the expression 'human rights' first emerged as part of the political settlement for a new world order in the 1940s, defining the Allied cause against Fascism, but entering the English language without agreement on its content, beyond the association with Franklin D. Roosevelt's 'Four Freedoms' Address. The meaning of the term was subsequently explained with the adoption of the non-binding Universal Declaration of Human Rights, which established moral, but not legal, obligations for Member States and did not provide an oversight role for the Organization.

All of this changed after the 1960 Sharpeville Massacre, when sixty-nine unarmed civilians were killed by armed South African police, when the newly independent African countries pushed the United Nations to adopt a series of measures targeting the apartheid State, establishing two important precedents: that human rights created binding legal obligations for states; and that the Organization had the power to evaluate the human rights practices of its Members. The focus was initially limited to situations of 'gross and systematic' violations of rights, but with the collapse of the standing of the Commission on Human Rights and its replacement by the Human Rights Council in 2006, all UN Members found their human rights performance subject to Universal Periodic Review against the standards in the Universal Declaration. This evolution in the status of the Universal Declaration of Human Rights, from non-binding moral code to the international law benchmark against which the human rights performance of all states is judged, is perhaps the most remarkable aspect of the human rights story told here.

The Invention of Human Rights

The human rights we have today are a consequence of the outcome of World War II and the decision of the victorious 'United Nations' to include reference to the notion in the Charter of the new world organization. There was nothing new in the idea that individuals had, or should have, rights simply by virtue of being human; nor in transnational measures motivated by humanitarian concerns (consider, for example, the moves against the slave trade and ad hoc instances of humanitarian intervention); or the possibility of an international organization having oversight of

the treatment of a population by its government (the League of Nations' minorities regime). The innovation was the use of the language of 'human rights'.

In the inter-war period, there had been some talk of rights, notably with the adoption of the 1929 Declaration of the International Rights of Man by the *Institut de Droit International*, which called for the extension of the constitutional protection of 'the rights of man [to] the entire world', specifically the rights to life, liberty, property, freedom of religion, the use of a minority language, and the guarantee of equality.[1] Later, at the outbreak of hostilities, in October 1939, *The Times* of London published a letter by the novelist H.G. Wells, in which he called for a declaration by the Atlantic peoples 'of the broad principles on which our public and social life is based' and included a draft Declaration of Rights.[2]

The key moment in the genesis story was Franklin D. Roosevelt's State of the Union message to Congress of 6 January 1941, almost a year before the United States of America entered the war, in which the US President declared that 'Freedom means the supremacy of human rights everywhere'. Roosevelt identified four essential freedoms—freedom of speech, freedom of religion, freedom from want, and freedom from fear—that should be enjoyed 'everywhere in the world'.[3] This is the first time the term 'human rights' was deliberately used in the English language,[4] and, as the historian Samuel Moyn points out, it 'entered history as a throwaway line, not a well-considered idea'.[5] The etymology of the expression is not clear, with the FDR Presidential Library reporting that the 'Four Freedoms' paragraphs did not appear until the fourth draft of the speech, although it confirms it was Roosevelt's own idea.[6] The impact was immediate, with the UK Foreign Secretary, Anthony Eden, stating: 'We have found in President Roosevelt's message to Congress in January 1941 the keynote of our own purpose.'[7]

The invention of the term did not guarantee that human rights would be central to the post-war order; indeed, the concept of the Four Freedoms entered the public imagination before that of human rights, largely because of the popularity

[1] 'Declaration of the International Rights of Man', adopted by the *Institut de Droit International* at its session held at Briarcliff, New York, on 12 October 1929, reprinted George A. Finch, 'The International Rights of Man' (1941) 35 *American Journal of International Law* 662, 664.

[2] See Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' (1992) 14 *Human Rights Quarterly* 447, 464–8.

[3] Franklin D. Roosevelt, State of the Union Address to the Congress, 6 January 1941. The influence of the address can be seen in the preamble to the Universal Declaration of Human Rights, which refers to the fact 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people': 'Universal Declaration of Human Rights', UNGA Res 217(III)A (10 Dec 1948) (adopted 48 votes to 0, with 8 abstentions).

[4] The *Oxford English Dictionary* records earlier uses of the term, but it is not clear that the authors had a specific meaning in mind, and it is certainly the case that the expression 'human rights' only entered widespread use after World War II. See 'human, adj. and n.'. OED Online. June 2017. Oxford University Press.

[5] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 51.

[6] FDR Presidential Library & Museum, 'FDR and the Four Freedoms Speech' https://fdrlibrary.org/four-freedoms accessed 31 January 2018.

[7] Quoted Roger Normand, *Human Rights at the UN: The Political History of Universal Justice* (Indiana UP 2007) 90.

of Norman Rockwell's paintings inspired by the speech.[8] The historian Elizabeth Borgwardt reports that President Roosevelt decided to capitalize on the favourable response to the 'Four Freedoms' address by putting forward 'some kind of public statement of the objectives in international relations in which the Government of the United States believed'. Roosevelt indicated that he was seeking to rely on 'internationalized conceptions in the Four Freedoms to advance the cause of "keeping alive some principles of international law, some principles of moral and human decency", for both US and world public opinion'.[9]

On 9 and 10 August 1941, Roosevelt met with British Prime Minister Winston Churchill, on board the *USS Augusta* in Placentia Bay, Newfoundland to discuss the situation in Europe and outline a vision for the post-war international system. The result was the Atlantic Charter, in which the United States and United Kingdom set out certain common principles on which they based their hopes for a better world after the final destruction of the Nazi tyranny. There was no reference to human rights, only the aspiration to see established a peace 'which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want'.[10] The inclusion of the expression 'all the men' was suggested by Churchill and Borgwardt argues that this 'minor, rhetorical modification' was understood as implying that 'the individual was becoming a legitimate object of international concern'.[11]

On 1 January 1942, after the United States had entered the war in December 1941, Roosevelt and Churchill met again, this time with representatives of the Union of Soviet Socialist Republics and China, to sign a document that become known as the United Nations Declaration. The preamble established that the signatories were convinced that 'complete victory over their enemies [was] essential to defend life, liberty, independence and religious freedom, and to preserve *human rights* and justice in their own lands as well as in other lands'.[12] This is the first international instrument to contain reference to human rights, although it is noteworthy the term had been absent from the 25 December 1941 draft and it was added by Roosevelt himself.[13] With the exception of the right to freedom of religion, which was not included in the Atlantic Charter and to which the Soviet Union had an ideological objection, the inclusion of human rights in 'The Declaration by United Nations' was not controversial and, on 2 January 1942, the representatives of twenty-two other nations added their signatures.

As the conflict continued, discussions on establishing a new world organization were held in Washington DC, at the Dumbarton Oaks estate owned by Harvard

[8] See 'Norman Rockwell's Four Freedoms', New York Times, 7 February 2017; also Elizabeth Borgwardt, 'FDR's Four Freedoms as a Human Rights Instrument' (April 2008) *OAH Magazine of History*, 8.

[9] Elizabeth Borgwardt, '"When You State a Moral Principle, You are Stuck with It": The 1941 Atlantic Charter as a Human Rights Instrument' (2006) 46 *Virginia Journal of International Law* 501, 517–18 (hereafter, Borgwardt, 'The 1941 Atlantic Charter').

[10] 'The Atlantic Charter', reprinted in the *Yearbook of the United Nations 1946–47*, 2.

[11] Borgwardt, 'The 1941 Atlantic Charter' (n. 9) 526–7.

[12] 'The Declaration by United Nations', reprinted in the *Yearbook of the United Nations 1946–47*, 1 (emphasis added).

[13] Robert E. Sherwood, *Roosevelt and Hopkins: An Intimate History* (Harper & Brothers 1948) 450.

University, between August and October 1944. The participants were China, Great Britain, the Soviet Union and the United States. A proposal by the United States that the general assembly of the post-war organization should be able to make recommendations on human rights was not, though, accepted by the other participants;[14] nor was a suggestion by China that the new organization should uphold the principle of racial equality, reflecting a concern around the racist ('whites only') immigration policies adopted by some countries. Lack of agreement meant there was no reference to human rights in the outcome of the Dumbarton Oaks conference, which disappointed those governments which had not participated, as well as non-governmental organizations and private citizens.[15]

The San Francisco conference, held between April and June 1945, saw an enlargement of participants to include some fifty nations. Small and medium-sized countries made proposals for the inclusion of human rights in the constituent instrument of the new organization and China again argued for recognition of the principle of racial equality, this time finding itself with greater support. Concurrently, knowledge emerged of the true horrors of the Nazi extermination camps.[16] The participating states now agreed that human rights should be listed amongst the purposes of the new organization. The decision was not completely idealistic, however, with the major powers in particular reluctant to accept interferences in their internal affairs; not surprising, perhaps, given the United States still had the problem of racial segregation, the United Kingdom remained a colonial power, and the USSR incarcerated political prisoners in the Gulag. The Charter reflects this tension, referring, on the one hand, to the need for the Organization to promote human rights, whilst, on the other, precluding the United Nations from intervening in matters which are properly within the domestic affairs of states. As Mary Ann Glendon observes, 'the Great Powers had gone along with the human rights language, but they make sure that the Charter protected their national sovereignty'.[17]

United Nations Human Rights Law

There are seven references to human rights in the Charter. The key provisions are the preamble, along with Articles 1(3) and 55.[18] The preamble reaffirms the faith of the peoples of the United Nations 'in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women'; Article 1(3) provides that the purposes of the Organization shall include 'promoting and

[14] Bruno Simma et al., *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 777.

[15] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (2nd edn, Pennsylvania UP 2003) 165.

[16] Ibid. 184–6.

[17] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 19.

[18] The others outline the human rights functions of the General Assembly (Article 13(1)(b)) and the Economic and Social Council (Articles 62(2) and 68), and affirm the applicability of human rights to populations under colonial rule (Article 76(c)).

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'; whilst Article 55(c) establishes that the UN shall 'promote … universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

There was initially some controversy as to whether the United Nations Charter created legally binding obligations for Member States in this area, not surprising given the language of 'promoting' human rights.[19] Writing in 1950, Hersch Lauterpacht argued that reference to human rights in the Charter reflected a conscious decision to develop a different kind of international community and whilst it might not be possible to identify the necessary positive measures, the Charter did establish negative obligations, prohibiting Member States from introducing laws curtailing the rights of women or imposing additional measures discriminating against persons belonging to religious, ethnic, or racial groups.[20] This reading found support in the 1971 Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, when the International Court of Justice concluded that the policy of apartheid in South West Africa (Namibia) was 'a flagrant violation of the purposes and principles of the Charter'.[21] Christian Tomuschat argues that 'from that moment, it was clear that the references to human rights and fundamental freedoms in the text of the Charter were to be viewed [as] establishing firm legal commitments for states'.[22] Any remaining doubt was removed by the judgment in *United States Diplomatic and Consular Staff in Tehran*, when the Court confirmed that wrongfully to deprive individuals of their liberty and to subject them to constraint in conditions of hardship was 'in itself manifestly incompatible with the principles of the Charter of the United Nations'.[23]

Once it was accepted the human rights provisions in the Charter created legal commitments for Member States, the next step was to explain the content of the obligation to promote human rights. Under the Charter, only the Security Council has the power to bind UN Members by its decisions,[24] and whilst it has shown some willingness to adopt law-making resolutions,[25] it has not done so on human

[19] Compare, however, *Sei Fujii v. The State*, before the District Court of Appeals of California, which held that a statute which prohibited aliens ineligible to citizenship from acquiring land was 'in direct conflict with the plain terms' of the UN Charter provisions on human rights: Quincy Wright, 'National Courts and Human Rights—The Fujii Case' (1951) 45 *American Journal of International Law* 62, 71.

[20] H. Lauterpacht, *International Law and Human Rights* (Stevens and Sons 1950) 153.

[21] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion [1971] ICJ Rep 16, para. 131 (hereafter *Legal Consequences*). Whilst the Opinion concerned the legality of the practice of systematic racial discrimination by a Mandatory power, the Court's conclusion was understood to apply more generally to all instances of systematic racial discrimination by UN Member States: Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 *American Journal of International Law* 337, 350 (hereafter Schwelb, 'Human Rights Clauses of the Charter').

[22] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, OUP 2008) 137.

[23] *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, para. 91.

[24] Article 24, UN Charter. Security Council resolutions bind UN Member States by virtue of Articles 25 and 48(1): *Legal Consequences* (n. 21), para. 116.

[25] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175.

rights.[26] The Council has addressed thematic issues that might be termed human rights, including the use of child soldiers,[27] and sexual violence and exploitation in conflict,[28] and been willing to invoke the language of human rights in specific contexts.[29] These are, though, circumstances where the Security Council has identified a threat to international peace and security,[30] and Article 2(7) of the Charter makes clear that these fall outside the domestic jurisdiction of Member States.[31] There is no problem with the Council intervening in human rights situations that threaten international peace and security, but the action is formally concerned with peace and security and not human rights.

The main bodies for developing human rights standards in the United Nations have been the General Assembly and the Economic and Social Council, along with their subsidiary bodies, the Human Rights Council and Commission on Human Rights. The authority of these bodies to regulate Member States depends on either an express grant of power in the Charter or an acceptance that it is necessary for the performance of the Organization's duties. The Charter provides limited guidance here. Articles 1(3) and 55 call on the UN to promote human rights, whilst Article 2(7) demands that the Organization not intervene in matters essentially within the domestic jurisdiction of the state.

The first point to note is that the promotion of human rights necessarily requires the Organization concern itself with situations within Member States, given that human rights are primarily concerned with the relationship between the government and the individual. Therefore, whilst Article 2(7) precludes the UN from intervening in matters within the domestic jurisdiction of Members, this cannot be read as preventing any activity in the sphere of human rights. The problem lies in establishing the dividing line between the legitimate exercise of regulatory authority by the UN and issues that should be left to the Member States; and this depends on how we understand the relationship between Articles 1(3) and 55, and Article 2(7), which, as we will see, can change over time.

A Complex System of Regulatory Authority

The United Nations Organization was created by the original signatories, with the preamble to the Charter proclaiming 'We the peoples of the United Nations … do

[26] See, generally, Bruno Stagno Ugarte and Jared Genser, 'Evolution of the Security Council's Engagement on Human Rights' in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014) 3.

[27] UNSC Res 1612 (26 July 2005) [28] UNSC Res 2272 (11 March 2016).

[29] Relevant examples include UNSC Res 182 (4 December 1963), para. 2, in which the Council called on South Africa to end the imposition of discriminatory practices 'contrary to the principles and purpose of the Charter'; also, UNSC Res 2312 (6 October 2016), para. 10, in which the Council, acting under Chapter VII, emphasized that the human rights of migrants should be fully respected.

[30] Article 39, UN Charter.

[31] Article 2(7), UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state[;] but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

hereby establish an international organization to be known as the United Nations.' By declaring its existence, the sovereign and independent Member States established an organization with the power to regulate their future conduct. In the words of the International Court of Justice: 'fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone'.[32]

The contention here is that we can best make sense of the workings of the Organization, by thinking of it as complex self-organizing system, the result of the actions and interactions of its Member States that looks to regulate the behaviour of the same countries that brought it into existence in the first place. When the Charter came into force on 24 October 1945, there was no United Nations system. The notion of a system implies something with multiple elements and, in the case of a complex system, an entity which is adaptive and capable of changing over time. Neither description applies to the text of the constituent instrument of an international organization. It was only when the UN bodies started to operate, and Member States responded to the pronouncements of those bodies, that a UN 'system' emerged, and, after this moment, the Members were no longer in control. Nigel White explains the point this way: 'although States may control the creation of the organisation, once created it takes on a life of its own'. The fact of majority rule means the organization 'is no longer in the control of states. Indeed, the reverse is true'.[33]

There is no doubt that the United Nations can be described as a system—the International Court of Justice has after all referred to the 'United Nations system'.[34] Complexity theory tells us that macro-system level characteristics emerge without the need for a sovereign power from the micro-level behaviours of component agents—with the system then regulating the behaviours of component agents. Jan Klabbers uses something like this idea when he refers to the fact that international organizations, like the United Nations, 'are, at one and the same time, independent of their members . . . and fundamentally dependent on them'.[35] The regulatory authority of the UN over its Member States emerges as the primary and secondary organs adopt rules that seek to determine the normative position of the Members—and the Member States accept that exercise of authority. Increasingly, scholars refer to the rules of the United Nations Organization in terms of 'UN law',[36] and Oscar Schachter has written that this United Nations law emerges from the 'complex patterns' of the actions of the various specialized bodies and agencies.[37]

[32] *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 185 (hereafter *Reparation for Injuries*).

[33] Nigel D. White, *The Law of International Organisations* (2nd edn, Manchester UP 2005) 20 (hereafter, White, *The Law of International Organisations*).

[34] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. 1996, p. 66, p. 80.

[35] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 36 (hereafter Klabbers, *International Institutional Law*).

[36] Nigel D. White, *The United Nations System: Toward International Justice* (Lynne Rienner Publishers 2002) 18.

[37] Oscar Schachter, 'United Nations Law' (1994) 88 *American Journal of International Law* 1, 16 (hereafter Schachter, 'United Nations Law').

The United Nations, like any other international organization, can only act within the powers given to it by the Member States, either by an express grant of regulatory authority in the constituent instrument (the doctrine of attribution) or through the recognition of the (implied) powers necessary for the performance of its duties.[38] The need for implied powers, follows on, as Klabbers observes, from the fact that, 'while the notion of attribution may be a nice point of departure[,] organizations are usually held to be *dynamic and living creatures*, in constant development, and it is accepted that their founding fathers can never completely envisage the future'.[39]

Much of the literature on the law of international organizations reflects an attempt to make sense of the paradox of a regulatory system emerging from the actions and interactions of the subjects it seeks to command. The original delegation of authority is seen to be supplemented by the doctrine of implied powers, but with unsatisfactory results, given the unclear boundaries of the organization's mandate and concerns about regulatory overreach. Arguments are then made that the organization's powers should be limited to those expressly included in the constituent instrument or which can be attached to an express power; to the necessary inherent powers of the organization; to those required for it to carry out its functions; or that constitutional limits should be placed on the exercise of authority by the organization.

But it is important to remember that international organizations are not autonomous, self-determining entities; they are comprised of the very same actors they seek to regulate and in turn look to control them. Klabbers expresses the point this way: 'The organization may aspire desperately to gain independence from the member states and impose its will on those member states, yet at one and the same time the organization can only act to the extent the member states allow this.'[40] Here he captures a central insight of complexity theory, that regulatory norms emerge from the activities of UN Member States and then determine, in large part, the future behaviour of the same states, without any single actor or institution being in control. The United Nations' regulatory authority is seen to have evolved 'through the less-than-intentional action of the constituted bodies',[41] as Member States responded to the impact of new technologies, population growth, the globalization of economic activity, the claims of colonized peoples, etc. In the words of Oscar Schachter: 'Each of these problems [was] perceived to require norms and procedures for resolving conflict and for collective action to render them effective.'[42]

[38] *Reparation for Injuries* (n. 32) 180.

[39] Klabbers, *International Institutional Law* (n. 35) 58 (emphasis added).

[40] Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31, 43 (reference omitted).

[41] Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 *Yale Journal of International Law* 289, 304.

[42] Schachter, 'United Nations Law' (n. 37) 16.

The Powers of the United Nations on Human Rights

The powers of the United Nations are, expressly or impliedly, contained in the Charter, and our understanding of the UN's authority in the area of human rights depends on how we read the constituent instrument. Article 31(1) of the Vienna Convention on the Law of Treaties lays out the general rule:[43] 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The ordinary meaning does not assist here, given that Charter provisions do not make clear when the UN can intervene in the domestic affairs of Member States to promote human rights; nor does reference to the object and purpose help, given the Organization is required to promote human rights (Articles 1(3) and 55), whilst not intervening 'in matters which are essentially within the domestic jurisdiction of any state' (Article 2(7)). Context is provided by the Charter's preamble, which simply highlights the problem, affirming the faith of Members 'in fundamental human rights [and] in the equal rights of . . . nations large and small'.

Where more than one interpretation is possible, as here, Article 32 of the Vienna Convention allows recourse to the *travaux préparatoires* (preparatory works) to confirm a meaning resulting from an application of the general rule in Article 31. D.R. Gilmour argues that the record of the San Francisco Conference makes clear that Article 2(7) was intended to prohibit 'any "action" by any organ of the United Nations concerning a matter which was within the domestic jurisdiction of particular States'.[44] This restriction was understood to apply to all UN bodies, with the exception of the Security Council.[45] The logical conclusion, as Nigel White explains, is that Article 2(7) was introduced to ensure that the Organization could only intervene where there was a clear violation of 'essential liberties and human rights' to such an extent it would compromise international peace and security.[46]

Evolution in the Charter System

The regulatory authority of the United Nations is based on the allocation of powers and responsibility to the Organization in the Charter, which is 'a multilateral treaty, albeit a treaty having certain special characteristics'.[47] Our starting point for making

[43] Whilst the Charter of the United Nations is often understood to have a particular status in international law, it is fundamentally a treaty that must be interpreted in accordance with the normal rules for treaty interpretation: José E. Alvarez, *International Organizations as Law-Makers* (OUP 2006) 83. The Vienna Convention on the Law of Treaties, Vienna (23 May 1969, into force 27 January 1980) 1155 UNTS 331 specifically applies to 'any treaty which is the constituent instrument of an international [i.e. intergovernmental] organization' (Article 5).

[44] D.R. Gilmour, 'The Meaning Of "Intervene" Within Article 2 (7) of the United Nations Charter: An Historical Perspective' (1967) 16 *International and Comparative Law Quarterly* 320, 333.

[45] Bruno Simma et al., *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 142.

[46] White, *The Law of International Organisations* (n. 33) 90.

[47] *Certain Expenses of the United Nations*, ICJ Rep. 1962, p. 151, p. 157.

sense of the powers of the Organization is the text of the constituent instrument, but Article 31(3) of the Vienna Convention on the Law of Treaties also requires us to take into account '(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[48] In the case of both subsequent agreements and subsequent practice, a consensus of Member States is formally required, but it is generally recognized that the practice can be the work of the UN bodies,[49] and that change can occur where it is 'generally accepted' by Member States,[50] or objected to by only a 'small obstinate minority'.[51] In the words of the International Court of Justice, the meaning of the Charter alters where a new interpretation 'has been generally accepted by Members of the United Nations and evidences a general practice of that Organization'.[52]

To understand the United Nations system, we have to make sense of the interrelationship between the Organization and its Members, showing how its regulatory powers have evolved with changes in the conduct of Member States. In the words of the International Court of Justice, the interpretation of the constituent instrument of the international organization depends on 'the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice'.[53]

The multitudinous possibilities of actions and interactions by and between Member States and United Nations bodies mean we cannot be certain how the UN will evolve over time, but that does not mean anything goes, as the Organization remains constrained by the framework of the Charter[54] and its past practices. As Judge Lauterpacht observed in his Separate Opinion in *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*: 'A

[48] Where there is not sufficient practice to demonstrate a common understanding amongst the states parties, practice is still relevant for the purposes of Article 32, Vienna Convention on the Law of Treaties as a subsidiary means of interpretation. This has a more limited application, however—to confirming a reading that can be made under the general rule contained in Article 31.

[49] See, for example, *Competence of Assembly Regarding Admission to the United Nations* [1950] ICJ Rep 4, 9: 'The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council.' The noteworthy point is that no UN body operates by way of unanimity. See, on this point, *Certain Expenses of the United Nations* [1962] ICJ Rep Separate Opinion of Judge Sir Percy Spender, 182, 192.

[50] Jean-Pierre Cot, 'United Nations Charter' (2011) *Max Planck Encyclopedia of Public International Law*, para. 60 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[51] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, CUP 2005) 52.

[52] *Legal Consequences* (n. 21), para. 22. See, also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para. 28: 'The Court considers that the *accepted* practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter' (emphasis added).

[53] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep 66, 75.

[54] White, *The Law of International Organisations* (n. 33) 72.

proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.'[55]

Between 1945 and 1960, with a few exceptions, the United Nations did not concern itself with violations of human rights in Member States. In a series of steps between 1960 and 2006, however, the Organization changed course, developing a more interventionist stance, focusing initially on the problem of systematic racial discrimination in southern Africa; then a small number of other *sui generis* cases; then all situations involving gross and systematic violations; until the establishment of the Human Rights Council and introduction of the Universal Periodic Review. None of this was brought about by formal amendment of the Charter under Article 108, requiring the support of two-thirds of Member States and the agreement of the permanent members on the Security Council; nor was it authorized by the International Court of Justice, which does not have the final say on the interpretation of the Organization's constituent instrument.[56] The changes in regulatory approach were the result of transformations in the behaviours of UN Member States. As Egon Schwelb explains: 'provided there was a majority strong enough and wishing strongly enough', the Organization could develop mechanisms for considering, investigating, and judging concrete human rights situations.[57] The evolution of human rights depended on the effective exploitation of opportunities by political actors, the positions taken by key political alliances, the power and number of the offending states and a variety of other factors. For this reason, Philip Alston concludes, 'efforts to identify and describe steady and principal patterns in the evolution of the various [human rights] procedures are generally misplaced'.[58]

The Four Phases of UN Regulation on Human Rights

We can divide the approach of the United Nations to human rights into four distinct phases: a period between 1945 and 1960, when the Organization took little interest in the issue, with the exception of adopting the non-binding Universal Declaration of Human Rights; most of the 1960s, when the focus was on the exceptional cases of apartheid South Africa and South West Africa (Namibia); the time between 1967 and 2006, when the UN focused on situations involving gross and systematic violations; and, finally, the period since 2006, when the introduction of the Universal Periodic Review saw the evaluation of the human rights performance of all UN

[55] *South-West Africa—Voting Procedure,* Advisory Opinion [1955] ICJ Rep 67, Separate Opinion of Judge Lauterpacht, 90, 106. The International Court of Justice makes the same point in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep 66, 75.

[56] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter),* Advisory Opinion [1962] ICJ Rep 151, 168: 'Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.'

[57] Schwelb, 'Human Rights Clauses of the Charter' (n. 21) 341.

[58] Philip Alston, 'Appraising the United Nations Human Rights Regime' in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon 1992) 1, 2.

Member States against all the standards in the Universal Declaration ('all human rights for all'). These phases are considered in turn.

Phase 1. Setting Standards: A Declaration on Human Rights

In the very early years, the United Nations took an active interest in human rights. In 1946, for example, the General Assembly adopted a resolution on the political rights of women, which pointed to the need for states to 'fulfil the purposes and aims of the Charter … by granting to women the same political rights as men'.[59] The Assembly also adopted resolutions critical of the human rights situations in Spain,[60] the Soviet Union,[61] and Bulgaria and Hungary.[62] By the 1950s, however, the General Assembly limited itself to calling on the Third Committee, which considers human rights issues, to devote as much time as possible to completing the drafting of the covenants on civil and political rights and economic, social, and cultural rights.[63]

The central contribution of the United Nations to human rights in the first phase (1945–1960) was the adoption of the Universal Declaration of Human Rights. Proposals by Latin American countries at the San Francisco conference for the inclusion of a bill of rights in the Charter had not been accepted,[64] and the detailed arrangements for the promotion of human rights were left to the Organization. The Economic and Social Council (ECOSOC) discharged its responsibility under Article 68 of the Charter to 'set up [a] commission … for the promotion of human rights' in 1946, when it established the Commission on Human Rights, whose first job was to draft a declaration on human rights.

Sixteen Member States were represented at the opening session of the United Nations Commission on Human Rights in Lake Success, New York between January and February 1947, under the chairmanship of Eleanor Roosevelt, widow of the former US President Franklin Roosevelt. Mary Ann Glendon reports that the lengthiest and most heated discussions concerned the underlying rationale for recognizing human rights, with no consensus emerging.[65] The task of preparing a preliminarily draft was delegated to the Canadian academic John Humphrey, then Director of the UN Human Rights Division, a post he held between 1946 and 1966. Humphrey instructed his staff to examine existing domestic constitutional

[59] Political Rights of Women, UNGA Res 56(I) (11 Dec 1946) (adopted unanimously). The General Assembly subsequently adopted a Convention on the Political Rights of Women, UNGA Res 640 (VII) (20 Dec 1952); 193 UNTS 134 (adopted 31 March 1953, into force 7 July 1954).

[60] Relations of Members of the United Nations with Spain, UNGA Res 39(I) (12 Dec 1946).

[61] Violation by the Union of Soviet Socialist Republics of fundamental human rights, UNGA Res 285 (III) (25 April 1949).

[62] Observance in Bulgaria and Hungary of human rights and fundamental freedoms, UNGA Res 272 (III) (30 April 1949); also, UNGA Res 294 (IV) (22 Oct 1949).

[63] Daniel J. Whelan, *Indivisible Human Rights: A History* (Pennsylvania UP 2010) 141.

[64] Roger Normand, *Human Rights at the UN: The Political History of Universal Justice* (Indiana UP 2007) 133.

[65] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 39–41.

arrangements, as well as any proposals for declarations on human rights. The resulting 'Humphrey draft' reflected, in Glendon's words, 'a distillation of nearly 200 years of efforts to articulate the most basic human values in terms of rights'.[66]

The Humphrey draft was then passed to a subcommittee of the Commission on Human Rights, where it was agreed the document would have greater coherence if any revisions were handled by a single draftsperson. The job was given to the French jurist, René Cassin, who was awarded the 1968 Nobel Peace Prize for his contribution to the protection of human rights. Glendon argues that Cassin's synthesis yielded 'a whole that was greater than the sum of its parts'. By joining together rights from an older tradition of political and civil liberty, to those reflecting the more modern preoccupation with social and economic needs, 'and by declaring that all these rights belong to everyone, everywhere, the Declaration was bringing something new into the world'.[67]

The balance between the UN's responsibility to promote human rights and its obligation not to intervene in matters within the domestic affairs of states remained unresolved, however, although it was clear that the Universal Declaration of Human Rights was intended to be supplementary to constitutional rights protection within the state and in his Nobel Peace Prize acceptance speech Cassin observed that the jurisdiction of the state over the individual 'will always be a fundamental principle. It will remain basic. But it will no longer be exclusive' and there will be situations where it is appropriate to transfer that jurisdiction 'to the whole of juridically organized mankind'.[68]

Human rights explained

When the Universal Declaration of Human Rights was adopted on 10 December 1948, it was proclaimed as 'a common standard of achievement for all peoples and all nations'.[69] The primary focus was the relationship between the government and the individual, with human rights conceptualized as rights within the political community of the state. Article 13, for example, refers to the right to freedom of movement 'within the borders of each state'; Article 15 to the right to a nationality; Article 16(3) to the protection of the family '[by] the State'; and Article 21 to the 'right to take part in the government of [the] country'.

Whilst the Declaration was directed towards states, it established correlative human rights for individuals, reflecting five underlying principles: the equal status of all human persons; the need for protection of the physical and psychological integrity of the individual; the right to personhood or meaningful agency; the requirement for full participation in the political, economic, social, and cultural, etc.,

[66] Ibid. 57. [67] Ibid. 69.

[68] René Cassin, Nobel Lecture, 11 December 1968, 'The Charter of Human Rights' http://www.nobelprize.org/nobel_prizes/peace/laureates/1968/cassin-lecture.html accessed 1 February 2018.

[69] Preamble, Universal Declaration of Human Rights, UNGA Res 217(III)A (10 Dec 1948) (adopted 48 votes to 0, with 8 abstentions).

life of the community; and the right to minimum welfare (we return to this subject in Chapter 6).

The importance of equal status is clear from the first two provisions of the Universal Declaration: Article 1 provides that 'All human beings are born free and equal in dignity and rights'; Article 2 that the rights in the Declaration are to be enjoyed 'without distinction of any kind'. The principle is reaffirmed in Article 6 (right to recognition as a person before the law) and Article 7 (equality before the law). The right to physical integrity is recognized in Article 3 (right to life, liberty, and security of person); Article 5 (prohibition on torture); Article 9 (prohibition on arbitrary arrest and detention); Article 13 (right to freedom of movement); and implied by the right to a fair trial in Articles 10 and 11. The right to psychological integrity can be observed in Article 12 (right to privacy, family, and home); and Article 17 (right to property). The right to personhood, or meaningful agency, is seen in Article 4 of the Universal Declaration (freedom from slavery); Article 16 (the right to marry and to found a family); Article 18 (freedom of thought, conscience, and religion); Article 19 (freedom of opinion and expression); Article 20 (freedom of peaceful assembly and association); and Article 26 (right to education, which 'shall be directed to the full development of the human personality'). The UDHR further recognizes that meaningful agency can only be enjoyed in community with others, with the recognition of the rights to political participation (Article 21); to work (Article 23); to rest and leisure, including periodic holidays with pay (Article 24); and to participate in the cultural life of the state (Article 27). Finally, the Universal Declaration affirms the need for minimum welfare, recognizing the right to an adequate standard of living, including food, clothing, housing, and medical care, and the right to social security in the event of circumstances beyond her control (Article 25(1)).

The status of the Universal Declaration of Human Rights

The Universal Declaration on Human Rights was adopted by forty-eight votes to nought, with eight abstentions: the Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, the Ukrainian SSR, the Union of South Africa, the Union of Soviet Socialist Republics, and Yugoslavia. Those nations that abstained, or expressed their concerns about the Declaration, can be divided into three: Muslim-majority countries worried about its compatibility with Islam;[70] Communist powers who objected to its individualistic approach,[71] and the possibility of interferences in domestic affairs;[72] and South Africa, which abstained because of its opposition to the blanket principle of non-discrimination in Article 2 (the National Party government had been elected on a platform of apartheid or racial separation in May 1948).

Following its adoption, Eleanor Roosevelt was clear that the Universal Declaration was not legally binding and did not require UN Members to change their domestic laws. The rights in the Declaration were 'standards toward which

[70] Report of the Third Committee (A/777), UN Doc. A/PV.183, 10 December 1948, p. 912 (Egypt).
[71] Ibid., p. 914 (Yugoslavia). [72] Ibid., p. 923 (USSR).

the nations must henceforward aim'.[73] Rather hubristically, and perhaps conscious of its limitations, she proclaimed that the Universal Declaration of Human Rights 'may well become the international Magna Carta of all men everywhere … comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789'.[74] Hersch Lauterpacht was rather less enthusiastic, judging that, as it was not accompanied by any requirement to effectively protect human rights, the Universal Declaration 'mark[ed] no advance in the enduring struggle of man against the omnipotence of the state'.[75] He concluded: 'Not being a legal instrument, the Declaration would appear to be outside international law.'[76]

There was, at the time of its adoption, no argument that the Universal Declaration of Human Rights was legally binding. That is not the position of many international lawyers today, who see it as explaining the human rights commitments of UN Members, 'left undefined by the Charter'.[77] Thomas Buergenthal, for example, concludes that the Universal Declaration '*has come to be* accepted as a normative instrument in its own right [that] spell[s] out the general human rights obligations of all UN member states'.[78] This evolution in the status of the Universal Declaration, from non-binding moral code to explaining the human rights provisions in the UN Charter, can be explained in one of two ways: either the Universal Declaration represented a 'subsequent agreement' of UN Member States on the meaning of the human rights provisions in the Charter; or the 'subsequent practice' of Member States in the period after its adoption manifested an implied acceptance that the Declaration details the content of the Charter's human rights clauses.[79]

There is widespread acceptance that a General Assembly resolution can reflect a 'subsequent agreement' on the meaning of the provisions in the UN Charter.[80] The standard example is the Declaration on Friendly Relations, adopted by the General Assembly without a vote on 24 October 1970.[81] The case has also made for the

[73] [Eleanor] Roosevelt, 'The Promise of Human Rights' (1948) 26(3) *Foreign Affairs* 470, 477.

[74] Quoted H. Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 *British Year Book of International Law* 354, 354.

[75] Ibid. 372.

[76] Ibid. 369. For his scepticism on the possibility of an international Bill of Rights, see Hersch Lauterpacht, *An International Bill of the Rights of Man* [1945] (OUP 2013) 9.

[77] John P. Humphrey, 'The International Bill of Rights: Scope and Implementation' (1975–6) 17 *William and Mary Law Review* 527, 529.

[78] Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783, 787 (emphasis added).

[79] Recall that Article 31(3) of the Vienna Convention on the Law of Treaties requires that we take into account (a) any subsequent agreement between the Member States regarding the interpretation of the Charter; and (b) any subsequent practice in its application of the Charter that establishes the agreement of Member States regarding its interpretation.

[80] See, on this point, Georg Nolte, 'Third report on subsequent agreements and subsequent practice in relation to treaty interpretation', UN Doc. A/CN.4/683, 7 April 2015, para. 63. See, also, Conclusion 12(2), International Law Commission, 'Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties', in Report of the International Law Commission, Seventieth session, UN Doc. A/73/10 (2018), p. 13 (subsequent agreements and practices 'may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument').

[81] Declaration on Principles of International Law Concerning Friendly Relations, UNGA Res 2625 (XXV) (24 Oct 1970) (adopted without a vote). On the idea that the Declaration represents an

Universal Declaration of Human Rights,[82] with Louis Sohn, for example, arguing that 'As the Declaration was adopted unanimously (with eight abstentions), it constituted an authoritative interpretation of the Charter'.[83] But this was not the view of international lawyers at the time (recall Hersch Lauterpacht's response to the Declaration) and Sohn appears to concede the point when he later writes that the Declaration 'is *now* considered to be an authoritative interpretation of the U.N. Charter'.[84] Unless we re-write history, we cannot explain the status of the Universal Declaration of Human Rights in terms of a 'subsequent agreement' on the meaning of Charter provisions.

This leaves the second possibility: the 'subsequent practice' of Member States established agreement that the Universal Declaration of Human Rights explains the content of the human rights clauses in the Charter. The argument can be developed in one of two ways. We can examine the individual provisions in the Declaration to see whether this non-binding guidance has been followed by UN Member States, with, for example, the US Third Restatement concluding 'it is increasingly accepted that states parties to the Charter are legally obligated to respect *some* of the rights recognized in the Universal Declaration',[85] or we can look for evidence that the UN Members agreed sometime after its adoption that the Declaration explained the meaning of the human rights clauses in the Charter. This, in fact, occurred on 13 May 1968, when the International Conference on Human Rights, called by the General Assembly,[86] and attended by representatives of eighty-four countries, adopted the Proclamation of Tehran, which concluded that the Universal Declaration of Human Rights represented a common understanding of the inalienable and inviolable rights of all members of the human family 'and constitute[d] an obligation for the members of the international community'.[87] Through their 'subsequent practice', in adopting the Proclamation of Tehran, UN Member States

example of a subsequent agreement establishing the authoritative interpretation of the Charter, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 42; also Helen Keller, 'Friendly Relations Declaration (1970)' (2009) *Max Planck Encyclopedia of Public International Law*, para. 30 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018. The problem (as with the Universal Declaration of Human Rights) is that there was no consensus on the status of the Friendly Relations Declaration at the time of its adoption. See, for example, Robert Rosenstock, 'The Declaration on Friendly Relations' (1971) 65 *American Journal of International Law* 713, 714 ('There is some difference of opinion among Members of the United Nations as to whether the Declaration represents a mere recommendation or a statement of binding legal rules' (reference omitted)).

[82] Philip Kunig, 'United Nations Charter, Interpretation of' (2006) *Max Planck Encyclopedia of Public International Law*, para. 13 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018. Boyle and Chinkin agree, concluding that 'There are well-known instances of General Assembly resolutions interpreting and applying the UN Charter, including the Universal Declaration of Human Rights': Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 216–17.

[83] Louis B. Sohn, 'The Shaping of International Law' (1978) 8 *Georgia Journal of International and Comparative Law* 1, 19.

[84] Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982–3) 32 *American University Law Review* 1, 16 (emphasis added).

[85] American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 701, Comment (d) (emphasis added).

[86] International Year for Human Rights [1968], UNGA Res 2081 (XX) (20 Dec 1965), para. 13.

[87] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF.32/41, para. 2.

accepted that the Universal Declaration of Human Rights explained the content of the human rights clauses in the Charter. What remained unclear was whether the Organization had the power to act when a Member State behaved in a way contrary to those legal commitments.

Phase 2. Targeting Apartheid in Southern Africa

There are two cardinal features of human rights today: normative standards that explain how states should treat individuals subject to their jurisdiction and control; and the existence of mechanisms to allow the international community to supervise and monitor countries' human rights performances. By the end of the 1960s, the United Nations had confirmed that the human rights clauses in the Charter established binding commitments for Member States and that the Universal Declaration explained the content of Charter provisions on human rights. Around the same time, the Organization also introduced a series of measures targeting South Africa, aimed at bringing an end to the practice of systematic racial discrimination in the country and establishing a precedent that could be applied more generally.

The United Nations' approach to the apartheid State is central to the story of human rights; indeed, it explains the emergence of international human rights law. South Africa was an original member of the Organization and the subject of racial discrimination came to the General Assembly in its very first session in 1946 in the form of a complaint by India concerning the 'Treatment of Indians in the Union of South Africa'. To the astonishment of the South African government,[88] the General Assembly decided that the matter fell within its jurisdiction and asserted, by a majority of 32–15, that the treatment of the minority population, 'should be in conformity with … the relevant provisions of the Charter'.[89] In 1949, the Assembly called on South Africa and India to enter into discussions on the issue, 'taking into consideration the purposes and principles of the Charter of the United Nations and the [Universal] Declaration of Human Rights'.[90] In 1950, the General Assembly widened the scope of its concern to include the entire non-white population, when it concluded that apartheid was based on doctrines of racial discrimination.[91]

The following year, the General Assembly repeated its request for a diplomatic solution and called on South Africa to 'suspend the implementation or enforcement of the provisions of the Group Areas Act [which segregated members of different groups identified by the apartheid State] pending the conclusion of the negotiations'.[92] In 1953, it expressed regret that South Africa had failed to engage with diplomatic efforts and instead had proceeded 'with further legislation contrary to the Charter and the Universal Declaration of Human Rights'.[93] In 1954, the Assembly noted

[88] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton UP 2009) 26.

[89] UNGA Res 44(I) (8 Dec 1946), para. 2.

[90] UNGA Res 265 (III) (14 May 1949).

[91] UNGA Res 395 (V) (2 Dec 1950).

[92] UNGA Res 511 (VI) (12 Jan 1952), para. 4.

[93] UNGA Res 719 (VIII) (11 Nov 1953), para. 5

the continued non-compliance of the Member State and 'invite[d] the Government of the Union of South Africa to reconsider its position'.[94] The call was repeated in rather formulaic terms in 1955, 1956, 1957, 1958, and 1959.

The power of an event: the Sharpeville Massacre

The turning point in the United Nations' approach to apartheid South Africa came with the Sharpeville Massacre of 21 March 1960, after which the Organization adopted a more interventionist stance, resulting in the institutional framework for human rights we see today. The story of that day is told by Tom Lodge in his book *Sharpeville: An Apartheid Massacre and Its Consequences*.[95] It begins the night before on 20 March. After hearing gunfire, the police in Sharpeville arrested Geelbooi Mofokeng, a known petty offender, near a spot where an arms cache had previously been discovered. After a severe beating, in which the police suspended Mofokeng on a pole, spinning him around between blows, it became evident Mofokeng knew nothing and he was released.

The 21 March had been chosen by the Pan Africanist Congress (PAC) to protest the pass laws that required every black South African to carry, what was effectively, an internal passport that controlled their movements. The plan was for members of the PAC to show the police they had no pass and for them to be arrested, with the objective of filling the gaols and clogging up the legal system.

The demonstration in Sharpeville began in the early morning and turned violent almost immediately, with stones thrown by protesters and teargas and shots fired by the police, with two people being killed. Later in the morning, a crowd started to gather outside the police station. From 10.30 am onwards, police reinforcements arrived in Saracen armoured personnel carriers, equipped with heavy machine guns. In the end, there were 400 policemen, with the white officers given rifles and 4,000 rounds of ammunition.

By lunchtime, the crowd outside the police station had grown to an estimated 20,000 people. All the evidence points to the gathering being peaceful and good-humoured, with most having come to give support to the PAC activists and not to offer themselves up for arrest. Nonetheless, the police officer in charge, Colonel 'Att' Spengler, ordered the local PAC leader Nyakane Tsolo to send the crowd home. When Tsolo refused, he was arrested. Spengler then approached another PAC leader, whose identity remains unknown, and there was an altercation. The crowd moved forward to see what was happening and Lieutenant Colonel GD Pienaar ordered his fellow police officers to load their weapons.

At this moment, Geelbooi Mofokeng, the petty criminal arrested and tortured the night before, thought he saw one of his interrogators in the police line and raised his gun to shoot. The person standing next to him forced Mofokeng's pistol into the air, but two shots were fired. In response, a police officer shouted in Afrikaans 'skiet'

[94] UNGA Res 820 (IX) (14 Dec 1954), para. 4.
[95] Tom Lodge, *Sharpeville: An Apartheid Massacre and Its Consequences* (OUP 2011).

or 'n'skiet', which translates as 'shot' or 'shoot'. The officer helping Spengler to his feet interpreted this as an order and opened fire, triggering a lethal fuselage as 168 police constables followed suit, discharging 1,344 rounds of ammunition into the crowd.[96] Amongst them was Lydia Mahabuke who remembers the event this way:

> Whilst we were still singing, without any word, without any argument, we just heard the guns being fired. I then tried to run … While I was running something was hitting me in the back.… There was blood streaming down my leg.[97]

By the end of the day, sixty-nine people lay dead or dying, with hundreds more injured.

The 'moral shock'[98] of the Sharpeville Massacre resulted in the United Nations moving to a position that conclusively rejected South Africa's argument that its system of government was an internal affair.[99] On 1 April 1960, eleven days after the killings, following a complaint by twenty-nine Member States, the Security Council adopted Resolution 134 (1960), which determined that the situation in South Africa 'had led to international friction and if continued might endanger international peace and security'.[100] In adopting this formula, the Council confirmed that the choice of political system did not fall exclusively within the domestic jurisdiction of the state and the Council called on South Africa to abandon the policy of apartheid.[101] Further resolutions were to follow, especially Resolution 182 (1963), which called on South Africa to end the imposition of discriminatory practices 'contrary to the principles and purpose of the Charter … and of the provisions of the Universal Declaration of Human Rights'.[102]

The UN General Assembly was not in session at the time of the Sharpeville Massacre, but, at the next available opportunity, it adopted, without a vote, Resolution 1510 (XV), which condemned all manifestations and practices of racial hatred in the political life of a society as violations of the Charter and Universal Declaration of Human Rights,[103] and Resolution 1598 (XV), which deplored South Africa's disregard of the demands of the Organization to end its policy of apartheid and called on states to consider taking separate and collective action with a view to bringing an end to the practice.[104] In its following session, the Assembly repeated its condemnation of South Africa and again urged Member States to take separate and collective action.[105] In 1962, the Assembly requested states to break off

[96] Ibid. 105. [97] Ibid. 10.

[98] Newell M. Stultz, 'Evolution of the United Nations Anti-Apartheid Regime' (1991) 13 *Human Rights Quarterly* 1, 6.

[99] Louis B. Sohn, *Rights in Conflict: The United Nations and South Africa* (Transnational 1994) 76.

[100] UNSC Res 134 (1 April 1960), para. 1. [101] Ibid., para. 4.

[102] In UNSC Res 554 (17 Aug 1984), the UN Security Council declared the new Constitution of apartheid South Africa to be 'null and void' (para. 2) on the basis that it was incompatible with the UN Charter and that what was required was 'the establishment of a democratic society, based on majority rule' (para. 4).

[103] Manifestations of racial and national hatred, UNGA Res 1510 (XV) (12 Dec 1960), para. 1.

[104] Question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa, UNGA Res 1598 (XV) (13 April 1961) (adopted 95–1, with only Portugal, then still a colonial power in southern Africa, voting against), para. 2.

[105] The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Republic of South Africa, UNGA Res 1633 (XVI) (28 Nov 1961), para. 5.

diplomatic relations with South Africa and introduce a range of sanctions.[106] The vote was 67–16, with 23 abstentions. At the same time, the General Assembly tasked the UN Commission on Human Rights to prepare a declaration and convention on the elimination of all forms of racial discrimination.[107] The argument against apartheid was now framed as a specific manifestation of a wider battle against racial discrimination.[108]

A turning point in UN human rights law

The importance of Sharpeville to human rights is reflected in the fact that 21 March (the date of the Massacre) is the United Nations International Day for the Elimination of Racial Discrimination. But why did Sharpeville represent a turning point in the Organization's approach to human rights? After all, the killings of civilians in Sharpeville were not the first by the apartheid State and there was no similar reaction to the deaths of more than fifty protesting north African immigrants by French police in the Paris Massacre of 17 October 1961.[109]

Path dependence tells us that, everything else being equal, a complex system will continue to function in the same way until some event causes the component agents to alter their behaviour. In the case of the United Nations system, that event was the Sharpeville Massacre, which resulted in the Organization intervening in the internal affairs of a Member State, with that involvement justified by reference to the human rights norm prohibiting discrimination on grounds of race. What changed was not, though, primarily the attitude of countries to the problem of apartheid South Africa, but the profile of the United Nations membership, following the admission of newly independent African states.

In 1945, only four of the original fifty-one Member States were from Africa: Egypt; Ethiopia; Liberia; and South Africa. By 1959, that number had grown slightly to nine (out of a total of eighty-two). In September 1960, sixteen newly decolonized countries were admitted, with that group alone representing one in six of the UN membership. One consequence, as Wellington W. Nyangoni points out, was that the Organization then devoted 'more time to the discussion and solution of African problems'.[110] By 1968, one in three UN Member States (forty-two in total) were from Africa and the clear majority were newly independent.

A primary focus of the newly independent countries was the situation in southern Africa, but human rights also featured strongly in their concerns.[111] Steven Jensen

[106] The policies of apartheid of the Government of the Republic of South Africa, UNGA Res 1761 (XVII) (6 Nov 1962).

[107] Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, UNGA Res 1780 (XVII) (7 Dec 1962), para. 1.

[108] Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Cornell UP 1999) 45.

[109] See, generally, Jim House and Neil MacMaster, *Paris 1961: Algerians, State Terror, and Memory* (OUP 2006).

[110] Wellington W. Nyangoni, *Africa in the United Nations System* (Associated UP 1985) 27.

[111] David A. Kay, 'The Impact of African States on the United Nations' (1969) 23 *International Organization* 20, 27.

explains the point this way: 'Africa was present at the moment when human rights acquired real meaning—namely as legally binding universal standards, and they were a driving force in the process.'[112] Through increased representation, a focus on issues that mattered to them, and a favourable political climate, in which the global superpowers looked to bring newly independent countries into their camp, African states were able to exercise a new and decisive influence on the shape of UN policy. In the words of R.P. Anand, one of the architects of the Third World Approach to International Law, writing at the time, the 'sudden expansion of the international society . . . upset the whole equilibrium [and] the "geography" of international law . . . radically changed'.[113]

The role of African countries in the development of human rights law undermines, to some extent, the criticism that human rights is essentially 'liberal and European', in Makau Wa Mutua's terms.[114] There is no doubt that international law is the result of the historically contingent realities of the emergence of sovereign states in Europe and the globalization of the notion of sovereignty through the related processes of colonization and decolonization. It is also the case that the Universal Declaration of Human Rights was drafted by individuals with a classically European education and that it drew on the constitutional practices of European countries, as well as Central and South American countries which had transplanted European systems of government. But it remains the case that the key event in the emergence of a body of international human rights law, with binding international law norms and institutional oversight by secondary agents of justice, was the Sharpeville Massacre, which led directly to a change in UN policy on apartheid South Africa, and newly independent African states played a decisive role in this development.

Phase 3. Responding to 'Gross and Systematic' Violations Everywhere

The United Nations' response to the situation in South Africa established two important precedents: the human rights provisions in the Charter created binding obligations for Member States and the Organization could intervene directly to try and bring an end to a situation involving serious violations. The circumstances of apartheid were initially regarded as *sui generis*. In 1961, for example, the United Kingdom declared that South Africa provided a 'unique' exception to the prohibition on the United Nations intervening in the domestic affairs of Members. From 1966, however, the UK agreed that the UN could involve itself wherever there was a clear pattern of human rights violations.[115] The focus of the Organization

[112] Steven L.B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (CUP 2016) 110.

[113] R.P. Anand, 'Attitude of the Asian-African States toward Certain Problems of International Law' (1966) 15 *International and Comparative Law Quarterly* 55, 67.

[114] Makau Wa Mutua, 'The Ideology of Human Rights' (1995–6) 36 *Virginia Journal of International Law* 589, 653.

[115] Roland Burke, *Decolonization and the Evolution of International Human Rights* (Pennsylvania UP 2010) 79 (hereafter, Burke, *Evolution of International Human Rights*).

subsequently turned from the exceptional case of systematic racial discrimination to situations of gross and systematic violations anywhere in the world. The key to this development was the acceptance by the United Nations Commission on Human Rights that it was competent to receive complaints of infringements of human rights.

At its inaugural session in 1947, the Commission on Human Rights had decided that it had 'no power to take any action in regard to any complaints concerning human rights', a position affirmed by its parent body, the Economic and Social Council.[116] Hersch Lauterpacht referred to this as 'an extraordinary degree of … abdication, on the part of the United Nations',[117] and the self-denying ordinance was met with dismay by activists, with, for example, the National Association for the Advancement of Colored People being denied the opportunity to present a public petition to the United Nations on the problem of racial discrimination in the United States, at the very same time the United Nations was struggling to find suitable accommodation for some delegates after the Waldorf–Astoria Hotel refused rooms to representatives from Ethiopia, Liberia, and Haiti.[118]

For the next two and a half decades, the Commission on Human Rights held to its position that it did not have the power to monitor and evaluate real live situations, because the Charter only required states to 'promote', rather than 'protect', human rights.[119] Then in 1966 the Commission's membership was enlarged to reflect the new profile of the Organization, following the admission of newly independent states.[120] One consequence was a change in the stance on individual petitions, specifically in relation to South Africa, as a new majority of African and Asian countries decided on the need for a more interventionist approach and in doing so established a precedent that could be applied in other situations. The historian Roland Burke notes 'the extraordinary irony of a 1960s, where an alliance of African and Asian dictatorships facilitated the construction of the human rights system that contained unprecedented potential for the future investigation of their own regimes'.[121] The key developments were the adoption, by the Commission, of the '1235' (1967) and '1503' (1970) procedures.

[116] ECOSOC, 'Communications Concerning Human Rights', Res 75 (V) (5 August 1947). See, also, ECOSOC 'Report of the Commission on Human Rights', Res 728(F) (XXVIII) (30 July 1959), para. 1.

[117] H. Lauterpacht, *International Law and Human Rights* (Stevens 1950) 236.

[118] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana UP 2007) 163–5; also, Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–1955* (CUP 2003) 106.

[119] Elsa Stamatopoulou, 'The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights' (1998) 55 *Washington and Lee Law Review* 687, 690.

[120] Beate Rudolf, 'United Nations Commission on Human Rights/United Nations Human Rights Council' (2008) *Max Planck Encyclopedia of Public International Law*, para. 4 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[121] Burke, *Evolution of International Human Rights* (n. 115) 91.

Resolutions 1235 (1967) and 1503 (1970)

In 1966, the Economic and Social Council adopted Resolution 1102 (XL),[122] which put an end to the 'no power to act doctrine'. The initial focus was the apartheid regime and in 1967 the Commission on Human Rights appointed an Ad Hoc Working Group of Experts on South Africa.[123] Three months later, it returned to the issue of individual petitions and, after some debate, adopted ECOSOC Resolution 1235 (XLII), which authorized the Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities to 'examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid'. Resolution 1235 (1967) further authorized the Commission to 'make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid[,] and report, with recommendations thereon, to the Economic and Social Council'.[124]

Resolution 1235 (1967) confirmed that the role of the United Nations in the field of human rights was not limited to standard-setting, but also included supervisory and monitoring responsibilities. Theo van Boven describes the struggle against apartheid as the 'ice breaker' that allowed the development of the new approach to tackling gross and systemic violations.[125] Resolution 1235 identified the problem of systematic racial discrimination in South Africa, South West Africa (Namibia), and Southern Rhodesia as the exemplar cases, but did not limit the application of the '1235' procedure to southern Africa. During the 1967 meeting of the Sub-Commission, a wide range of petitions were circulated, including allegations of abuses in Sudan, Egypt, Zaire, Indonesia, Greece, and Haiti—although no action was taken in these cases.[126]

The United Nations had shifted its focus from the exceptional circumstances of southern Africa, to gross and systematic violations of rights anywhere in the world. For Christian Tomuschat, the decisive turning point came in 1975 when the Commission applied the '1235' procedure to Chile, a move which 'took away from that resolution its contextual connotation as a tool for combating the evil practice of apartheid'.[127] For Philip Alston, the new path was confirmed with the adoption of resolutions on Nicaragua, Guatemala, and Equatorial Guinea in 1979.[128]

[122] ECOSOC, 'Measures for the Speedy Implementation of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination', Res 1102 (XL) (4 March 1966).

[123] Antje C. Berger, 'Special Rapporteurs of Human Rights Bodies' (2013) *Max Planck Encyclopedia of Public International Law*, para. 5 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[124] ECOSOC, 'Question of the Violation of Human Rights', Res 1235 (XLII) (6 June 1967), paras 2–3.

[125] Theo van Boven, 'United Nations Strategies to Combat Racism and Racial Discrimination' in Monique Christine Castermans-Holleman et al. (eds), *The Role of the Nation-State in the 21st Century* (Kluwer 1998) 251, 256.

[126] Burke, *Evolution of International Human Rights* (n. 115) 83.

[127] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, OUP 2008) 141.

[128] Philip Alston, 'The Commission on Human Rights' in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon 1992) 126, 159 (hereafter, Alston, 'The Commission on Human Rights').

ECOSOC Resolution 1503 (1970), which followed three years after Resolution 1235 (1967), made no mention of exemplar cases. In contrast to the public '1235' process, Resolution 1503 established a private procedure under which a working group of the Sub-Commission could consider, on a confidential basis, communications that appeared to show 'a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission'.[129] The Commission on Human Rights could then decide whether to make a study under the '1235' procedure or establish an ad hoc independent committee with the consent of the target country to report in confidence.[130] Alston reports that between eight and ten Members were subject to review under the '1503' procedure each year.[131]

The '1235' and '1503' procedures made clear that some human rights issues did not fall within the reserved domain of UN Member States, but they drew a clear distinction between the rights in the UDHR and the limited circumstances in which the Organization would intervene, where there was evidence of 'gross and systematic violations'.[132] Nonetheless, as Lori Damrosch points out, the mechanisms 'helped overcome long-running resistance in various quarters to international scrutiny of conduct occurring within States in respect of their own nationals'.[133]

The United Nations now considers country-specific problems under the Special Procedures mechanisms of the Human Rights Council. The Special Procedures all have different instructions and go under different titles, including Special Rapporteur and independent expert. The job of the Special Procedures is to investigate, examine, monitor, advise and report, and make recommendations to the Human Rights Council on the subject of their mandate.[134] There is no real pattern to the Special Procedures, which, as Surya Subedi points out, 'simply grew out of practice, some accidental and some with a degree of determination on the part of developing countries'.[135] As of 20 August 2018, there were eleven country mandates, ranging from Belarus to Syria, along with forty-four thematic mandates, the oldest being the Working Group on Enforced or Involuntary Disappearances (established in 1980) and the newest, the Special Rapporteur on the Elimination

[129] ECOSOC, 'Procedure for Dealing with Communications Relating to Violations of Human Rights', Res 1503 (XLVIII) (27 May 1970), para. 5.

[130] Ibid., paras 6–7. [131] Alston, 'The Commission on Human Rights' (n. 128) 151.

[132] The 1993 UN Vienna Declaration and Programme of Action listed as examples of 'gross and systematic' violations: torture, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, poverty, hunger and other denials of economic, social, and cultural rights, religious intolerance, terrorism, discrimination against women, and lack of the rule of law: Vienna Declaration and Programme of Action, 12 July 1993, UN Doc. A/CONF.157/23, para. 30.

[133] Lori F. Damrosch, 'Gross and Systematic Human Rights Violations' (2011) *Max Planck Encyclopedia of Public International Law*, para. 2 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[134] Miloon Kothari, 'From Commission to the Council: Evolution of UN Charter Bodies' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 587, 607.

[135] Surya Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge 2017) 163.

of Discrimination against Persons Affected by Leprosy and their family members (2017).[136]

Phase 4. The Human Rights Council and 'All Human Rights for All'

The United Nations Commission on Human Rights achieved several successes in its sixty-year history, notably in the drafting of the Universal Declaration of Human Rights and human rights treaties but, by the new millennium, it had fallen into disrepute because of the problem of politicization. Members of the Commission were representatives of Member States and, in that sense, the body was necessarily political. The concern was that decisions were being taken primarily on the basis of political considerations.

For some, politicization referred to the fact that certain countries appeared immune from criticism because of the problem of majority voting or in view of the fact they had been elected to the Commission. For others, politicization concerned 'naming and shaming' through the adoption of country-specific resolutions.[137] The Like-Minded Group, in particular, which includes the Peoples Republic of China and Russian Federation, regarded the singling out of states as an affront to sovereignty and saw the replacement of the Commission as an opportunity for a more co-operative, less confrontation, way of working.[138] The position of the Organization as a whole was that the problem lay in the lack of objective application of standards, with the 2004 report of the High-Level Panel concluding that the Commission on Human Rights 'cannot be credible if it is seen to be maintaining double standards in addressing human rights'.[139] General Assembly Resolution 60/251, which effectively dissolved the Commission, affirmed 'the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization'.[140]

The decline in the reputation of the Commission saw its replacement in 2006 by the Human Rights Council.[141] Olivier de Frouville makes the point that the reason

[136] See 'Special Procedures of the Human Rights Council' www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx, accessed 23 February 2018.

[137] Elvira Domínguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 *Chinese Journal of International Law* 721, 723.

[138] Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109, 132.

[139] High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations 2004), para. 283.

[140] Human Rights Council, UNGA Res 60/251 (15 March 2006) (adopted by 170 votes to 4, 3 abstentions), preamble.

[141] On the background to the establishment of the Human Rights Council, see Paul Gordon Lauren, '"To Preserve and Build on Its Achievements and to Redress Its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council' (2007) 29 *Human Rights Quarterly* 307. On the Human Rights Council generally, see Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015); Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Taylor and Francis 2013); Miloon Kothari, 'From Commission to the Council: Evolution of UN Charter Bodies' in Dinah Shelton (ed.), *The Oxford*

for establishing the Council was the desire to replace the politicized Commission—nothing more: there was no 'clear vision or plan … only a slogan ["human rights council"] that was used to satisfy an urgent political need for reform'.[142]

Member States could have established the Human Rights Council by amending the Charter, requiring the support of two-thirds of the membership, including the positive approval of all permanent members of the Security Council.[143] Instead, the General Assembly simply called on the Economic and Social Council to abolish the Commission on Human Rights (a subsidiary body of ECOSOC) and, in its place, created the Human Rights Council, as a subsidiary body of the Assembly. Resolution 60/251, passed with 170 in favour, 4 against (Israel, Marshall Islands, Palau, United States of America) and 3 abstentions (Belarus, Iran, Venezuela), easily crossing the two-thirds threshold required for important General Assembly resolutions.[144]

The Human Rights Council, a subsidiary body of the UN General Assembly, consists of forty-seven Member States elected by a majority of the General Assembly, with an equitable geographical distribution. In contrast to the Commission, members are formally required to uphold the highest standards in the promotion and protection of human rights during their three-year term of office and must be reviewed under the Universal Periodic Review. The General Assembly may, by a two-thirds majority, suspend the rights of membership of the Council for a country that commits gross and systematic violations of human rights.[145]

The mandate of the Human Rights Council is not limited to situations of gross and systematic violations of rights, although it is instructed to address these cases.[146] Its function is to promote 'universal respect for the protection of all human rights and fundamental freedoms for all'.[147] The notion of 'all human rights for all' was popularized in the 1990s, with UN efforts to promote the ideal culminating, as Jean Philippe Therien and Philippe Joly point out, in the creation of the Human Rights Council in 2006.[148] All human rights include all 'civil, political, economic, social and cultural rights, including the right to development'.[149]

Handbook of International Human Rights Law (OUP 2013) 587; and Bertrand G. Ramcharan, *Law, Policy and Politics of the UN Human Rights Council* (Brill 2015).

[142] Olivier de Frouville, 'Building a Universal System for the Protection of Human Rights: The Way Forward' in M. Cherif Bassiouni and William A. Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia 2011) 241, 264.

[143] Article 108, UN Charter. It is worth recalling that the United States—a permanent Member—voted against the resolution establishing the Human Rights Council.

[144] Article 7(2) of the UN Charter allows for subsidiary organs to be established; Article 22 provides that the General Assembly 'may establish such subsidiary organs as it deems necessary for the performance of its functions'. Under Article 18(2) of the UN Charter, a resolution of the General Assembly establishing a subsidiary body requires the support of two-thirds of Member States, but not the positive support of the five permanent members of the Security Council.

[145] Human Rights Council, UNGA Res 60/251 (15 March 2006), para. 8.

[146] Ibid., para. 3. [147] Ibid., para. 2.

[148] Jean Philippe Therien and Philippe Joly, 'All Human Rights for All: The United Nations and Human Rights in the Post-Cold War Era' (2014) 36 *Human Rights Quarterly* 373, 391.

[149] Human Rights Council, UNGA Res 60/251 (15 March 2006), para. 4.

Universal Periodic Review

Operative paragraph 5(e) of General Assembly Resolution 60/251 tasked the new Human Rights Council to 'Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments'.[150] The key phrase here is 'human rights obligations and commitments', which is not defined in the Resolution. The Human Rights Council decided that the relevant standards, for the purposes of review, would be those contained in (a) the United Nations Charter; (b) the Universal Declaration of Human Rights; (c) the human rights treaties to which a Member State was party; along with (d) any other voluntary pledges and commitments.[151] The important point is that, following the innovation of the Universal Periodic Review (UPR), the Universal Declaration of Human Rights now provides the minimum benchmark against which the human rights performance of states will be judged, or, at least, of all UN Member States.

As a subsidiary body of the General Assembly, the regulatory powers of the UN Human Rights Council depend on a delegation of authority by the General Assembly. The authority of the General Assembly depends in turn on the allocation of responsibilities under the Charter, taking into account any subsequent agreements and subsequent practice.[152] Given that Resolution 60/251 was adopted by majority vote, albeit by a large majority, it does not reflect a 'subsequent agreement' by UN Member States on the human rights commitments that flow from membership in the Organization. However, the fact that those countries that abstained and voted against have participated in the Universal Periodic Review means there is evidence of a subsequent practice reflecting an acceptance of the right of the Human Rights Council to evaluate the human rights performance of all UN Members. The adoption of General Assembly Resolution 60/251, along with the subsequent practice of Universal Periodic Review, expanded the authority of the General Assembly under the Charter, allowing for compulsory review of the performance of all Member States against the range of human rights in the Universal Declaration.

Whilst all Member States have, in fact, participated in the Universal Periodic Review, it is important to be clear this is not a voluntary process. Resolution 60/251 was adopted by a large majority and those few states that abstained or voted against have subsequently participated, both as states under review and members of the Council. Indeed, when Israel, which had voted against the establishment of the Human Rights Council, failed to participate, the Council adopted a critical resolution,[153] and the country then participated in the next session. In June 2018,

[150] Ibid., para. 5(e).

[151] Human Rights Council, 'Institution-building of the United Nations Human Rights Council', Res 5/1 (18 June 2007) (adopted without a vote), para. 1.

[152] Article 31(3), Vienna Convention on the Law of Treaties.

[153] See Decision adopted by the Human Rights Council at its seventh organizational meeting, 'Non-cooperation of a State Under Review with the Universal Periodic Review Mechanism', UN Doc. A/HRC/OM/7/1, 4 April 2013.

the United States announced its departure from the Human Rights Council.[154] Because the process of Universal Periodic Review is applied to all UN Member States, the Human Rights Council has the right, nonetheless, to review the United States during the third cycle of reviews (ending in 2021).

During the negotiations leading to the establishment of the Human Rights Council, the expression peer review was widely used. Resolution 60/251 does not refer to peer review, but periodic review, although the terms are understood to be synonymous. The objective of Universal Periodic Review is to promote and deepen respect for human rights by providing feedback to Member States, by Member States, on their human rights performance. All UN Members are subject to review, and all Members can participate in the process. The intention being that the Universal Periodic Review would lead to a less politicized approach and a focus on the facts of the situation, although there is evidence that politicization remains a problem.[155]

The Universal Periodic Review is based on three sources: information provided by the state under review; material supplied by the Office of the High Commissioner for Human Rights (OHCHR) on the data contained in the reports of treaty bodies, Special Procedures, and other United Nations documents; and reports from stakeholders, such as national human rights institutions and non-governmental organizations, also collated by the OHCHR. The review is led by a group of three countries on the Human Rights Council, known as the troika, who serve as rapporteurs. Following consideration by the UPR Working Group, which consists of all forty-seven members of the Council, although any UN Member State can take part, an outcome report is prepared by the troika, with the involvement of the state under review and assistance from the OHCHR. The outcome report consists of a summary of the proceedings and any recommendations for action made by the other Member States.

A state under review may either accept a recommendation, with a view to implementation, or note a recommendation.[156] The possibility of rejection was not provided for, although, as Roland Chauville notes, countries have sometimes responded by not accepting or rejecting recommendations,[157] often in relation to calls for reform in controversial areas, such as the use of the death penalty, the treatment of minorities, or the activities of the UN Special Procedures. The large majority of recommendations, between one-half and two-thirds, are accepted by states under

[154] Mike Pompeo, Secretary of State, and Nikki Haley, US Permanent Representative to the United Nations, 'Remarks on the UN Human Rights Council', 19 June 2018 https://www.state.gov/secretary/remarks/2018/06/283341.htm, accessed 20 August 2018. For commentary, see Sarah Joseph, 'As the US leaves the UN Human Rights Council, it may leave more damage in its wake', The Conversation, 20 June 2018 https://theconversation.com/as-the-us-leaves-the-un-human-rights-council-it-may-leave-more-damage-in-its-wake-98618, accessed 20 August 2018.

[155] Rosa Freedman and Ruth Houghton, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17 *Human Rights Law Review* 753.

[156] Human Rights Council, 'Institution-building of the United Nations Human Rights Council', Res 5/1 (18 June 2007) (adopted without a vote), para. 32.

[157] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 87, 101.

review. The political scientists Edward McMahon and Marta Ascherio identify three reasons for this: a state might accept that a recommendation reflects a valid criticism of its human rights performance, the recommendation might not be controversial, or the state under review might be concerned about the 'visuals' of not accepting large numbers of recommendations.[158] In terms of actual implementation, Karolina Milewicz and Robert Goodin make the point that countries often implement recommendations in the run-up to their next Universal Periodic Review,[159] suggesting the process might, in fact, be an effective mechanism for the promotion of human rights.

Conclusion

The objective of this chapter was to explain the emergence and evolution of the body of United Nations human rights law. By looking to complexity theory, it showed how a regulatory system could emerge from the interactions of UN Member State and then in turn bind those same Members. This is explained in international law doctrine by the role of subsequent practice in the interpretation of the powers of the Organization under its constituent instrument. The UN system developed within the state space, or room for manoeuvre, created by the Charter, evolving with changes in the behaviours of the UN bodies, primarily the Economic and Social Council and the Commission on Human Rights, and the General Assembly and Human Rights Council, which, in turn, depended on the attitudes of the Member States to human rights problems.

After an initial flourish of activity in the very early years, culminating in the adoption of the Universal Declaration of Human Rights in 1948, the UN human rights system fell into desuetude. Complexity tells us that in the absence of some new information, complex system like the United Nations will not change. Two factors influenced the evolution in the Organization's approach to human rights in the 1960s: its expansion to include the newly independent African countries and the reaction to the event of the Sharpeville Massacre of 21 March 1960, with the UN explaining its interest by reference to the prohibition of systematic racial discrimination. Whilst the apartheid State was the initial focus, none of the measures were framed in such a way as to exclude the possibility of the precedent being applied more generally and the United Nations' concern about gross and systematic violations was extended to other countries, especially Chile, following the 1973 military *coup d'état* that brought Augusto Pinochet to power.

After Sharpeville, the United Nations adopted a series of measures that confirmed the two cardinal features of international human rights law: human rights norms are

[158] Edward McMahon and Marta Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 *Global Governance* 231, 239.

[159] Karolina M. Milewicz and Robert E. Goodin, 'Deliberative Capacity Building through International Organizations: The Case of the Universal Periodic Review of Human Rights' (2018) 48(2) *British Journal of Political Science* 513, 527.

binding on states; and the international community has the right to monitor and review the performance of countries against those standards. With the establishment of the Human Rights Council and introduction of the Universal Periodic Review both elements were combined: all UN Member States would be held accountable for their human rights performance against all the standards in the Universal Declaration of Human Rights. This was not part of any grand plan. The lack of credibility in the work of the Commission on Human Rights had led to agreement that a new institution was required, but there was little debate on whether and how the Organization should monitor and supervise human rights, or the standards against which states would be judged. Without meaningful discussion, UN Member States agreed they would be held to account against the standards in the Universal Declaration, in other words, they took the moral force and binding nature of the Declaration for granted and proceeded to introduce a mechanism of peer review with the utopian aim of moving towards the guarantee of 'all human rights for all'.

4

The Core UN Human Rights Treaty Systems

The previous chapter showed how the United Nations' approach to human rights changed in the aftermath of the 1960 Sharpeville Massacre. Along with procedures targeting gross and systematic violations, the Organization adopted the first global human rights treaty—the 1965 Convention on the Elimination of Racial Discrimination, quickly followed by the International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights in 1966, introduced to give effect to the rights in the Universal Declaration of Human Rights. No other UN human rights treaty was concluded until the Convention on the Elimination of Discrimination Against Women in 1979, which was followed by the Convention Against Torture in 1984, the Convention on the Rights of the Child in 1989, Convention on the Rights of Migrant Workers in 1990, Convention on the Rights of Persons with Disabilities in 2006, and Convention for the Protection from Enforced Disappearance, also in 2006. There was no grand plan behind the design of the UN human rights treaty system. The Race Convention was simply taken as a precedent for the other treaties, with the result that the basic structure of the core human rights treaties is the same. Each outlines the obligations of states parties, establishing correlative convention rights for individuals,[1] and creating a bespoke monitoring body to review compliance.[2]

Again, we will be looking to the insights from complexity theory to model and make sense of the United Nations human rights treaty systems. The approach obviously requires some explanation given that complex systems are self-organizing, whilst the human rights treaties were adopted by the UN General Assembly. There are three points to note, however. First, human rights treaties are emergent in the sense of being agreed following diplomatic negotiations, bargaining, and compromises. Second, the opposability of a treaty depends on the actions of countries in signing and ratifying the convention, and the response of other states parties to any reservations. Finally, the text does not speak for itself: the structure and meaning of a human rights treaty emerges through the interactions of states parties, along with

[1] Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3(1) *Journal of International Dispute Settlement* 7, 28 ('obligations flowing from human rights treaties . . . create correlative rights . . . for individuals').

[2] Earlier United Nations human rights instruments had not included a bespoke monitoring mechanism. See Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; also, Convention on the Political Rights of Women (adopted 31 March 1953, entered into force 7 July 1954) 193 UNTS 135.

their reactions to the pronouncements of the treaty body, within the interpretative framework provided by international law.

This chapter first details the core United Nations human rights treaties, before explaining the regime on opposability and denunciation, which tells us which countries are bound by what treaties. It then considers the scheme on reservations to explain the scope of a state party's obligations, noting the way this differs from general international law. The work then turns to the problem of establishing the meaning of convention rights, examining the Vienna Convention rules on interpretation, before considering the distinctive *pro homine* ('in favour of the individual') approach thought to be more appropriate in the case of human rights treaties, and which first emerged in *Golder v. United Kingdom* (1975) to the consternation of the general international lawyers sitting on the European Court of Human Rights at the time. Whilst the text of the treaty will always provide the starting point for discussion on the obligations of the states parties, complexity theory helps to illuminate the ways treaties can evolve with alterations in the behaviours of the parties, including their reactions to the pronouncements of the supervisory body, or by a change in the ordinary meaning of terms in line with technical and scientific developments, variations in societal understandings, and wider modifications in regulatory approaches outside of the treaty system.

The Core UN Human Rights Treaties

The term 'human rights' was given legal significance in 1945 when it was included in the Charter of the United Nations; its meaning was explained by the General Assembly with the adoption of the Universal Declaration of Human Rights in 1948. Attempts to transform the Declaration into a binding legal code were, though, immediately bogged down in Cold War disputes,[3] and the logjam was only broken after the Sharpeville Massacre of 21 March 1960, when the Organization moved to adopt a declaration and then, in 1965, a Convention on the Elimination of All Forms of Racial Discrimination (ICERD):[4] the first global human rights treaty. As Patrick Thornberry explains, the Convention 'was drawn up under the shadow of apartheid . . . and provide[d] part of the normative weaponry to struggle against it'.[5]

[3] Jochen Von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 *European Journal of International Law* 903, 910.

[4] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD), preamble: 'Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid.'

[5] Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester UP 2002) 202. The point is made clear in Article 3, ICERD, which provides that 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit, and eradicate all practices of this nature in territories under their jurisdiction'. On 30 November 1973, the United Nations adopted the Convention on the Suppression and Punishment of the Crime of Apartheid, UNGA Res 3068 (XXVIII), which established that 'apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid . . . are crimes violating the principles of international law' (Article I(1)).

Agreement on the Race Convention did not change the normative content of human rights, as it reaffirmed the commitment of the international community to the related principles of equality and non-discrimination. Its significance lay in the establishment of a Committee to monitor the performance of states, by evaluating complaints from individual victims,[6] and introducing a system of compulsory review of the measures taken to give effect to the treaty provisions.[7] This model, of setting out the obligations of states and establishing a bespoke supervisory body, was then applied to the other UN human rights treaties, a point explained by the notion of path dependence—having established a template for a global human rights treaty, it was simply easier to replicate this, rather than introduce a reformed structure,[8] or follow suggestions for a World Court of Human Rights.[9]

There are nine core human rights treaties identified by the Office of the United Nations High Commissioner for Human Rights and they have been accepted by the overwhelming majority of states. Five deal with a range of issues: the International Covenant on Economic, Social and Cultural Rights (169 parties, as of 20 August 2018),[10] International Covenant on Civil and Political Rights (172 parties),[11] Convention on the Rights of the Child (196 parties),[12] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (52 parties),[13] and the Convention on the Rights of Persons with Disabilities (177 states).[14] The remaining four focus on a specific problem: the International Convention on the Elimination of All Forms of Racial Discrimination (179 parties),[15] Convention on the Elimination of All Forms of Discrimination Against Women (189 parties),[16] Convention Against Torture and Other Cruel, Inhuman

[6] ICERD, Article 14. The Convention also allows the possibility of complaints from other states parties: Article 11.

[7] Article 9(1).

[8] On the problems with the existing structure, see Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, June 2012 www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf, accessed 13 February 2018.

[9] See Julia Kozma, Manfred Nowak, and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010); Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 *Human Rights Law Review* 251; and Jesse Kirkpatrick, 'A Modest Proposal: A Global Court of Human Rights' (2014) 13 *Journal of Human Rights* 230. For a contra view, see Philip Alston, 'Against a World Court for Human Rights' (2014) 28 *Ethics and International Affairs* 197.

[10] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[11] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[12] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[13] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICMW).

[14] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

[15] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

[16] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

or Degrading Treatment or Punishment (163 parties),[17] and the International Convention for the Protection of All Persons from Enforced Disappearance (58 parties).[18]

The Human Rights Treaty Systems

When the texts of the UN human rights treaties were adopted by the General Assembly, there were no 'treaty systems'. The notion of a system implies the presence of multiple elements, and in the case of complex systems, an entity that can evolve over time as the component agents respond to new information. In the case of the core human rights treaties, the system is a result of the relationships between the states parties and the text of the convention, and their interactions with each other, and with the supervisory body. There are, then, four points of focus when mapping the treaty system: the text, the state party, the other states parties, and the treaty body. The text establishes the state's commitments, subject to any evolution in meaning. States accept the authority of the treaty system by way of signature and ratification, or equivalent procedure. The opposability of the treaty requires consideration of the conditions under which a state's consent to be bound can be expressed, and the circumstances under which a country can repudiate its obligations; the question of the binding force of an individual provision depends on the presence of any valid reservations. The issues are examined in turn.

Opposability and denunciation

Once adopted and open for signature, a human rights treaty comes into force when the required number of parties has ratified the convention. This can be a short or a long process. The Convention on the Rights of the Child came into force in under a year; the Migrant Workers Convention took over twelve years. Once in force, the treaty is binding on the parties and must be performed in good faith—the international law principle *pacta sunt servanda*. States are only subject to the authority of a treaty when they accept its obligations. The convention rights of individuals derive then, as Alain Pellet points out, 'from the state's consent to be bound by such instruments',[19] and they can therefore differ from country to country, depending on whether a state has signed and ratified the relevant conventions.

Treaty obligations continue to bind the states parties until one of two things happen: either the convention comes to an end by way of termination or other process, or an individual country denounces the treaty and withdraws, leaving the treaty

[17] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

[18] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).

[19] Alain Pellet, 'Reservations to Treaties and the Integrity of Human Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Handbook of International Human Rights Law* (Routledge 2013) 323, 325 (hereafter Pellet, 'Reservations').

regime in place. Where denunciation is provided for, a state party has the right to withdraw in accordance with the conditions and procedures laid out in the treaty. In the cases of the Convention on the Elimination of Racial Discrimination,[20] Convention on the Rights of the Child,[21] and Convention Against Torture,[22] states parties can denounce by writing to the UN Secretary General. Where the treaty does not contain a clause, it is not subject to denunciation or withdrawal, unless it can be established that the parties intended to admit such a possibility or the right is implied by the nature of the convention.[23]

The Human Rights Committee, established under the International Covenant on Civil and Political Rights, has declared that the absence of a withdrawal clause in the ICCPR is not to be regarded as an oversight, concluding that states parties cannot denounce or withdraw from the Covenant. The Committee adopted this position following the purported denunciation by the Democratic People's Republic of Korea in August 1997.[24] When North Korea submitted its overdue second periodic report in 2000, the Committee welcomed 'the opportunity to resume the dialogue with the State party'.[25] The Human Rights Committee explains its position on the impossibility of denunciation or withdrawal in the language of the acquired human rights doctrine.[26] Once a country accedes to the ICCPR, individuals acquire, in the words of Thomas Buergenthal, a former member of the Committee, 'an independent or vested right—independent of the state—to the protection of the guarantees and measures of implementation set out in the Covenant'.[27] Recognized convention rights remain unaffected, then, by a change in the government or government policy, or in the status of the territory, including by way of transfer to another country, or the emergence of a newly independent state,[28] or the dissolution of the state.[29] The same approach to denunciation or withdrawal has been followed by the other UN human rights treaty bodies where the Convention does not contain a specific provision.[30]

[20] Article 21, ICERD. [21] Article 52, CRC. [22] Article 31, CAT.

[23] Article 56(1), Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[24] See, generally, Elizabeth Evatt, 'Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence' (1999) 5(1) *Australian Journal of Human Rights* 215; also, Hans Klingenberg, 'Elements of Nordic Practice 1998: Denmark' (1999) 68 *Nordic Journal of International Law* 163.

[25] Human Rights Committee, Concluding Observations, DPRK UN Doc. CCPR/CO/72/PRK, 27 August 2001, para. 2.

[26] Human Rights Committee, General Comment No. 26, 'Continuity of Obligations', UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4.

[27] Thomas Buergenthal, 'The UN Human Rights Committee' in J.A. Frowein and R. Wolfrum (eds), 5 *Max Planck Yearbook of United Nations Law* (2001) 341, 361 (hereafter Buergenthal, 'The UN Human Rights Committee' (n. 27)).

[28] Menno T. Kamminga, 'Impact on State Succession in Respect of Treaties' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 99, 109.

[29] Rosalyn Higgins, 'Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting' (1996) 6 *European Human Rights Law Review* 570, 579 (hereafter Higgins, 'Ten Years').

[30] Fausto Pocar, 'Some Remarks on the Continuity of Human Rights and International Humanitarian Law Treaties' in Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 279, 284.

Reservation to human rights treaties

The next issue when considering the authority of a treaty is the existence of any valid reservations reducing the obligations of the reserving state.[31] In the practice of human rights, concerns have been raised around the willingness of countries to enter reservations to essential clauses; reservations that suggest the priority of domestic law or religious norms over the plain meaning of convention rights; and reservations that look to reduce the role of the supervisory bodies. As Elizabeth Lijnzaad points out: 'The impression is that many States, when ratifying, at the same time ruin the treaty [by turning] a human rights instrument into a moth-eaten guarantee.'[32]

The Vienna Convention on the Law of Treaties outlines three types of reservation. Permitted reservations are those specifically allowed by the treaty. Here, a state may enter a reservation, if it so chooses, and become a party with the benefit of the reservation. Nothing more is required.[33] Possible reservations are allowed provided at least one existing state party accepts the reservation,[34] and silence is deemed to be acceptance.[35] Where an existing party accepts a proposed reservation, the treaty enters into force between the two states, with the exception of the reserved provision. The same is the case where a party objects to the reservation, but not to the convention coming into force between the two states.[36] Where a state party objects to the treaty coming into force between it and the reserving state, there are no treaty relations between the two.[37] Finally, certain reservations are not permitted because of the express or implied terms of the convention,[38] or because they are incompatible with its object and purpose.[39]

There is no question of recognizing the effectiveness of reservations expressly or impliedly prohibited by the treaty, as the collective will of the contracting parties has established that these are not acceptable.

The position on reservations incompatible with the object and purpose is less clear because the 'object and purpose' of a human rights treaty can be difficult to identify in practice and it is not evident which actors are empowered to decide on the compatibility of reservations. For members of the Opposability School, everything depends (as with the regime on possible reservations) on the reactions of the other states parties, who are free to accept or reject any reservation; for members of the Permissibility School, the status of a reservation must be resolved by reference to the text, taking into account the pronouncements of the supervisory bodies.

[31] Article 2(1)(d), Vienna Convention on the Law of Treaties (VCLT).

[32] Elizabeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff 1995) 3.

[33] Article 20(1), VCLT. One example is Article 28, Convention Against Torture, which allows states parties to enter a reservation to the right of the Committee to investigate allegations of torture.

[34] Article 20(4), VCLT. The Second Optional Protocol to the Covenant on Civil and Political Rights on the abolition of the death penalty, for example, prohibits reservations, with one exception: for a most serious crime of a military nature committed during wartime: Article 2, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

[35] Article 20(5), VCLT. [36] Article 21(1) and (3), VCLT.

[37] Yearbook of the International Law Commission (1966), vol. II, p. 209 [1].

[38] Articles 19(a) and (b), VCLT. [39] Article 19(c), VCLT.

Five of the core UN treaties expressly allow for reservations, except where incompatible with the object and purpose.[40] The others do not contain a reservations clause, but the practice has been to accept reservations, provided they are not contrary to the object and purpose.[41] In other words, reservations to the core UN human rights treaties are possible, provided they are not contrary to the object and purpose.

The Convention on the Elimination of Racial Discrimination is the only one of the treaties to establish a concrete test for determining whether a reservation is compatible; in this case, a reservation is incompatible with the object and purpose 'if at least two thirds of the States Parties … object to it'.[42] There have been a large number of reservations to the Convention and a significant number of objections, although none has reached the two-thirds threshold.[43] This fact has not prevented the Committee on Racial Discrimination from 'taking a position on reservations',[44] and concluding that several are incompatible with the object and purpose of the Race Convention.[45]

The practice of the treaty bodies dealing with specific issues, the Committee on the Elimination of Racial Discrimination, Committee on Discrimination Against Women, Committee Against Torture, and Committee Against Enforced Disappearance, has been to conclude that reservations to provisions relating to the primary objective of the treaty, that is, ending discrimination on grounds of race, discrimination against women, torture, and the practice of enforced disappearance are incompatible with the object and purpose of the relevant Convention.

The Committee on Discrimination Against Women has, for example, made the point that the object and purpose of the Women's Convention 'is to end discrimination against women and to achieve de jure and de facto equality for them'. Consequently, any reservations to Article 2 (the requirement to introduce measures

[40] Article 51(2), Convention on the Rights of the Child; Article 91(2), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 46(1), Convention on the Rights of Persons with Disabilities; Article 28 (2), Convention on the Elimination of All Forms of Discrimination Against Women; and Article 20(2), International Convention on the Elimination of All Forms of Racial Discrimination.

[41] See, for example, Human Rights Committee, General Comment No. 24, 'Reservations', U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 7 (ICCPR) (hereafter HRC, General Comment No. 24, 'Reservations'); Convention Against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, UN Doc. CAT/C/USA/CO/3-5, 19 December 2014, para. 9 ('under international law, reservations that are contrary to the object and purpose of a treaty are not permissible').

[42] Article 20(2), International Convention on the Elimination of All Forms of Racial Discrimination.

[43] The International Court of Justice, which has interpretative authority under Article 22, ICERD, has confirmed the two-thirds test: *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility [2006] ICJ Rep 6, para. 77 (hereafter, *Armed Activities*).

[44] Human Rights Treaty Bodies, Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2007/5, 9 February 2007, para. 6.

[45] See, for example, Concluding observations of the Committee on the Elimination of Racial Discrimination (Yemen), UN Doc. CERD/C/YEM/CO/17-18, 4 April 2011, para. 13; also, Concluding observations of the Committee on the Elimination of Racial Discrimination (Saudi Arabia), UN Doc. CERD/C/62/CO/8, 2 June 2003, para. 9.

to eliminate discrimination) or Article 16 (prohibition on discrimination against women in marriage and family relations) will be considered contrary to its object and purpose, as they 'perpetuate the myth of women's inferiority'.[46] Reservations to provisions that support the primary objective are also regarded as incompatible and the Committee Against Torture has, on this basis, decided that any reservation to Article 14 (right to redress and fair and adequate compensation) would be incompatible with the object and purpose of the Convention Against Torture and, as a consequence, called on New Zealand to withdraw its reservation to the provision, notwithstanding the fact no other country objected.[47]

In relation to the general treaties, dealing with a range of issues, the practice of the supervisory bodies has been to conclude that some convention rights are more fundamental than others. The Human Rights Committee has, for example, determined that reservations to 'provisions in the Covenant that represent customary international law' are not permitted because they are incompatible with the object and purpose of the ICCPR,[48] although the Committee's list of customary rights is longer than that of most commentators;[49] it also includes convention rights that have been the subject of reservations, including the prohibitions on the execution of children and advocacy of racial hatred. The treaty body also takes the view that a state party cannot exclude the obligation to 'present a report and have it considered by the Committee'.[50]

In terms of specifying the actor with the responsibility for determining the compatibility of reservations, the position of the Human Rights Committee is that, whilst objections by states parties may provide some guidance, it has the final say

[46] Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and Nineteenth sessions), GAOR, Fifty-third session, Supplement No. 38 (A/53/38/Rev.1) (1998), p. 47, paras 10 and 15.

[47] Committee Against Torture, Concluding observations on the sixth periodic report of New Zealand, UN Doc. CAT/C/NZL/CO/6, 2 June 2015, para. 20.

[48] HRC, General Comment No. 24, 'Reservations' (n. 41), paras 7 and 8.

[49] Ibid., para. 8: 'a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.' (See Chapter 5 on customary human rights law.)

[50] Ibid., para. 11. Pakistan entered a reservation to this requirement when it ratified the ICCPR, but withdrew it when other states parties objected that the reservation was contrary to the object and purpose of the Convention. The position of the Human Rights Committee is not shared by the International Law Commission: Guideline 3.1.5.7, 'Guide to Practice on Reservations to Treaties', Report of the International Law Commission, GAOR UN Doc. A/66/10, p. 12 (hereafter, ILC, 'Guide to Practice on Reservations to Treaties'). The International Law Commission looked for support for its position to *Armed Activities*, where the International Court of Justice concluded that a reservation to its own supervisory jurisdiction in relation to the Genocide Convention would be permissible to the extent that the reservation was not 'incompatible with the object and purpose of the Convention': *Armed Activities* (n. 43), para. 66. In many respects the judgment adds nothing to the established doctrine. The question remains whether reservations to the core supervisory functions of human rights bodies are contrary to the object and purpose of the Convention. See, on this point, *Armed Activities* (n. 43), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, para. 21.

on the matter.[51] The General Comment making this claim was met with substantial criticism from certain states parties on the ground it did not reflect general international law. The International Law Commission has largely followed the position of the dissenting states to conclude that, as treaty bodies do not enjoy interpretative authoritative, they cannot formally assess the validity of reservations.[52]

Consideration of reservations under the core United Nations human rights treaties involves the application of an abstract, albeit substantive, test (the 'object and purpose' test),[53] by a supervisory body that does not enjoy interpretive authority, that is the right to have the final say on the meaning of treaty provisions,[54] leading to a lack of clarity on the position of states parties with, what the supervisory body considers to be, an invalid reservation. The problem with this blurriness in the practice of reservations is that general international law holds that a state *cannot* become a party to a treaty *with* the benefit of a reservation incompatible with the object and purpose: either the reservation prevents the state from becoming a party (the view of the International Court of Justice),[55] or the reservation is severable, in that it can be ignored (the position of the Human Rights Committee).[56] It all depends, in the view of the International Law Commission, on the attitude of the reserving state to the importance of the reservation.[57]

The practice of the human rights bodies shows a different approach, however. A country with, what the treaty body regards as, an impermissible reservation is treated *as a party* to the convention, *with* the benefit of the reservation. This position is adopted by the Committee on Discrimination Against Women,[58] the Committee on the Rights of the Child,[59] the Committee on Economic, Social and Cultural Rights,[60] and Committee on the Elimination of All Forms of Racial Discrimination,[61] and there are no cases where a supervisory body has concluded

[51] Human Rights Committee, General Comment on Reservations (n. 41), para. 18.

[52] Guideline 3.2.4, ILC, 'Guide to Practice on Reservations to Treaties' (n. 50). Reserving states simply have to 'give consideration to that body's assessment of the permissibility of the reservations' (Guideline 3.2.3).

[53] *Reservations to the Convention on Genocide*, Advisory Opinion [1951] ICJ Rep 15, 26–7 (hereafter, *Reservations* case).

[54] See, on this point, *Armed Activities* (n. 43), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, paras 15 and 16.

[55] *Reservations* case (n. 53) 29. (Where a state party determines that a reservation is not compatible with the object and purpose of the treaty, 'it can in fact consider that the reserving State is not a party to the Convention'.)

[56] Human Rights Committee, General Comment on Reservations (n. 41), para. 18.

[57] Commentary on Guideline 4.5.3, ILC, 'Guide to Practice on Reservations to Treaties' (n. 50). The Guidelines establish a presumption that, unless the contrary position is established, a state should be considered a party to the treaty without the benefit of the reservation: Guideline 4.5.3 (2)–(3). See, Pellet, 'Reservations' (n. 19) 329–30.

[58] Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and Nineteenth sessions), GAOR, Fifty-third session, Supplement No. 38 (A/53/38/Rev.1) (1998), p. 47, para. 24.

[59] Committee on the Rights of the Child, General Comment No. 5 (2003), 'General Measures of Implementation', UN Doc. CRC/GC/2003/5, 27 November 2003, para. 15.

[60] See, for example, Committee on Economic, Social and Cultural Rights, Concluding Observations on Initial Report of Kuwait, UN Doc. E/C.12/1/Add.98 7 June 2004, para. 28.

[61] See, for example, Concluding observations of the Committee on the Elimination of Racial Discrimination (Yemen), UN Doc. CERD/C/YEM/CO/17-18, 4 April 2011, para. 13.

that a state with a reservation incompatible with the object and purpose is not a party, by, for example, refusing to examine a state report.

The work of the Human Rights Committee is illustrative here. Recall the Committee's position is that a reservation that offends a customary norm is incompatible with the object and purpose and will generally be severable, with the country treated as a party to the ICCPR, but without the benefit of the reservation. In relation to Australia's reservation to Article 20 (prohibition on hate speech), however, which the Committee regards as a customary norm (as with all the examples here),[62] the Human Rights Committee simply called on the state to 'consider withdrawing its reservation';[63] on France's to Article 27 (rights of minorities), it requested the state 'reconsider its … reservation';[64] and with Maldives' reservation to Article 18 (freedom of thought, conscience, and religion), the Committee argued that the state 'should withdraw its reservation'.[65] The formulations are noteworthy, as the position of the Committee is that these reservations are ineffective, as they are incompatible with the object and purpose, so withdrawal would be of symbolic value only.

The consistent practice of the supervisory bodies, where they determine that a reservation is contrary to the object and purpose of the human rights treaty, is to request that the state withdraw the impugned reservation. Take the example of Kuwait. The Committee on Discrimination Against Women concluded that a reservation which limited the right to stand and vote in elections to men was contrary to the object and purpose, and 'encourage[d] the State party to expedite the necessary steps for the withdrawal of its reservation … which it believe[d] to be contrary to the object and purpose of the Convention'.[66] (The Government of Kuwait withdrew the reservation in December 2005.) The Committee on Economic, Social and Cultural Rights expressed its concern about reservations on the right to strike and limiting the right to social security to Kuwaitis, and called on the country 'to consider withdrawing its reservations … which are incompatible with the object and purpose of the Covenant'.[67] When signing the Convention on the Rights of the Child, Kuwait expressed 'reservations on all provisions of the Convention that are incompatible with the laws of Islamic Shari'a and the local statutes in effect'. The Committee

[62] See n. 49.

[63] Human Rights Committee, Concluding Observations (Australia), UN Doc. CCPR/C/AUS/CO/5, 7 May 2009, paras 9 and 26.

[64] Concluding observations on the fifth periodic report of France, UN Doc. CCPR/C/FRA/CO/5, 17 August 2015, para. 5. The Committee has also upheld the reservation in an individual opinion: C. L. D. v. France, Communication No. 439/1990, U.N. Doc. CCPR/C/43/D/439/1990 (1991), para. 4.3.

[65] Human Rights Committee, Concluding Observations (Maldives), UN Doc. CCPR/C/MDV/CO/1, 31 August 2012, para. 5.

[66] Report of the Committee on the Elimination of Discrimination against Women, Concluding Observations on Combined initial and second periodic report by Kuwait, UN Doc. A/59/38 (Part I), 18 March 2004, para. 61.

[67] Committee on Economic, Social and Cultural Rights, also, Concluding observations on the second periodic report of Kuwait, UN Doc. E/C.12/KWT/CO/2, 19 December 2013, para. 6; see, also, Concluding observations on initial report of Kuwait, UN Doc. E/C.12/1/Add.98 7 June 2004, para. 28 ('The Committee encourages the State party to consider withdrawing reservations and declarations entered upon the ratification of the Covenant in the light of the fact that they negate the core purposes and objectives of the Covenant').

on the Rights of the Child 'urge[d] the State party to review [this] general reservation … with a view to withdrawing [it]', on the ground that it 'jeopardize[d] the implementation of all provisions of the Convention'.[68] In all cases, the supervisory body declared that the reservation was contrary to the object and purpose of the relevant convention, and called on the state to withdraw the reservation, but the decision on withdrawal was framed as one for the country concerned.

This is not, though, the end of the matter. The treaty bodies have developed a practice whereby they require the party to reflect on the reasons and justifications for any reservation and encourage the State Party to withdraw them with a view to coming into full compliance with the convention.[69] The reserving state is not required to withdraw the reservation, but it must reflect in good faith on the objections of the other states parties and the supervisory body, with a view to modifying or withdrawing any impugned reservation.[70]

A reserving state, *acting in good faith*, must believe its reservation is compatible with the object and purpose of the convention, otherwise it would not seek to introduce an impermissible reservation—the same presumption does not apply to bad faith reservations. Where other states parties disagree, the reservation has a questionable status as a matter of international law and there is no way for the issue to be resolved objectively given the absence of a Human Rights Court with the final say on the matter. As the International Court of Justice noted in *Reservations to the Convention on Genocide*, different states parties can come to different conclusions as to whether a reservation is compatible with the object and purpose of the

[68] Committee on the Rights of the Child, Concluding observations on the second periodic report of Kuwait, UN Doc. CRC/C/KWT/CO/2, 29 October 2013, para. 8.

[69] The general practice is reflected in the Harmonized Guidelines on Reporting under the International Human Rights Treaties, which establish that states parties should report on the nature and scope of any reservations to the core UN human rights treaties and to explain 'why such reservations were considered to be necessary and have been maintained': UN Secretary-General, 'Harmonized Guidelines on Reporting under the International Human Rights Treaties, Including Guidelines on a Core Document and Treaty-Specific Documents', UN Doc. HRI/GEN/2/Rev.6, 3 June 2009, para. 40(b). The Human Rights Treaty Bodies Working Group on Reservations has recommended that treaty bodies, in their concluding observations, express concern for the maintenance of reservations and encourage the complete withdrawal of reservations: Human Rights Treaty Bodies, Report of the Meeting of the Working Group on Reservations, UN Doc. HRI/MC/2007/5, 9 February 2007, para. 9.

[70] The Committee on the Elimination of Discrimination Against Women, for example, requires that states parties explain the reason for any reservation and 'keep the necessity for such reservations under close review and in their reports include a timetable for their removal': General Recommendation No. 23 (Sixteenth session, 1997), Article 7 (political and public life), para. 44. The position of the Committee on the Elimination of All Forms of Racial Discrimination is that states parties are required to provide a justification for the maintenance of any reservations and to report on any plans to limit or withdraw the reservation: Committee on the Elimination of Racial Discrimination, General recommendation No. 32, 'The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination', UN Doc. CERD/C/GC/32 24 September 2009, para. 38; also, General recommendation No. 35, 'Combating racist hate speech', UN Doc. CERD/C/GC/35, 26 September 2013, para. 23. The consistent practice of the Committee on the Rights of the Child is to recommend that states parties review and withdraw any reservations to the Convention. Where a state party decides to maintain a reservation, 'the Committee requests that a full explanation be included in the next periodic report': Committee on the Rights of the Child, General Comment No. 5 (2003), 'General measures of implementation of the Convention on the Rights of the Child', UN Doc. CRC/GC/2003/5, 27 November 2003, para. 13.

convention, or not.[71] The only, highly unlikely, possibility is that all the other states parties object to a reservation *and* to the treaty coming into force in relation to the reserving state; then the reserving state cannot become party to the convention.

The human rights treaty bodies have the right, and indeed the responsibility, under the conventions to express an opinion on the status of any reservation, but they do not enjoy interpretative authority. We cannot then apply a process of deductive reasoning to conclude that where a supervisory body says a reservation is incompatible with the object and purpose, it is, as a matter of law, an invalid reservation that can be ignored or which calls into question the participation of the reserving state in the treaty. The lack of formal delegation of interpretive authority to the treaty bodies means that we must look to the subsequent practice under the treaty system to establish whether the parties have allocated the right to have the final say on the validity of reservations to the treaty body or that they agree with the conclusions of the treaty body as to the compatibility of certain kinds of reservations. Thus, when the Human Rights Committee said that it has the final say on 'whether a specific reservation is compatible with the object and purpose of the [ICCPR]',[72] and that a state 'may not reserve the right not to present a report and have it considered by the Committee',[73] it is possible for either (or both) declarations to be an accurate statement of the law, depending on the reaction of the states parties.

Where the states parties accept the position of the treaty body on the compatibility of a certain type of reservation with the object and purpose of the convention, this establishes a definitive rule under the treaty system by way of subsequent agreement and subsequent practice (see below). Where there is not sufficient evidence to demonstrate a consensus between the treaty body and the states parties on the validity of a particular type of reservation, the pronouncements of the treaty bodies still contribute to our understanding of the treaty system by way of a supplementary means of interpretation (Article 32, Vienna Convention on the Law of Treaties). The more evidence we have from the reactions of states parties and the pronouncements of the supervisory body that a reservation is not acceptable, the more likely we are to conclude it is, as a juridical fact, incompatible with the object and purpose (this is a variant of the Bayesian hypothesis discussed in the Introduction).[74] But we cannot be certain, and the determination of the incompatibility of a reservation with the object and purpose of a human rights treaty is ultimately a question of subjective professional judgment taking into account the convention provisions and subsequent practice under the treaty system.

This lack of clarity in the status of impugned reservations can explain the reluctance of the supervisory bodies to treat questionable reservations as invalid, unless they are specifically required to do so, when, for example, considering an individual application complaining of a violation of convention rights.[75] The lack

[71] *Reservations* case (n. 53), 26–7.
[72] Human Rights Committee, General Comment on Reservations (n. 41), para. 18.
[73] Ibid., para. 11. [74] See 'Introduction' (n. 43).
[75] See, for example, *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999, 31 December 1999.

of interpretative authority, that is the right to have the final say on the meaning of convention terms, also explains the practice of the treaty bodies of declaring reservations to be contrary to the object and purpose of the contention, and therefore impermissible, and then repeatedly asking the State Party to withdraw the reservation to come into full compliance with the obligations under the treaty, but leaving it to the State party to withdraw the impugned reservation.

The Interpretation of Human Rights Treaties

The previous sections looked at the opposability of human rights treaties and the identification of convention rights applicable to a state party. This part is concerned with how we make sense of treaty provisions. The international law on the interpretation of treaties is found in Articles 31–33 of the Vienna Convention on the Law of Treaties,[76] and the treaty bodies all take the Vienna Convention as the basis for interpretation.[77] Article 31 lays out the 'general rule' (singular). Subsection (1) provides the following: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Context is limited by Subsection (2) to the instrument itself, and any agreement or instrument adopted in connection with the conclusion of the treaty.[78] Subsection (3) requires that any subsequent agreement or practice that establishes the meaning of the instrument shall be taken into account, along with relevant rules of international law.[79] All of the elements in Article 31, as the International Law Commission explained, are to be understood as 'a single combined operation' and must all be 'thrown into the crucible [to] give the legally relevant interpretation'.[80] No wonder the process of treaty interpretation is often described as an art, rather than a science.

Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation to confirm a meaning resulting from an application of Article 31 where there is more than one possible reading,[81] and to determine meaning when

[76] The Vienna Convention on the Law of Treaties reflects customary international law in this area. See *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), Preliminary Objections, [2016] ICJ Rep 100, para. 33; also *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), Judgment [2009] ICJ Rep 213, para. 47.

[77] See, for example, *S. W. M. Broeks v. the Netherlands*, Communication No. 172/1984, U.N. Doc. CCPR/C/29/D/172/1984 (1987), para. 12.3 ('the Committee has taken into account the "ordinary meaning" of each element of the article in its context and in the light of its object and purpose' (Article 31 [VCLT])). See, also, *Errol Johnson v. Jamaica*, Communication No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996), para. 8.2(c); Report of the Committee Against Torture (Inquiry in Sri Lanka), GAOR, Fifty-seventh session, Supplement No. 44 (A/57/44), para. 182 (the Committee gives 'the ordinary meaning to be ascribed to the term "systematic" … as required by article 31 of the Vienna Convention').

[78] Article 31(2), VCLT.

[79] Article 31(3), VCLT.

[80] Yearbook of the International Law Commission (1966), vol. II, pp. 219–20 [8].

[81] See, for example, *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgment [1994] ICJ Rep 6, para. 55.

Article 31 leaves it ambiguous or obscure, or results in an interpretation that is manifestly absurd or unreasonable. Beyond reference to the *travaux préparatoires* (the drafts and records of discussions leading to the adoption of the convention), the supplementary means are not defined, although the International Law Commission stated that the word 'supplementary' makes it clear that Article 32 'does not provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]'.[82]

There are five issues to consider when interpreting a human rights treaty: the relevance of the *pro homine* ('in favour of the individual') method; the possibility of a change in the meaning of convention terms over time by way of subsequent practice; the role of the treaty bodies; developments in the wider international law system; and an evolution in the ordinary meaning of terms because of developments in science, technology, and social attitudes.

The *Pro Homine* Approach to Interpretation

The basic approach to interpretation is explained in Article 31 of the Vienna Convention on the Law of Treaties: there is a need to look for the ordinary meaning of the words used, in the context of the treaty, in light of its object and purpose. The primary focus is on the text, which is presumed, in the words of the International Law Commission, to be 'the authentic expression of the intentions of the parties'.[83] This has not always been the approach of the human rights treaty bodies, however, which have deviated from the 'generally accepted interpretative canons of international law'.[84] Consider, for example, the conclusion of the Human Rights Committee in *Toonen v. Australia* that a prohibition on private homosexual behaviour in Tasmania constituted an arbitrary interference with the right to privacy, and that discrimination on grounds of 'sex' included discrimination on grounds of sexual orientation.[85] Whatever the ethical and intellectual arguments in support of this position, it is not consistent with the stance of the majority of states parties at the point of conclusion of the International Covenant on Civil and Political Rights in 1966, or when *Toonen* was decided in 1994, or in the present day, especially as a large number of countries still criminalize homosexuality.[86]

[82] Yearbook of the International Law Commission (1966), vol. II, p. 223 [19].

[83] Ibid., p. 220 [11].

[84] Jonas Christoffersen, 'Impact on General Principles of Treaty Interpretation' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 37, 37.

[85] *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[86] See generally Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *Human Rights Law Review* 613. The Human Rights Committee has, though, reaffirmed its position in its Draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, para. 40 www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx, accessed 13 February 2018.

Whereas the approach to interpretation under general international law is, in the words of Judge Rosalyn Higgins, to 'give flesh to the intention of the parties, [i.e.] to decide what general idea the parties had in mind',[87] scholars have identified a *pro homine* methodology of interpretation in the case of human rights treaties,[88] which requires that human rights norms are interpreted in the way 'most favorable to the individual human being and protective of human dignity'.[89] The Inter-American Court of Human Rights explains the idea this way: when interpreting a human rights convention, it is necessary 'to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being'.[90] This is also expressed in terms of a *pro persona* technique, with, for example, Helen Keller and Fabián Salvioli, both members of the Human Rights Committee, arguing that the task of interpreting the ICCPR 'should be performed on the basis of the pro persona principle [which] creates greater safeguards for the rights of victims of human rights violations and sends a signal to States regarding their future conduct'.[91] Yota Negishi explains the general point this way: 'the so-called pro homine or pro persona principle . . . prioritizes the most beneficial interpretation and application of norms for individuals'.[92]

The justification for the *pro homine* approach to interpretation is explained by the distinctive nature of human rights treaties, which are focused on conditions within a country and not inter-state relations,[93] giving them a constitutional, quasi-constitutional, or simply non-reciprocal nature.[94] Moreover, the object and purpose of human rights treaties is 'the protection of the basic rights of individual human beings',[95] suggesting they should be interpreted to have a real effect on the 'concrete and actual lives of individuals who are the recognised right holders of human rights treaty law.'[96] The *pro homine* methodology is particularly associated with the regional human rights bodies. The Inter-American Court has, for example, concluded

[87] Declaration of Judge Higgins, *Kasikili/Sedudu Island* (Botswana/Namibia) Judgment [1999] ICJ Rep 1045, 1113, para. 4.

[88] Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 739, 766 (hereafter, Fitzmaurice, 'Interpretation of Human Rights Treaties').

[89] H. Victor Condä, *A Handbook of International Human Rights Terminology* (2nd edn, Nebraska UP 2004) 208

[90] Inter-American Court of Human Rights, *Case of the 'Mapiripán Massacre' v. Colombia*, Judgment of 15 September 2005 (Merits, Reparations, and Costs), para. 106.

[91] *Elgueta v. Chile*, Human Rights Committee, UN Doc. CCPR/C/96/D/1536/2006, 30 September 2009, Individual opinion of Committee members Ms Helen Keller and Mr Fabián Salvioli (dissenting), para. 11.

[92] Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control' (2017) 28 *European Journal of International Law* 457, 471.

[93] *Reservations* case (n. 53) 23.

[94] Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *European Journal of International Law* 489, 514.

[95] *The Effect of Reservations on the Entry into Force of the American Convention*, Advisory Opinion OC-2/8, Inter-American Court of Human Rights Series A No. 2 (24 September 1982), para. 29.

[96] Başak Çali, 'Specialised Rules of Treaty Interpretation: Human Rights' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2012) 525, 539.

that the American Convention 'should be interpreted in favor of the individual',[97] and the European Court of Human Rights has referred to 'the special character of the [European Convention on Human Rights] as a constitutional instrument of European public order (*ordre public*) for the protection of individual human beings'.[98]

The power of an event: *Golder v. United Kingdom*

The genesis of the *pro homine* approach lies in the judgment of the European Court of Human Rights in *Golder v. United Kingdom*, decided on 21 February 1975. The facts do not suggest any great legal principle, although complexity theory tells us that seemingly minor events can have a disproportionate impact on the way systems evolve over time (the idea of non-linearity, or 'Butterfly effect'). Sidney Elmer Golder was serving a sentence for robbery with violence when he was accused by Prison Officer Laird of being involved in a riot, although the accusation was subsequently dropped. Golder was not allowed to consult a lawyer—and was therefore effectively denied the right to commence civil proceedings for libel against Laird. Article 6 of the European Convention on Human Rights contains provisions on the conduct of civil proceedings, but no express right to access the courts in civil cases. The Court of Human Rights concluded it was inconceivable the Convention would describe the procedural guarantees without establishing a right of access to the court where the individual could benefit from those guarantees. Finding access was implied by Article 6, the Court explained that this was 'not an extensive interpretation forcing new obligations on the Contracting States', but one based on the terms of the provision, read in its context and having regard to the object and purpose of the Convention on Human Rights.[99]

Golder was decided by 9 votes to 3. In his Separate Opinion, Sir Gerald Fitzmaurice argued strongly that the majority had taken the wrong path. The function of a human rights court, he insisted, was to interpret the Convention in light of what the parties had agreed—and this was reflected in the text. Fitzmaurice regarded the explanation that a right of access *to* the courts was implied by the existence of procedural guarantees *in* the courts as a non-sequitur and expressed concern the Court was taking on the role of a 'judicial legislator', which he considered to be inappropriate. Fitzmaurice expressed the view that the novelty, at the time, of states accepting binding obligations in the field of human rights, along with oversight by a supranational court, demanded 'a cautious and conservative' approach to interpretation, with '[a]ny serious doubt .... resolved in favour of, rather than against, the government concerned'.[100]

[97] *Case of 19 Merchants v. Colombia*, Judgment, Inter-American Court of Human Rights, Series C No. 109 (5 July 2004), para 173.

[98] *Sargsyan v. Azerbaijan*, Reports of Judgments and Decisions 2015, para. 147.

[99] *Golder v. United Kingdom*, A18, para. 36.

[100] Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 39.

John Merrills argues that Fitzmaurice's reasoning in *Golder* was more compelling than that of the majority,[101] and it is noteworthy that the dissenting judges included the Court's pre-eminent public international lawyers (Gerald Fitzmaurice and Alfred Verdross). Malgosia Fitzmaurice (Fitzmaurice's daughter in law) concludes that the majority's approach to interpretation must have been 'an unacceptable (if not shocking) violation of the sacred principles of international law' for a classical international lawyer such as Fitzmaurice,[102] who found himself on a 'different wavelength', in Merrills' terms, from the rest of the Court.[103] Martins Paparinskis notes that, after *Golder*, Fitzmaurice's opinions became increasingly sceptical, from his early pleas for the ordinary rules of interpretation not to be pushed aside, to criticism of what he saw as quasi-legislative judgments. His dissents had no effect, however, and the *Golder* approach was strengthened in subsequent cases, 'becoming accepted and uncontroversial'.[104] In the end, Fitzmaurice came to accept the new realities, albeit retaining his position that there were limits to judicial discretion.[105]

The difference of opinion between Fitzmaurice and the majority in *Golder v. United Kingdom* reflected a wider debate on the nature of human rights law. Before moving to Strasbourg, where he served on the European Court of Human Rights between 1974 and 1980, Fitzmaurice, a former UK Foreign Office official, had been a member of the International Court of Justice between 1960 and 1973, where he had replaced Hersch Lauterpacht when Lauterpacht died in 1960 whilst still in office. When Lauterpacht was being considered for the International Court in 1954, the Foreign Office described him as 'not . . . entirely sound from our point of view on matters of Human Rights; that is to say, his bias would be to take perhaps too wide a view on the topic'. The legal historian, Brian Simpson, concludes that the note was probably drafted by Fitzmaurice in his role as FCO legal advisor.[106]

Malgosia Fitzmaurice highlights the different approaches to interpretation adopted by the two knights. Sir Gerald believed in adherence to the letter of the law, rather than the idealist and subjective claims of justice.[107] The role of the judge was to apply the law, not to develop it. He was, Malgosia Fitzmaurice concludes, 'a supporter of human rights, however, not at the detriment of the rule of law, for the sake of misguided sense of justice'.[108] Sir Hersch, on the other hand, considered that the judicial function included filling any gaps in the law and when doing so,

[101] J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester UP 1995) 41.

[102] Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties' (2008) 21 *The Hague Yearbook of International Law* 101, 151.

[103] J.G. Merrills, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law* (Kluwer 1998) 87.

[104] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 151.

[105] See, for example, *National Union of Belgian Police v. Belgium*, Ser. A19, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 10.

[106] A.W. Brian Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 *Law Quarterly Review* 49, 49–50.

[107] Malgosia Fitzmaurice, 'The Tale of Two Judges: Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice' (2008) 61 *Revue Hellenique de Droit International* 125, 128.

[108] Ibid. 170.

the judge should, as far as possible, advance the position of the individual—Gerald Fitzmaurice referred to this as the 'humanitarian strain' in Hersch Lauterpacht's teleological approach to interpretation.[109] Looking to *Golder v. United Kingdom*, it is clear that the European Court of Human Rights developed its approach to interpretation more in line with Lauterpacht's stance, whereby concern for the individual takes precedence over the literal text, read in the light of the states parties' intentions.

The significance of *Golder* was twofold. The judgment 'marked the start of a new era' for the European Court of Human Rights,[110] as it began to deliver more judgments and take the leading role in the interpretation of the European Convention on Human Rights. Magdalena Forowicz notes that *Golder* 'set the tone of the interpretation framework that the court would develop in subsequent years'.[111] More importantly for these purposes, *Golder* was central to the way international human rights law developed, as the treaty bodies followed the lead of the European Court. Malgosia Fitzmaurice explains the point this way: the 'characteristic, and some would say expansive', approach that first emerged in *Golder*, which holds that the object and purpose of a convention for the protection of human rights can outweigh the plain meaning of the text, was 'a foundational element in relation to the special approach that human rights tribunals have taken to interpretation'.[112]

Changes in the Treaty Over Time

There is general acceptance that the meaning of treaty terms can change over time, along with the obligations of states parties.[113] Take the example of the right to conscientious objection in the International Covenant on Civil and Political Rights, the right to refuse to serve in the armed forces on ethical or religious grounds. Heiner Bielefeldt and his colleagues make the point that the Human Rights Committee has 'fundamentally changed its position' on the issue over the last three decades, from initially deciding the ICCPR did not recognize such a right, to concluding it could be found in Article 18 (right to freedom of religion).[114]

The recognition of the possibility of change does not mean that anything goes. In *Reservations to the Convention on Genocide*, Judge Alejandro Alvarez argued that the evolution of a treaty system 'can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only

[109] Ibid. 138.

[110] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 248.

[111] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010) 23.

[112] Fitzmaurice, 'Interpretation of Human Rights Treaties' (n. 88) 761.

[113] Daniel Costelloe and Malgosia Fitzmaurice, 'Lawmaking by Treaty: Conclusion of Treaties and Evolution of Treaty Regimes in Practice' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 111, 117.

[114] Heiner Bielefeldt et al., *Freedom of Religion or Belief: An International Law Commentary* (OUP 2016) 269.

with regard to the future'.[115] Alvarez was correct to observe that a treaty system can change, but wrong to conclude the past is irrelevant, with the treaty system evolving within the state space, or phase space, or simply room for manoeuvre, provided by the convention, with the treaty system evolving as the states parties and the treaty body respond to changes within and outside the treaty system, including developments in societal understandings and regulatory approaches.

The required approach is explained in the Vienna Convention on the Law of Treaties. Article 31(1) lays out the general rule: a treaty must be interpreted in accordance with the ordinary meaning given to words and phrases, in light of the context and object and purpose. Article 31(3) also allows reference to the subsequent practices of the parties to clarify the meaning of treaty provisions, and, where the convention establishes a treaty body to monitor performance, new understandings can emerge from the interactions between the states parties and the treaty body—the component agents in the treaty system, in the language of complexity theory. Change in the meaning of provisions can also occur because of adaptions in the wider international law system, whilst the evolutionary approach to interpretation means that developments outside international law, including alterations in societal attitudes and regulatory approaches, can result in a modification of the 'ordinary meaning' to be given to treaty terms. The issues are considered in turn.

Subsequent practice

Article 31(3)(b) of the Vienna Convention on the Law of Treaties directs those involved in interpretation to have recourse to 'Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Subsequent practice can include, inter alia, the adoption of domestic legislation or executive or judicial action; official declarations regarding the interpretation or application of the treaty; protests against non-performance by other parties; and tacit consent to the statements or actions of other parties.[116] Richard Gardiner explains the idea of subsequent practice this way: 'Words [in the treaty] are given meaning by action.'[117]

Consensus is important here: in the absence of agreement, a treaty cannot be modified by subsequent practice.[118] As Gardiner notes, subsequent practice

[115] *Reservations to the Convention on Genocide* [1951] ICJ Rep, Dissenting Opinion of M. Alvarez, 49, 53.

[116] See Georg Nolte, Special Rapporteur, First report on subsequent agreements and subsequent practice in relation to treaty interpretation, International Law Commission, Sixty-fifth session, Geneva, 6 May–7 June and 8 July–9 August 2013, UN Doc. A/CN.4/660, paras 110–11; and Georg Nolte, Special Rapporteur, Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, International Law Commission, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, UN Doc. A/CN.4/683, para. 42.

[117] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 253. See, generally, Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford: Oxford University Press, 2018).

[118] *Kasikili/Sedudu Island* (Botswana v. Namibia) [1999] ICJ Rep 1076, paras 63 and 74. Where there is not sufficient practice to demonstrate a common understanding amongst the states parties, practice is still relevant for the purposes of Article 32, as a subsidiary means of interpretation. This has a

'attributes interpretive significance to the fact of agreement where there is no formal instrument'.[119] The justification for looking to subsequent practice is explained by the International Law Commission in terms of constituting 'objective evidence of the understanding of the parties as to the meaning of the treaty'.[120] The concept is sometimes referred to as auto-interpretation, capturing the fact, in René Provost's words, that 'the interpretive agent in this context is, so to speak, both judge and party'.[121]

Birgit Schlütter makes the point that there has not been a great reliance on subsequent practice by the UN human rights treaty bodies. This tends to be limited to cases where a supervisory body wants to revise its stance on the interpretation of the convention.[122] Thus, in *Yoon and Choi v. Republic of Korea*, the Human Rights Committee relied on subsequent practice to conclude that the ICCPR included an implied right to conscientious objection, having previously decided the opposite. In explaining its change of position, the Committee referred to the fact that 'an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service'.[123] In a dissenting opinion, Ruth Wedgwood accepted that subsequent practice might be relevant in the interpretation of the Covenant, but noted that the Committee had failed to provide any evidence in this case.[124] The same criticism has been made by Georg Nolte about the work of the human rights treaty bodies more generally.[125]

Subsequent practice and the role of treaty bodies

The real importance of subsequent practice is that it allows us to account for the role of the human rights treaty bodies in the interpretation of the conventions. A cursory glance at any human rights textbook would give the impression that the supervisory bodies play, in the words of Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, 'an important role in establishing the normative content of human rights'.[126] It is, though, not easy to explain how this can be the case under the Vienna Convention rules, given the lack of delegation of interpretative authority.

more limited application, however—to confirming a reading that arises from the general rule contained in Article 31.

[119] Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (OUP 2012) 475, 483.

[120] Yearbook of the International Law Commission (1966), vol. II, p. 222 [15].

[121] René Provost, 'Interpretation in International Law as a Transcultural Project' in Andrea Bianchi et al. (eds), *Interpretation in International Law* (OUP 2015) 290, 293.

[122] Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 261, 316 (hereafter, Schlütter, 'Aspects of Human Rights Interpretation').

[123] *Mr. Yeo-Bum Yoon and Mr. Myung-Jin Choi v. Republic of Korea*, Communication Nos 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004 (2006), para. 8.4.

[124] Dissenting opinion by Committee member Ms Ruth Wedgwood.

[125] Georg Nolte, 'Jurisprudence under Special Regimes Relating to Subsequent Agreement and Subsequent Practice' in Gorg Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013) 210, 281–2.

[126] Statement by Mr Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the International Law Commission, 21 July 2015 www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16254&LangID=E, accessed 5 February 2018.

The pronouncements of supervisory bodies come in one of three forms: Concluding Observations on the periodic reports submitted by the states parties; [127] Views and Opinions on complaints by individuals alleging a violation of convention rights;[128] and General Comments on the meaning of terms, which are said to reflect the 'accrued experience' of the treaty body.[129]

The status of Concluding Observations has been the subject of significant academic debate,[130] although the International Court of Justice has followed the position of the Human Rights Committee in deciding that the ICCPR is applicable outside the territory of a State party.[131] The status of Views and Opinions on individual complaints has also been the focus of discussion, with some writers observing that 'Views' and 'Opinions' cannot, by definition, be legally binding,[132] whilst others argue the quasi-judicial nature of the mechanisms means the outcomes have precedential value.[133] The position of the Human Rights Committee is that its Views represent an 'authoritative determination' of the legal position of states parties,[134] a stance that is, to some extent, supported by the International Court of Justice, which concluded that it 'should ascribe great weight to the interpretation adopted by this independent body'.[135] There is also an emerging consensus that

[127] The public review of the reports of states parties is said to be the core function of the supervisory bodies. See Nigel S. Rodley, 'The Role and Impact of Treaty Bodies' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 621, 626 (hereafter Rodley, 'The Role and Impact of Treaty Bodies').

[128] Dinah Shelton argues that this 'constitute[s] one of the most effective means of promoting State compliance with human rights obligations': Dinah Shelton, 'Human Rights, Individual Communications/Complaints' (2006) *Max Planck Encyclopedia of Public International Law*, para. 49 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018. There is also the possibility of a complaint by another state party, but this is rarely (if ever) used: Rodley, 'The Role and Impact of Treaty Bodies' (n. 127) 633 ('No such complaint has been lodged with a treaty body since the inception of the system'); also Geir Ulfstein, 'Human Rights, State Complaints' (2011) *Max Planck Encyclopedia of Public International Law*, para. 5 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[129] Rodley, 'The Role and Impact of Treaty Bodies' (n. 127) 631. See further Office of the United Nations High Commissioner for Human Rights, Report on the working methods of the human rights treaty bodies relating to the State party reporting process, UN Doc. HRI/ICM/2010/2, 10 May 2010, paras 120–2. The International Court of Justice has, for example, observed the evolution in the approach of the Human Rights Committee on the right in Article 14(1), ICCPR (right to equality before the courts). The 1984 General Comment, the ICJ noted, 'did no more than repeat the terms of the provision'; whilst the 2007 Comment 'gives detailed attention' to the subject. The difference is explained in terms of the '30 years of experience' of the Committee in the application of the provision: *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* [2012] ICJ Rep 10, para. 39.

[130] Compare, for example, Jack Goldsmith, 'Should International Human Rights Law Trump US Domestic Law?' (2000) 1 *Chicago Journal of International Law* 327, 331; and Buergenthal, 'The UN Human Rights Committee' (n. 27) 351.

[131] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para. 111.

[132] Wade M. Cole, 'Individuals v. States: The Correlates of Human Rights Committee Rulings, 1979–2007' (2011) 40 *Social Science Research* 985, 987.

[133] Higgins, 'Ten Years' (n. 29) 570.

[134] Human Rights Committee, General Comment No. 33, 'The Obligations of States Parties under the Optional Protocol to the ICCPR', adopted Ninety-fourth session, UN Doc. CCPR/C/GC/33.

[135] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Rep 2010, p. 639, para. 66.

General Comments adopted by the Human Rights Committee[136] have some degree of interpretive authority,[137] although the point is disputed by some states parties.[138] Academic opinions differ as to the status of the General Comments more generally, although most commentators regard them as valuable indicators of the content of treaty provisions, whilst a small number see them as authoritative.[139]

Where a convention allocates interpretive authority to a court or other body, this actor has the final say on the meaning of treaty terms. This is not the case here. Sir Nigel Rodley, former chair of the Human Rights Committee, explains the point this way: 'It is self-evident that the UN treaty bodies are not courts and, accordingly, that their outputs are not of themselves binding on States.'[140] Whilst Rodley sees the *quality* of the pronouncements as the key to their authority or binding nature,[141] the calibre of a legal instrument is not normally the relevant criterion when considering its directional powers and there are many examples of poorly drafted treaties, judgments, and legislative acts that are nonetheless binding as a matter of law. There are two possibilities, then: either, a human rights treaty body is just another international law actor and it must persuade scholars and practitioners concerned with the interpretation of the convention to accept its position; or the pronouncements of the supervisory bodies have a particular significance.

Examining the legal practice, it is clear that the Concluding Observations, Views and Opinions, and General Comments and Recommendations of the human rights treaty bodies are given a status not accorded to the communications of other

[136] Article 40(4) of the International Covenant on Civil and Political Rights establishes that the Human Rights Committee 'shall study the reports submitted by the States Parties [and] shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties'.

[137] See, for example, Buergenthal, 'The UN Human Rights Committee' (n. 27) 387; also Sandy Ghandhi, 'Human Rights and the International Court of Justice in the Ahmadou Sadio Diallo Case' (2011) 11 *Human Rights Law Review* 527, 534–5.

[138] Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, p. 9.

[139] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 929–30 (hereafter, Mechlem, 'Treaty Bodies'); also, Peter-Tobias Stoll, 'Human Rights, Treaty Bodies' (2008) *Max Planck Encyclopedia of Public International Law*, paras 33–4 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[140] Nigel Rodley, 'The International Court of Justice and Human Rights Treaty Bodies' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 87, 88.

[141] Rodley argues that Concluding Observations should to be treated with caution, as they are often adopted under extreme time constraints, with the supervisory body having only a matter of hours to agree a text drafted by one of its members; he regards Views and Opinions on individual cases as a more reliable and authoritative guide to the meaning of convention rights, because the Committee will generally have taken the time to careful apply the convention rights to the facts. The same point applies to General Comments, which are often the result of a considered drafting process, with states parties being consulted at an early stage: ibid. 89–91. Others take a less sanguine view on the quality of General Comments, with Bruno Simma arguing they are 'all too often marked by a dearth of proper legal analysis compensated by an overdose of wishful thinking': Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3(1) *Journal of International Dispute Settlement* 7, 27. A clear example of this can be found in Human Rights Committee, General Comment No. 14, Article 6 (Right to life), adopted Twenty-third session (1984), which asserts (without analysis or explanation): 'The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity' (para. 6).

actors, including for example, academics. This can only be explained under the Vienna Convention rules by the role of subsequent practice in the application of the treaty,[142] given the absence of a formal delegation of authority in the text of the treaty and that the pronouncements of the supervisory bodies are adopted in the execution of the supervisory bodies' responsibilities under the convention.[143]

Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, those interpreting a treaty are required to take into account subsequent practice in its application, but a revised understanding only emerges where the practice 'establishes the agreement of the parties regarding its interpretation'. It follows that a pronouncement of a human rights body can only provide a definitive interpretation where it is accepted by the states parties,[144] or where the parties remain silent. Because there is no meeting of the parties,[145] it makes no sense to require the positive, vocalized support of all states parties for us to conclude that an interpretation put forward by a treaty body has been accepted as providing the proper interpretation of the convention.[146] The pronouncements of the treaty bodies establish an authoritative reading of the Convention where we see the treaty body relying on its own position in its subsequent practice and where there is no objection to that position in the responses of the states parties, including responses in their reports to the treaty body and dialogue with the treaty body.

The parties will be aware when a General Comment or General Recommendation has been adopted, often following a process of consultation, notice and comment, and they can be expected to respond where they disagree with the approach of the treaty body to the interpretation of a convention provision. The same cannot be said about Concluding Observations directed at other states parties, as it would be unrealistic to expect states to examine all Concluding Observation for evidence of

[142] See, for example, Martin Scheinin, 'Impact on the Law of Treaties' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 24, 33; also David McGrogan, 'On the Interpretation of Human Rights Treaties and Subsequent Practice' (2014) 32 *Netherlands Quarterly of Human Rights* 347, 352; and Mechlem, 'Treaty Bodies' (n. 139) 920.

[143] The position of the International Law Commission is that 'subsequent practice' must be attributable to a state party: Conclusion 5, International Law Commission, 'Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties', in Report of the International Law Commission, Seventieth session, UN Doc. A/73/10 (2018), p. 13 (hereafter, ILC, Draft Conclusions on Subsequent agreements and subsequent practice). The position of the special rapporteur, Georg Nolte, is that this applies to the supervisory bodies established under human rights treaties: Georg Nolte, 'Fourth report on subsequent agreements and subsequent practice in relation to treaty interpretation' UN Doc. A/CN.4/694, 7 March 2016, para. 42.

[144] The International Court of Justice has confirmed that the non-binding recommendations of an inter-governmental body established under a treaty can contribute to a revised understanding of the treaty, but only where adopted by a consensus of the states parties: *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment [2014] ICJ Rep 226, para. 46 (hereafter, *Whaling in the Antarctic*).

[145] Contrast this with the position under the International Convention for the Regulation of Whaling, where each state party was represented on the International Whaling Commission: ibid., para. 45.

[146] The International Law Commission does not accept this possibility: Conclusion 13(3), ILC, Draft conclusions on subsequent agreements and subsequent practice (n. 143). ('Silence by a party shall not be presumed to constitute subsequent practice . . . accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.')

an approach to interpretation they disagreed with. The adoption of Opinions and Views sits somewhere between the two, although, given the requirement for a clear explanation of the approach to interpretation by the treaty body, it would not be unreasonable to expect each state party to pay attention to the relatively small number of cases decided each year. There is, however, little evidence in the subsequent practice under the human rights treaty system of Opinions and Views being treated as an authoritative statement of the law by the states parties.

Where the pronouncements of human rights bodies are accepted by the states parties, or acquiesced to by way of silence where a negative response would be expected if they disagreed, the pronouncements establish an authoritative interpretation of treaty provisions. Where one or more states parties object, a General Comment or General Recommendation cannot be taken as authoritative under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, but it can be relied on under Article 32 to confirm a meaning resulting from an application of the general rule on the interpretation under Article 31. In any case, the parties are, in the words of the International Court of Justice, required to 'give due regard to recommendations' of the bodies established under a treaty regime,[147] and must provide a reasoned explanation where they disagree with the interpretative approach of the supervisory body.

Changes in international law

The general rule is that a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms, in their context, in the light of its object and purpose. Article 31(3)(c) further provides that those interpreting the convention must take into account 'Any relevant rules of international law applicable in the relations between the parties'. This includes rules in force at the time the treaty is concluded and those which emerge subsequently.[148] Consequently, whilst, at the time of its adoption, the text reflects the shared understanding of the parties as to their obligations, the treaty is not immune to developments in the wider international law system. This is seen most clearly in Article 64 of the Vienna Convention on the Law of Treaties, which establishes that where a norm of *jus cogens* emerges after the conclusion of a treaty, that treaty becomes void and terminates. Thus, in *Aloeboetoe et al. v. Suriname*, the Inter-American Court of Human Rights determined that a 1762 convention requiring the return of captured slaves could not be invoked because it conflicted with the prohibition on slavery—a *jus cogens* norm that emerged in the twentieth century.[149] More prosaically, it is recognized that where a treaty refers to a generic international law term, such as 'territorial status' or 'jurisdiction', etc., the

[147] *Whaling in the Antarctic* (n. 144) para. 83.

[148] Yearbook of the International Law Commission (1966), vol. II, p. 222 [16]; see, also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, para. 53.

[149] *Aloeboetoe et al. v. Suriname*, Judgment, Inter-American Court of Human Rights, Series C No. 15 (10 September 1993), para. 57.

provisions change with any transformation in meaning in the wider international law system.[150]

Changes outside the international law system: evolutionary interpretation

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, the International Court of Justice confirmed that it was 'bound to take into account the fact that the concepts [in the League of Nations Covenant] were not static, but were by definition evolutionary'.[151] Evolutionary interpretation—sometimes referred to as evolutive or dynamic interpretation[152]—is central to human rights treaties, where the approach is said to be 'more deeply embedded … than in general international law'.[153]

Evolutionary interpretation is concerned with the possibility that the meaning of provisions can, in the words of the International Court of Justice, 'evolve over time'.[154] Evolutionary interpretation does not alter the process of interpretation—what changes is the temporal frame. The normal approach is to establish the meaning the states parties intended to express at the time of the treaty's conclusion.[155] In other words, we enquire: 'What did the words and phrases mean (then) to the states parties?' Evolutionary interpretation, on the other hand, directs us to ask, 'What do these words and phrases (now) mean?' But the general rule (singular), as explained in Article 31(1) of the Vienna Convention on the Law of Treaties remains the same. The convention must be interpreted in accordance with the *ordinary meaning* to be given to the terms in their context and in the light of its object and purpose. What changes is the 'ordinary meaning'.

Evolutionary interpretation recognizes that the ordinary meaning of words and phrases can change over time, although reference to the context and object and purpose in Article 31 means that any alteration must run with the grain of the treaty. As

[150] *Aegean Sea Continental Shelf*, Judgment [1978] ICJ Rep 3, para. 77.

[151] On the relationship between the Mandate holder and the Trust territory, the International Court of Justice concluded that developments in international law over fifty years left 'little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned': *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, para. 53. Judge Sir Gerald Fitzmaurice took the opposite view, arguing that the agreement represented a compromise between the signatories, with concessions made in order to reach agreement: 'Whether this attitude was unethical according to present-day standards (it certainly was not so then) [was] juridically beside the point': Dissenting Opinion of Judge Sir Gerald Fitzmaurice, para. 85.

[152] 'Evolutive interpretation' is synonymous with 'dynamic interpretation': Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D. Evans (ed.), *International Law* (3rd edn, OUP 2010) 188. See also Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 472.

[153] Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682, 13 April 2006, para. 130.

[154] *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) [2009] ICJ Rep 213, para. 66. Evolutionary interpretation is not concerned with the application of established understandings to new circumstances; our conception of the right to privacy in the age of the Internet, for example.

[155] Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26 *European Journal of International Law* 169, 171.

the European Court of Human Rights has explained, evolutionary interpretation cannot be used to 'legislate' rights that were not included by the states parties when the omission was deliberate.[156]

Evolutionary interpretation is now firmly established as part of the normal rules for establishing the meaning of terms.[157] In *Dispute regarding Navigational and Related Rights*, the International Court of Justice confirmed that an evolutionary approach will be presumed where 'the parties have used generic terms . . . and where the treaty has been entered into for a very long period or is "of continuing duration" '.[158] An evolutionary methodology is clearly appropriate in the case of human rights treaties, given the provisions are formulated in very general terms and the instruments are intended to be unending.

Looking to the practices of the regional and global bodies, we see a dependable reliance on evolutionary interpretation. The African Commission on Human and Peoples' Rights has, for example, developed, what Rachel Murray calls, 'dynamic interpretations of the law'.[159] Notably, the Commission relied on a 'creative and dynamic' method of interpretation to decide that the Endorois were a people for the purposes of the African Charter on Human and Peoples' Rights.[160] The African Commission accepted it had initially been reluctant to define the term 'peoples', but was now aware of 'an emerging consensus on some objective features that a collective of individuals should manifest to be considered as "peoples" '.[161] In reaching this conclusion, it referred to publications by its own Working Group on Indigenous Populations/Communities, as well as those of the International Labour Organisation, the UN Working Group on Indigenous Populations, and the UN Special Rapporteur on Indigenous People. In *Right to Information on Consular Assistance*, the Inter-American Court of Human Rights observed that international human rights law had 'made great headway thanks to an evolutive interpretation of international instruments of protection'.[162] In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, it further concluded that human rights treaties 'are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions'.[163]

[156] *Johnston and others v. Ireland*, Ser. A112, para. 53.

[157] Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3(1) *Journal of International Dispute Settlement* 7, 26; Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 2.

[158] *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) [2009] ICJ Rep 213, para. 66.

[159] Rachel Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2008) 55 *International and Comparative Law Quarterly* 193, 195.

[160] Fons Coomans, 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749, 757.

[161] Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, para. 151.

[162] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, Series A, No. 16 (1 October 1999), para. 114.

[163] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-American Court of Human Rights, Series C No. 79 (31 August 2001), para. 146.

Evolutionary interpretation—also referred to as dynamic or evolutive interpretation or the living instrument doctrine,[164] has been central to the European human rights system. Luzius Wildhaber, a former President of the European Court of Human Rights, argues that 'it is precisely the genius of the [European Convention on Human Rights] that it … has shown a capacity to evolve in the light of social and technological developments that its drafters, however far-sighted, could never have imagined'.[165] The genesis of the approach lies in the 1978 judgment in *Tyrer v. United Kingdom*, where the Court determined that 'the Convention [was] a living instrument which … must be interpreted in the light of present-day conditions'. There is little justification for the dictum, beyond the assertion that 'the Court cannot but be influenced by the developments and commonly accepted standards [in the policies of the states parties]'.[166] The *locus classicus* on evolutionary interpretation is found in *Loizidou v. Turkey*, where the Court confirmed that the European Convention on Human Rights was a 'living instrument which must be interpreted in the light of present-day conditions'; moreover, given that its object and purpose was the protection of individuals, the Convention had to be interpreted and applied 'so as to make its safeguards practical and effective'.[167]

When developing new understandings of convention rights by the process of evolutionary interpretation, the Court of Human Rights will consider a number of factors. First, it will examine whether there have been any developments in scientific or technical knowledge. In *L. and V. v. Austria*, for example, the Court referred to 'recent research according to which sexual orientation is usually established before puberty' to justify changing its case law on the age of consent.[168] Second, the Court will reflect on any developments in societal understandings and regulatory approaches:[169] in *Vallianatos and others v. Greece*, concerning a ban on same-sex couples from registering as a civil union, it concluded that it 'must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships'.[170] Third, the Court will consider whether a wider international consensus is emerging.[171] Because of this, in *Christine Goodwin v. United Kingdom*, it accepted the right to legal recognition of the new sexual identity of post-operative transsexuals on the basis of 'evidence of a continuing international trend in favour [of recognition]'.[172] In the absence of an emergent, or

[164] Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57, 64.

[165] Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 *Ritsumeikan Law Review* 83, 84.

[166] *Tyrer v. United Kingdom*, Ser. A26, para. 31.

[167] *Loizidou v. Turkey* (Preliminary Objections), Ser. A310, paras 71–2.

[168] *L. and V. v. Austria*, Reports of Judgments and Decisions 2003-I, para. 47.

[169] *Pla and Puncernau v. Andorra*, Reports of Judgments and Decisions 2004-VIII, para. 62.

[170] *Vallianatos and others v. Greece*, Reports of Judgments and Decisions 2013, para. 84.

[171] *Demir and Baykara v. Turkey*, Reports of Judgments and Decisions 2008, para. 68.

[172] *Christine Goodwin v. United Kingdom*, Reports of Judgments and Decisions 2002-VI, para. 85; see also *Stafford v. United Kingdom*, Reports of Judgments and Decisions 2002-IV, para. 68.

emerging, regional or global consensus, the Court will not accept that a new reading should be applied to the European Convention on Human Rights.[173]

The United Nations human rights bodies have also relied on evolutionary interpretation.[174] In *Yoon and Choi v. Republic of Korea*, for example, the Human Rights Committee concluded that the right to freedom of conscience included a right to conscientious objection to military service. The position was in contrast to its own previous stance, with the Committee noting that the meaning of a convention right can evolve 'over time in view of its text and purpose'.[175] In its General Recommendation on special measures, the Committee on the Elimination of Racial Discrimination made the point that the Race Convention 'is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society'.[176] In *Stephen Hagan v. Australia*, it concluded that the long-standing use of the name 'E.S. "Nigger" Brown Stand' for a grandstand at a sporting stadium (the individual honoured was neither black nor of aboriginal descent) was offensive and insulting, 'even if for an extended period it may not have necessarily been so regarded'. The Committee confirmed that the Race Convention must be interpreted and applied taking into account the circumstances of contemporary society and this included increased sensitivities around words now found offensive.[177]

In its General Comment No. 2, on the implementation of the Convention Against Torture, the Committee Against Torture observed that its understanding of the treaty was 'in a process of continual evolution',[178] allowing it to determine that the Convention Against Torture includes implied rights for detainees to be informed of their rights, to receive independent legal and medical assistance and to contact relatives,[179] and that states parties have an implied obligation to prevent acts of torture or ill-treatment by private actors, including instances of gender-based violence, such as rape, domestic violence, female genital mutilation, and human trafficking.[180] In justifying its approach, the Committee declared that 'Experience since the Convention came into force has enhanced [its] understanding of the scope and nature of the prohibition against torture[,] as well as of evolving effective measures to prevent it in different contexts'.[181]

Under the regional treaties, the states parties have allocated functional responsibility to a commission or court to answer the question: 'What do these words and phrases in the treaty (now) mean?' The bodies look to the conclusions of expert

[173] *Vo v. France*, Reports of Judgments and Decisions 2004-VIII, para. 82 ('there is no European consensus on the scientific and legal definition of the beginning of life').

[174] Fitzmaurice, 'Interpretation of Human Rights Treaties' (n. 88) 767; also, Schlütter, 'Aspects of Human Rights Interpretation' (n. 122) 296.

[175] *Yoon and Choi v. Republic of Korea*, Communications Nos 1321/2004 and 1322/2004, UN Doc. CCPR/C/88/D/1321-1322/2004, 23 January 2007, para. 8.2.

[176] Committee on the Elimination of Racial Discrimination, General Recommendation No. 32, 'The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination', UN Doc. CERD/C/GC/32, 24 September 2009, para. 5.

[177] *Stephen Hagan v. Australia*, CERD, Communication No. 26/2002, UN Doc. CERD/C/62/D/26/2002, para. 7.3.

[178] Committee Against Torture, General Comment No. 2, 'Implementation of Article 2 by States Parties', UN Doc. CAT/C/GC/2, 24 January 2008, para. 4.

[179] Ibid., para. 13. [180] Ibid., para. 18. [181] Ibid., para. 14.

opinion on technical and scientific developments, along with any developments in societal understandings or regulatory approaches, to see if there has been a change in the meaning of the words and phrases used in the conventions. The veracity of the conclusions of the African Commission on Human and Peoples' Rights (and now the Court), the American Court of Human Rights, and the European Court of Human Rights does not, though, depend on their ability to correctly identify newly emergent, or emerging, explanations of convention terms; their conclusions are, ipso jure, correct because the states parties have given them the final say on interpretation.[182] Their approach to interpretation may be subject to critical comment, but it remains a correct statement of the law until revised or reversed.

The same cannot be said about the human rights bodies under the core UN treaties, which do have the final say. It is not sufficient for a treaty body to *say* that a new meaning has emerged because of developments in technical or scientific knowledge, changes in societal attitudes, or new regulatory approaches. The supervisory bodies must *show* this is the case by providing the relevant evidence, including by drawing on their own work in reviewing states parties reports. States parties, along with international law scholars and practitioners, can then consider the approach of the supervisory body, with a possible consensus emerging within the interpretive community on the 'ordinary meaning' to be given to treaty terms.

Who is 'Master' of the UN Human Rights Treaties?

In Lewis Carroll's *Alice Through the Looking Glass*, Humpty Dumpty, says, scornfully, that 'When I use a word, it means just what I choose it to mean, neither more nor less'. 'The question is', Alice replied, 'whether you *can* make words mean so many different things.' 'The question is', said Humpty Dumpty, 'which is to be master—that's all.'[183]

The key issue when establishing the meaning of treaty terms is often not the how, but the who. The process of interpretation is relatively clear. The Vienna Convention on the Law of Treaties directs us to look at the words used, in the context of the preamble, in light of the object and purpose of the convention, relevant rules of international law and any preparatory materials. We must also take into account any subsequent practices under the treaty system, including the work of the treaty body, as well as recognizing the possibility of change in the ordinary meaning of terms by way of evolutionary interpretation.

[182] See Article 3(1), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/EXP/AFCHPR/PROT (III); Article 45(3), African Charter on Human and Peoples' Rights (1987) 21 ILM 59; Article 62(3), American Convention on Human Rights, 22 November 1969, OAS Treaty Series 36; Article 32(1), European Convention on Human Rights (as amended by the provisions of Protocol No. 14 (CETS No. 194)).

[183] Lewis Carroll, *Alice Through the Looking Glass* [1871] (Enhanced Media 2016) 48 (emphasis added).

The words and phrases in a convention mean, then, what international lawyers decide they mean, following an application of the process outlined in the Vienna Convention—a point confirmed by the International Court of Justice in *Whaling in the Antarctic*, when it drew a clear distinction between the way scientific experts use the term 'scientific research' and the international law meaning, with the ICJ declaring that 'Their conclusions as scientists . . . must be distinguished from the interpretation of the Convention, which is the task of this Court'.[184]

There are three possibilities when considering the identity of those international law actors who are 'Masters' of the treaty, in the sense of having the final say on the meaning of its provisions.

First, a treaty can allocate interpretative authority to a court or tribunal, as, for example, in the case of the European Convention on Human Rights, which gives the Court of Human Rights the final say on the meaning of convention rights.[185] Five of the core UN human rights treaties give the International Court of Justice the final say on interpretation,[186] but this is rarely invoked,[187] and in the vast majority of cases there will not be an authoritative statement on the legally correct way to interpret a United Nations human rights treaty.

Second, a settled meaning can emerge where the states parties accept an interpretation proposed by the body established under the convention. This is explained by the role of subsequent practice in the interpretation of treaties. Where a General Comment or General Recommendation adopted by the treaty body is accepted by the parties, including by way of silence, it provides an authoritative statement of the meaning of treaty terms. Where one or more states object, the Comment or Recommendation cannot be taken as authoritative, but it does count as a supplementary means of interpretation, which can confirm a reading that results from an understanding of the ordinary meaning of treaty terms in the context of the convention and in light of its object and purpose.

Where a body with the right to the final say adopts a particular interpretation or a settled meaning emerges through the interactions of the states parties and the treaty body, that understanding of the convention establishes *the* legally correct interpretation of the convention. Any other reading is wrong, as a matter of law.

In all other circumstances, the proper interpretation of the instrument emerges from the writings of those international law scholars and practitioners working on and with the treaty, trying to make sense of the text, along with the patterns of subsequent practice of the states parties and the pronouncements of the treaty body,

[184] *Whaling in the Antarctic* (n. 144) para. 82.

[185] Article 32(1), European Convention on Human Rights ('The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention').

[186] Article 22, ICERD; Article 29(1), CEDAW; Article 30(1), CAT; Article 92(1), ICMW; Article 42(1), CED.

[187] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections*, Judgment [2011] ICJ Rep 70; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment [2012] ICJ Rep 422.

as well as developments inside and outside the international law system. Together, these scholars and practitioners constitute an interpretative community.[188]

The concept of an interpretive community was introduced by the literary theorist Stanley Fish to resolve the argument as to whether the (objective) meaning of words and phrases could be found in the text; or in the (subjective) understanding of the reader. The difficulty for those who argued for an objective reading was the fact of disagreement amongst readers; the problem for those arguing for subjectivity was the relative consistency in comprehension. The solution, Fish concluded, was to recognize that interpreters are not individuals, but members of a community with a shared belief as to the task of interpretation.[189]

In the case of international lawyers, we share a common insight as to how we should read human rights (and other) treaties, reflected in the approach outlined in the Vienna Convention on the Law of Treaties.[190] Whilst the Vienna Convention tells us how we should go about the task of interpretation, it does not guarantee that everyone will reach the same conclusion. The objective of interpretation is not to establish *the* meaning of the text, but *a* meaning, which depends on how we apply the interpretive rules to the text in front of us. Once we are convinced we have the correct interpretation, our next task is to demonstrate to other members of the interpretative community, the other international lawyers concerned with the interpretation of the treaty, that we have established the proper meaning of convention terms;[191] in other words, establishing *the* correct interpretation depends, as John Tobin points out, on the emergence of an accepted reading of the convention that 'attracts and achieves dominance over all other alternative understandings within the relevant interpretive community'.[192]

The meaning of a provision in a UN human rights treaty is then an emergent property of the actions and interactions of the states parties and the supervisory body; or an emergent property of the communications of international lawyers on the correct way to read the convention. Where the pronouncements of the treaty body are accepted by the states parties, this establishes an authoritative interpretation by way of 'subsequent practice', normally through the adoption of a General Comment or Recommendation; where this is not the case, the meaning of treaty terms is established by the interpretive community of international lawyers working with the convention, who must look to the ordinary meaning of the terms, taking

[188] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi et al. (eds), *Interpretation in International Law* (OUP 2015) 147.

[189] Stanley Fish, *Doing What Comes Naturally* (Clarendon 1989) 142.

[190] On the makeup of the interpretive community, see Andraz Zidar, 'Interpretation and the International Legal Profession Between Duty and Aspiration' in Andrea Bianchi et al. (eds), *Interpretation in International Law* (OUP 2015) 133, 134.

[191] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12 *Michigan Journal of International Law* 371, 379; also, Jean d'Aspremont, *Epistemic Forces in International Law* (Edward Elgar 2015) 203–4.

[192] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1, 7.

into account the requirements of the *pro homine* ('in favour of the individual') approach, and any evolution in the ordinary meaning, including through the work of the treaty bodies.

The position of each member of the interpretative community establishes *a* reading of the treaty, with *the* correct meaning emerging from the heterogeneous communications of practitioners and academics. Where a settled view on the correct way to interpret the treaty is established within the interpretive community, this 'mainstream' position becomes the starting point for any discussion. It does not, however, establish *the* correct reading of the treaty, with the consequence that any other reading is wrong as a matter of law. We identify the mainstream position in an interpretive community through a process of inductive reasoning, looking for patterns in the writings of international human rights lawyers. Because we are relying on an inductive methodology, our understanding of the correct way to interpret the treaty which emerges from those writings can only be presumptively correct, although the more the writings coalesce around a certain approach to interpretation, the more likely that is to be the correct reading of the treaty.[193]

Conclusion

This chapter has shown that we can productively think about the core United Nations human rights treaties as complex systems—and that this can help us make sense of the practice of human rights. Human rights treaty systems are self-organizing because the component elements are linked through a complicated network of relationships, with no single actor in control. We model the system by looking at the text; the connections between the states parties and the treaty, established by way of signature and ratification, subject to any valid reservations; the links between the parties inter se, which concerns the opposability of the convention; and the relationships between the states parties and the supervisory body.

The treaty system emerges from the interactions of the component agents—the states parties and supervisory body; its regulatory authority depends on the opposability of the convention and its individual provisions, and the meaning attached to treaty terms. The basic rule on interpretation is explained in Article 31 of the Vienna Convention on the Law of Treaties: the convention must be interpreted in accordance with the ordinary meaning of words and phrases, in light of the context and object and purpose. Scholars and practitioners have adopted a *pro homine* ('in favour of the individual') approach to the interpretation of human rights treaties, focused on the object and purpose, and reflecting the influence of the moral concept of human rights on the legal practice. The genesis for this distinctive methodology can be traced back to the 1975 judgment of the European Court of Human Rights in *Golder v. United Kingdom*, which sent the nascent body of human rights law on a different evolutionary path from general international law.

[193] See 'Introduction' (n. 43).

Whilst the text will always provide the initial point of reference for understanding the UN human rights treaty systems, this chapter has shown the importance of changes in the meaning of human rights treaty provisions over time. The meaning of treaty terms can evolve through the subsequent practices of states parties and the treaty bodies, with new understandings emerging following changes in the behaviours of the same component agents, resulting in an expansion of the commitments of the parties, a phenomenon explained in complexity theory by the related notions of emergence and downward causation. Evolution in human rights treaties can also result from adaptions in the wider international law system and changes in the external environment, such as developments in science and technology, and new societal understandings or regulatory approaches.

There was no great transformation in the content of human rights following the establishment of the UN treaty system, whose objective was to give legal effect to the already recognized moral rights in the Universal Declaration of Human Rights. The key innovation was the introduction of the supervisory bodies to monitor the performances of states parties and in doing so to explain in greater detail the scope and content of convention rights—a task the treaty bodies arrogated to themselves. These secondary agents of justice do not, however, enjoy interpretative authority, that is they do not have the right to have the final say on the meaning of treaty terms. For a revised understanding to be acknowledged, the position of the treaty bodies must be accepted by the states parties; in other words, the meaning of convention rights is an emergent property of the interactions of the component agents in the system—the states parties and treaty body. In other cases, the detailed understanding of convention rights emerges through the communications of international lawyers on the subject, with a mainstream position being established where a particular interpretation is widely accepted within the interpretive community.

The United Nations human rights treaty systems evolve with alterations in the behaviours of states parties and the human rights bodies and we have seen significant transformations in our knowledge of international human rights law, including recognition that the opposability of convention rights does not require ongoing consent (the acquired rights doctrine); that states parties must explain and justify the maintenance of reservations (which is not required under the Vienna Convention on the Law of Treaties); that the ordinary meaning of convention rights can change over time, with technological developments, the transformation of social attitudes, and adaptations in regulatory approach; and in the development of a *pro homine* ('in favour of the individual') approach to interpretation that explains why human rights treaties evolve, over time, towards the greater protection of 'all human rights for all', as if they were being pulled in that direction by some unseen force.

5

Customary Human Rights Law

The previous two chapters showed how states could voluntarily limit their internal sovereignty, or freedom of action, by accepting human rights obligations, either by membership of the United Nations Organization or accession to one or more human rights treaties. The focus here is on customary law, which binds all countries without the requirement for an expression of positive consent. By thinking of custom as a complex system, in which the physical and verbal communication acts of states (to borrow the language of the International Law Commission) lead to a shared understanding of appropriate behaviour, without the need for a guiding hand or sovereign power, we can model the emergence and evolution of customary human rights and see that its creation is no different from other areas of custom, thereby rejecting claims that customary human rights law is 'counterfactual custom' or 'fake custom' because of the practice of violations of human rights.

The chapter first explains the two-element approach to the identification of custom, showing how we can think of custom as the emergent property of the communication acts of states. To demonstrate the existence of custom there must be evidence of a pattern of state practice showing the existence of a rule and a pattern of communications evidencing a belief that the rule is binding as a matter of international law (normally referred to as the *opinio juris* element). Where this is observed to be the case, there is a customary international law rule. There is then no sovereign power legislating custom; it is an emergent property of the performative acts of states, who literally 'speak' custom into existence, with the emergent customary rules then binding the same actors. In other words, custom exhibits the core characteristics of a complex system and complexity serves to remind us of the importance of path dependence, the power of events, and the possibilities of change as states respond to new information.

The event that led to the emergence of the first customary human right was the Sharpeville Massacre of 21 March 1960, after which the international community framed its interest and intervention in South Africa in terms of human rights, with the General Assembly adopting a Declaration and Convention on the Elimination of Racial Discrimination, allowing Judge Tanaka, in the 1966 *South West Africa* cases, to recognize a customary norm prohibiting discrimination on grounds of race. The international community also denied the status of persistent objector to the apartheid State, confirming that the opposability, that is binding nature, of fundamental human rights did not depend on state consent. After Sharpeville, customary international law was set on a new path, allowing the emergence of a body of law

that restricted the internal freedom of action of sovereign and independent states. None of this was inevitable or pre-ordained. The contingent nature of the development is made clear from an examination of the decisions of the International Court of Justice on South West Africa (Namibia) in the 1960s and early 1970s, which (eventually) determined that the prohibition on racial discrimination was a customary norm establishing obligations *erga omnes*, that is, owed to the international community as a whole.

The chapter concludes by showing how the existence of a General Assembly resolution or a law-making treaty on human rights changes our approach to the identification of custom, providing a template against which we can evaluate the available evidence of state practice and *opinio juris*. That is not to suggest that customary human rights can be created by the General Assembly and there remains a requirement to demonstrate reference to, and reliance on, a customary human rights norm in the world beyond the United Nations Plaza in New York.

Customary Human Rights Law

With the exception of the persistent objector doctrine (see below), customary law binds all states; in the words of the International Court of Justice, customary norms 'have equal force for all members of the international community'.[1] Moreover, the opposability of a customary norm does not depend on its positive acceptance by a country.[2] There is, then, an incentive for activists and scholars to argue for the customary status of human rights norms. Take the example of Myanmar. The country is not a signatory to the UN Convention Against Torture or the International Covenant on Civil and Political Rights, but it is, like all countries, bound by the international custom prohibiting torture—provided, of course, we can show the prohibition on torture is a customary norm.

This is no easy task. To demonstrate that a customary norm exists, there must be evidence of a general practice of states. The difficulty is that the practice of human rights is often the practice of violations.[3] As Jan Klabbers observes: 'Surely, it is awkward to conclude that if and when states commit torture, torture can become legally justified as customary international law.'[4] Even if we accept that the non-use of torture counts as state practice, there remains the problem of detecting a clear pattern of conduct from which we can abstract a general rule,[5] and in any case Amnesty International has documented torture in 141 countries, concluding that 'Torture

[1] *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, para. 63 (hereafter, *North Sea Continental Shelf* cases).

[2] Michael Akehurst, 'Custom as a Source of International Law' (1975) *British Yearbook of International Law* 1, 23 (hereafter, Akehurst, 'Custom').

[3] Frédéric Mégret, 'International Human Rights Law Theory' in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 199, 220.

[4] Jan Klabbers, 'The Curious Condition of Custom' (2002) 8 *International Legal Theory* 29, 34.

[5] Robert Kolb, 'Selected Problems in the Theory of Customary International Law' (2003) 50 *Netherlands International Law Review* 119, 124 (hereafter, Kolb, 'Customary International Law').

is thriving because rather than respecting the law, many governments are either actively using torture or turning a blind eye'.[6]

This difficulty has led many scholars to reject the notion we must look for evidence of customary human rights in the physical actions of states on the ground (the traditional approach) arguing that we should focus instead on law-making treaties and General Assembly resolutions.[7] Olivier de Schutter claims that 'well-intentioned' scholars turned to custom in the 1970s and 1980s when many countries seemed unwilling to sign and ratify human rights treaties, but that 'this "modern" view results in distorting the classical notion of custom in such a way that the notion is barely even recognizable under its new disguise'.[8] By adopting a deductive methodology,[9] which looks first to the instruments adopted by the UN General Assembly and only then considers the actual practices of countries,[10] 'modern' custom is said to invert the 'traditional' inductive technique, which seeks to abstract general rules from empirically observable instances of practice. Modern custom, Robert Kolb argues, 'is therefore something of a "contra-factual custom", a concept very far indeed from the classical conception of customary law'.[11] Fernando Tesón goes further, concluding that modern custom is 'fake custom', because of the disconnect between the claimed norm and the practice of states and 'No area of international law exemplifies fake custom better than the law of international human rights'.[12]

A second difficulty is that custom, in the words of Omri Sender and Sir Michael Wood, has traditionally been conceptualized as 'devoid of independent normative considerations',[13] simply reflecting patterns of state behaviour. This value-neutral conception is problematic for those who reject the notion that the existence of human rights should depend on the self-interested law-making activities of states, given states are the primary violators of rights. Scholars have responded by claiming that where there is agreement a norm *should* be part of customary international law

[6] https://www.amnesty.org/en/get-involved/stop-torture/, accessed 23 February 2018.

[7] Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 111, 118.

[8] Olivier De Schutter, *International Human Rights Law* (CUP 2010) 52.

[9] Deductive methodologies are not unknown in international law. The International Court of Justice applied deductive reasoning when it identified 'a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community' (*Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment [1984] ICJ Rep 24, para. 111) and referred to the 'natural' or 'inherent' nature of the customary right of self-defence (*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment [1986] ICJ Rep 14, para. 176) (hereafter *Military and Paramilitary Activities*).

[10] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn, OUP 2008) 37. See, also, Michael Wood, Special Rapporteur, First report on formation and evidence of customary international law, International Law Commission, Sixty-fifth session, Geneva, 6 May–7 June and 8 July–9 August 2013, UN Doc. A/CN.4/663, para. 98.

[11] Kolb, 'Customary International Law' (n. 5) 125–6.

[12] Fernando R. Tesón, 'Fake Custom' in Brian D. Lepard (ed.), *Reexamining Customary International Law* (CUP 2017) 86, 106.

[13] Omri Sender and Michael Wood, 'The Emergence of Customary International Law: Between Theory and Practice' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133, 139.

(the subjective element, or *opinio juris*), we can dispense with the requirement for consistency of state practice, or at least reduce its importance.[14] Theodor Meron, for example, claims 'It is, *of course*, to be expected that those rights which are most crucial to the protection of human dignity … will require a lesser amount of confirmatory evidence'.[15]

Others go further to insist we should not look for evidence of customary human rights in the words and practices of states, but in the ethical demands of human rights.[16] Niels Petersen explains the point this way: customary human rights law 'is often not primarily characterized by methodological rigor, but rather by an attempt to reconcile legal interpretation with considerations of efficiency or moral intuitions about human rights'.[17] Normally, the argument for the ethical dimension is implied or assumed, but a few scholars have been explicit in making the case. Brian Lepard, for one, argues that customary human rights emerge where states decide that fundamental ethical principles should be recognized as customary norms through the adoption of law-making treaties and General Assembly resolutions.[18] The philosopher John Tasioulas is of the view that custom necessarily includes an ethical component, if it is to be 'morally binding on its subjects'.[19] He extends the argument to the process of identifying customary norms, concluding there is an obligation on international lawyers to interpret the 'raw data of state practice and opinio juris in its best moral light'.[20] The difficulty is that Article 38 of the Statute of the International Court of Justice does not include an ethical component, referring only to 'international custom, as evidence of a general practice accepted as law', and international courts and tribunals have not demanded evidence of an ethical dimension to customary rules,[21] and the requirement is not found in the mainstream writings.[22]

There are, then, three ways in which customary human rights law is said to be different from custom more generally: it downplays the importance of the actual practices of states on the ground; it focuses on the adoption of instruments by the

[14] John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85, 96.

[15] Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law* (Clarendon 1989) 94 (emphasis added).

[16] See, on this point, Hugh Thirlway, *The Sources of International Law* (OUP 2014) 63 (hereafter, Thirlway, *Sources*).

[17] Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 *European Journal of International Law* 357, 363.

[18] Brian D. Lepard, 'Toward a New Theory of Customary International Human Rights Law' in Brian D. Lepard (ed.), *Reexamining Customary International Law* (CUP 2017) 233, 254. His position is part of a wider argument that focuses on *opinio juris* (and not state practice): Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 97–8.

[19] John Tasioulas, 'Customary International Law: A Moral Judgment-Based Account' (2015) 108 *American Journal of International Law* 328, 330.

[20] John Tasioulas, 'Opinio Juris and the Genesis of Custom: A Solution to the "Paradox" ' (2007) 26 *Australian Year Book of International Law* 199, 199.

[21] In the 1966 *South West Africa* cases, the International Court of Justice observed that it was 'a court of law, and [could] take account of moral principles only in so far as these are given a sufficient expression in legal form': *South West Africa*, Second Phase, ICJ Rep 1966 6, para. 49.

[22] Thirlway, *Sources* (n. 16) 54. Cf. however James R. Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303, 314 ('A formulation of *opinio juris* which appears to exclude that moral element does not seem appropriate').

UN General Assembly (the so-called modern custom);[23] and it is said to incorporate a moral dimension. There are though several problems with arguments that 'customary human rights law' is different from 'customary international law'. First, legal systems do not generally recognize different law-making procedures depending on the subject matter under consideration, and there is no evidence for this in international law. Second, international law has rules which establish the responsibility of states for violating customary norms, with a sanctions regime, and it is not clear this would apply to a novel system of customary human rights law. Third, human rights lawyers and scholars do not see themselves as operating outside the international law system. All human rights textbooks, for example, start with an explanation of the sources of international law, including customary international law. Finally, as the following sections make clear, claims for the distinctive nature of customary human rights are misguided and a proper understanding of the way custom emerges and evolves can not only accommodate human rights, but also explain how the recognition of customary human rights from the 1960s transformed international custom more generally.

The Two-Element Approach

International lawyers have long accepted that the law of nations can be identified by looking at the customary practices of states.[24] The contemporary formulation of this idea is found in Article 38(1)(b) of the Statute of the International Court of Justice, which lists as one of the sources of international law, 'international custom, as evidence of a general practice accepted as law'. Whilst the provision is badly drafted, there is general recognition it outlines a two-element approach:[25] to show the existence of custom, there must be (a) evidence of a general practice; and (b) evidence of a belief that the practice is required by international law—the *opinio juris* element. Compelling evidence of a settled practice or a clear *opinio juris* might reduce the burden for the other element,[26] but confirmation of both is required,[27] and proof for each must be sought separately, although we can rely on the same materials for both elements. Thus, the decision of a domestic court to remove immunity from a

[23] The US Third Restatement of Foreign Relations Law concludes, for example, that 'the practice of states that is accepted as building customary international law of human rights includes some forms of conduct *different from* those that build customary international law generally': American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 701, Reporters' Notes, para. 2 (emphasis added).

[24] David J. Bederman, *Custom as a Source of Law* (CUP 2010) 140.

[25] This approach has been confirmed by the Permanent Court of International Justice in *Case of the SS 'Lotus'*, PCIJ, Ser. A, No. 10, pp. 18 and 28; and the International Court of Justice in *North Sea Continental Shelf* cases (n. 1) para. 77.

[26] See, for example, James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 26–7 (hereafter, Crawford, *Brownlie's Principles*); also Frederic L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146, 149.

[27] *Military and Paramilitary Activities* (n. 9) para. 184.

public official for acts of torture, 'in line with a generally recognized international law norm', would be both evidence of state practice and *opinio juris*.

Custom is primarily concerned with establishing norms of appropriate behaviour in the international community. Human rights are said to be different, in that they are not focused on problems of co-operation and co-ordination between countries,[28] but the relationship between the state and the individual. The performance of human rights obligations does not, in the words of Bruno Simma and Philip Alston, 'run between' states.[29] The traditional mechanism of claim and counterclaim between states does not, then, work in the case of human rights, particularly given the reluctance of states to criticize the human rights performance of others, with the consequence that it is difficult to build an argument for customary human rights norms by this methodology.[30]

The key to understanding custom is not, though, the horizontal relationships between countries, but the vertical relationships between states and customary international law.[31] Hersch Lauterpacht describes this in terms of 'the complexities—indeed the mysteries—of the rise of binding customary law from amidst the amorphous and, when taken in isolation, inconclusive manifestations of conduct'.[32] Custom arises, as Krzysztof Skubiszewski observes, from the 'actions and reaction' of states,[33] as they respond to new information, without the need, in Laurence Helfer and Ingrid Wuerth's words, for 'a formal discussion or exchange of views'.[34] Customary norms then constrain the actions of the same countries that brought them into existence—James Crawford refers to states being in a dialogical relationship with international law, 'shaping it and shaped by, making it and made by it'.[35]

In the language of complexity theory, customary international law is a self-organizing system: norms emerge as a consequence of the behaviour of states, and then bind the very same agents (what theorists call downward causation). Simply put, states make international custom; they are then regulated by it. Custom emerges from the actions and interactions of states, and sometimes the actions of non-state actors like the UN General Assembly.[36] Its emergent nature is confirmed by the

[28] Thirlway, *Sources* (n. 16) 177.

[29] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988–9) 12 *Australian Year Book of International Law* 82, 99.

[30] Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' (2008) *Max Planck Encyclopedia of Public International Law*, para. 16 <http://opil.ouplaw.com/home/EPIL>, accessed 22 February 2018.

[31] See on this point, Pierre-Hugues Verdier and Erik Voeten, 'How Does Customary International Law Change? The Case of State Immunity' (2015) 59 *International Studies Quarterly* 209, 210.

[32] Hersch Lauterpacht, *The Development of International Law by the International Court* [1958] (Grotius 1982) 390.

[33] Krzysztof Skubiszewski, 'Elements of Custom and the Hague Court' (1971) 31 *Zeitschrift für Auslandisches Öffentliches Recht und Völkerrecht* 810, 812.

[34] Laurence R. Helfer and Ingrid B. Wuerth, 'Customary International Law: An Instrument Choice Perspective' (2016) 37 *Michigan Journal of International Law* 563, 575.

[35] James Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law 2014) 19 (hereafter, Crawford, *Chance, Order, Change*).

[36] 'In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law': Conclusion 4(2), International Law Commission, 'Text of the draft conclusions on identification of customary international law', in Report of the

fact it 'is not written and has no "authoritative" text'.[37] Evidence of the existence of custom is not found in a central registry, like the United Nations Treaty Collection, but dispersed throughout the international law system, in the judgments of courts and tribunals, and in the writings of publicists, including in textbooks and the reports of bodies such as the International Law Commission and International Law Association. This data constitutes the memory of the international law system, and like all memories, it is partial and selective, as some practices are remembered and some forgotten.

Both what states 'do' and what they 'say' are relevant in the formation of custom, a point confirmed in the 2018 draft conclusions on identification of customary international law adopted by the International Law Commission.[38] Forms of evidence of *opinio juris* are limited to verbal acts, such as statements made on behalf of states and diplomatic correspondence.[39] A 2000 report by an International Law Association committee described, without further comment or explanation, verbal acts as 'forms of speech-act'.[40] The notion of a speech act was developed by the linguistic philosopher John Austin to explain how words, and words alone, can, in certain circumstances, create a new legal reality—saying 'I do' at a marriage ceremony is the standard example.[41] These performative acts, in Austin's terminology, remake the legal world around us, changing our legal positions, so that saying 'I do', is different from saying 'Let's get married'.[42] Moreover, the notion of a performative act is not limited to verbal acts of communication. Any semiotic phenomena, or sign, that signals a view about how the world should be can be a performative act;[43] anything, in the words of the linguistic philosopher Jacques Derrida, that can be 'put between quotation marks'.[44] In other words, physical acts can be performative acts, where they signal an intention to create a new legal reality.

In the case of custom, the physical and verbal acts of states can be understood as performative acts when they speak to the existence, or not, of a customary norm. The point becomes clear if we consider the *Corfu Channel* case, where the International Court of Justice observed the fact of British warships sailing through Albanian waters; the firing of artillery by the Albanians; protest by the United Kingdom; and

International Law Commission, Seventieth session, UN Doc. A/73/10 (2018), p. 119 (hereafter, ILC, Draft conclusions on Identification of customary international law).

[37] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *European Journal of International Law* 523, 524.

[38] Conclusion 6(1), ILC, Draft conclusions on identification of customary international law (n. 36).

[39] Conclusion 10(2), ibid.

[40] International Law Association, Final Report of the Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law', Conference Report London (2000), p. 14 www.ila-hq.org/index.php/committees, accessed 13 February 2018 (hereafter ILA Report on Custom).

[41] J.L. Austin, *How to Do Things with Words*, (2nd edn, OUP 1975) 6.

[42] Often it is the words of others that remake our legal world, the judgment of a court being the exemplar case. See Ino Augsberg, 'Reading Law: On Law as a Textual Phenomenon' (2010) 22 *Law & Literature* 369, 374.

[43] Marais Kobus, *Translation Theory and Development Studies: A Complexity Theory Approach* (Routledge 2014) 70.

[44] Jacques Derrida, *Limited Inc.* (Northwestern UP 1988) 12.

a diplomatic exchange in which the UK claimed that innocent passage through straits was a right recognized under international law, whilst Albania contended that no such right existed.[45] Both the physical acts of sailing the warships through the territorial waters and attempts to prevent that activity, together with the verbal acts of complaint and response spoke to the existence, or otherwise, of a customary norm and in doing so helped constitute the norm. These were performative acts in international law: 'I am sailing my warship through your territorial waters in pursuance of my right of innocent passage' (a physical communication act); 'I am writing to complain about the infringement of sovereignty occasioned by you sailing through my territorial waters' (a verbal communication act). Through repeated performative acts, the scope and content of a customary norm becomes clear over time, as we accumulate evidence of the appropriate standard of behaviour (state practice) and evidence of a belief that adherence to the standard is obligatory as a matter of international law (*opinio juris*). In simple terms, through their performative acts, states 'speak', or 'write', customary international law norms into existence; in the language of complexity, custom is an emergent property of the physical and verbal communication acts of states.

State practice

The 2018 International Law Commission draft conclusions on the identification of custom make the point that state practice 'may take a wide range of forms. It includes both physical and verbal acts'.[46] Physical acts incorporate executive conduct, including operational conduct 'on the ground'. Verbal acts comprise the written and spoken communications of states in the form, inter alia, of diplomatic correspondence, including protests, policy statements, domestic legislation, decisions of national courts, and statements made in international organizations, such as the United Nations.[47] The only stipulation is that these communication acts must be heard and understood by other states, who can then react where necessary. As Maurice Mendelson observes, 'behaviour does not count as State practice if it is not communicated to another State'.[48]

Being clear about what communications count in the formation of customary international law is important for understanding the scope of international human rights law. Take the example of enforced disappearance, the abduction of a person by the state and concealment of their fate. Here we might observe domestic legislation in State A prohibiting enforced disappearance, but also the widespread use of enforced disappearance by the police in State A; a complaint by State B about enforced disappearance in State A; the General Assembly resolution on the right not

[45] *Corfu Channel* case, Judgment, [1949] ICJ Rep 4, 27.
[46] Conclusion 6(1), ILC, Draft conclusions on identification of customary international law (n. 36).
[47] Conclusion 6(2), ibid.
[48] Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177, 204.

to be subjected to enforced disappearance;[49] and the Convention for the Protection of All Persons from Enforced Disappearance, with fifty-eight states parties.[50] The introduction of domestic legislation by State A is relevant, but the actual practice of enforced disappearance does not count, unless the state claims a right to carry out enforced disappearance, because practice only counts when it speaks to the existence of a norm. The complaint by State B is clearly of interest, as is the adoption of the General Assembly resolution and the human rights treaty. When evaluating the evidence, then, we see on the one hand, domestic legislation, the complaint by State B, and the General Assembly resolution and the human rights treaty supporting the existence of a norm prohibiting enforced disappearance; on the other, we have nothing, unless the state claims a right or liberty in international law to carry out a policy of enforced disappearance.

All states can contribute to the development of customary norms and it is difficult for one country to exercise a decisive influence, although, as B.S. Chimni points out, 'it is accepted wisdom that the weight of some actors will matter more'.[51] Charles de Visscher develops a well-known analogy to explain the influence of powerful states in which he compares the growth of custom to the gradual formation of a path across vacant land, observing that, amongst the users of the track, there will always be 'some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say that power in this world, or because their interests bring them more frequently this way'.[52] Whilst the comparison recognizes the reality that some states exercise a greater influence on custom formation than others,[53] it confirms that custom is not the product of any one state—no single actor makes the path or directs others where to cross; customary international law is an emergent property of the actions and interactions of states in the international community.

The challenge for those looking to identify new customs is to abstract the rules from the practices of states. The task of collating and making sense of the evidence of state practice is variously described as being 'difficult[,] requiring long and tedious investigations',[54] or simply 'impossible for one researcher to [carry out]'.[55] Often, it is the practice of a limited number of countries that is taken into account, perhaps no more than a dozen,[56] with a focus on the 'major powers and the most

[49] Declaration on the Protection of All Persons from Enforced Disappearance, UNGA 47/133 (18 December 1992) (adopted without a vote).

[50] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED).

[51] B.S. Chimni, 'An Outline of a Marxist Course on Public International Law' in Susan Marks (ed.), *International Law on the Left* (CUP 2008) 53, 71.

[52] Charles de Visscher, *Theory and Reality in Public International Law*, translated by P.E. Corbett (Princeton UP 1968) 155.

[53] Akehurst, 'Custom' (n. 2) 23 ('[T]he practice of some states is more frequent or better publicized than the practice of other states, not because it is intrinsically more important').

[54] Karol Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff 1993) 116 (hereafter, Wolfke, *Custom*).

[55] Jordan J. Paust, 'Customary International Law: Its Nature, Sources and Status as Law of the United States' (1990) 12 *Michigan Journal of International Law* 59, 68.

[56] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757, 767.

affected states'.[57] Vaughan Lowe suggest that one solution is 'to ignore the problem', pointing out that tribunals and writers are often satisfied with 'very little in the way of state practice'.[58] In similar vein, Stefan Talmon argues that, over the years, the International Court of Justice 'has pulled a number of customary international law "rabbits" out of its hat'.[59]

Whilst Article 38(1)(b) refers only to the requirement of evidence of a 'general practice', it is primarily the practices of states that count.[60] The activities of certain non-state actors can also be relevant, notably the work of United Nations,[61] but there is no evidence of the practices of non-governmental organizations contributing by, for example, 'naming and shaming' countries with poor human rights records.[62]

State practice is, of course, the practice of individuals acting on behalf of states. The recent literature has, by and large, followed the model from state responsibility, by way of analogy, to conclude that state practice, in the words of the International Law Commission, 'consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions'.[63] In other words, all state actors can contribute to state practice in the same way that all state actors can engage the responsibility of the state. Given the limited doctrinal support for this position, we would expect the analogy to be self-evident, but it is not.[64] Take the example of a police officer who racially abuses, without reprimand, a foreign national. The act might well engage the responsibility of the state, but would it really contribute to state practice on the customary norm prohibiting racial discrimination?[65] The relevant distinction, when identifying state practice, is not between different types of actors, but different kinds of acts: some acts, by some actors, are relevant in the formation of custom and some are not. A threat to use military force, for example, counts as state practice, but only when made by an actor with the capacity to carry out that threat.

The view that only some acts, by certain persons, count as state practice has traditionally been understood as restricting the concept 'to a type of situation falling within the domain of international relations',[66] and therefore limiting practice to

[57] Niles Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 *American University International Law Review* 275, 277.

[58] Vaughan Lowe, *International Law* (OUP 2007) 47 (hereafter Lowe, *International Law*).

[59] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417, 434.

[60] *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment [1985] ICJ Rep 13, para. 27 ('It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States').

[61] Conclusion 4, ILC, Draft conclusions on identification of customary international law (n. 36).

[62] On the possibility of non-governmental organizations participating in customary international law formation, see Isabelle R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 *Virginia Journal of International Law* 211, 227 ff.

[63] Conclusion 5, ILC, Draft conclusions on identification of customary international law (n. 36).

[64] See on this point, Tullio Treves, 'Customary International Law' (2006) *Max Planck Encyclopedia of Public International Law*, paras 31–2 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018 (hereafter, Treves, 'Customary International Law').

[65] See, on this point, Lowe, *International Law* (n. 58) 43.

[66] Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 *American Journal of International Law* 662, 666.

acts that run between states, excluding, for example, national legislation and national court decisions, which are generally accepted as evidence of state practice.[67] The key to making sense of custom is not, though, as we have seen, the horizontal relationships between states, but the vertical relationships between states and customary norms. Michael Akehurst expresses the point this way: State practice 'covers any act or statement by a State from which views can be inferred about international law'.[68] The relevant question, when considering whether an act counts, is to ask whether it expressly or impliedly reflects the view of the state on the scope and content of a norm of appropriate behaviour, and this will depend both on the nature of the performative act and the identity of the actor communicating the state's position.

Opinio juris

Along with evidence of state practice, the identification of custom requires evidence of a belief the practice is 'accepted as law'. This approach emerged towards the end of the nineteenth century,[69] and the notion of *opinio juris* is traced back to either the civil lawyer, Francois Gény, or the Roman law expert, Alfonse Rivier, with Rivier's conception adopted by Lassa Oppenheim.[70] The function of *opinio juris* is to distinguish between common habits, such as tipping in a restaurant, and practices required by law, like paying the bill. Lassa Oppenheim expresses the point this way: 'Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.'[71] *Opinio juris* allows us to separate customary international law norms from norms of appropriate behaviour carried out as a matter of courtesy, convenience, or comity, etc. The International Law Commission lists as evidence of *opinio juris* the following verbal communication acts: statements made on behalf of states; official publications; legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization.[72]

Stability and Change in Customary International Law

A standard view in the literature is that 'a true custom is not intentionally created by anyone'.[73] States simply go about their business and where a pattern of behaviour

[67] Conclusion 6(2), ILC, Draft conclusions on identification of customary international law (n. 36).
[68] Akehurst, 'Custom' (n. 2) 10.
[69] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *European Journal of International Law* 523, 532.
[70] Anthony Carty, 'Doctrine Versus State Practice' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 972, 978.
[71] L. Oppenheim, *International Law: A Treatise, Vol. I. Peace* (1st edn, Longmans 1905) 23.
[72] Conclusion 10, ILC, Draft conclusions on identification of customary international law (n. 36).
[73] Wolfke, *Custom* (n. 54) 52 (references omitted).

can be observed, we speak of a customary practice. Custom is, in Raphael Walden's terms, the 'unintentional and unconscious'[74] outcome of the actions, reactions, and interactions of states. But, as Maurice Mendelson points out: 'It is a necessary condition of the creation of a customary rule that at least some States should have willed the existence of the rule: the State or States initiating the practice and the State or States imitating, or genuinely acquiescing in it.'[75] Even if a country did not intend to create a new customary norm, it must be presumed to have acted intentionally, and other states assumed to have reacted in a considered manner; custom is not then the result of a coincidence of accidental behaviours.

Take the example of the norm establishing the exclusive right of coastal states to exploit their continental shelf. No such right existed on 28 September 1945, the date on which the United States claimed sovereign rights to the shelf by way of the 'Truman Proclamation'. The US was motivated by economic self-interest (oil had been discovered on the shelf), but it could not frame its claim in these terms or limit such claims to itself—a point recognized at the time.[76] By asserting sovereign rights to its shelf, the United States made clear other coastal states could do the same with respect to their continental shelves. When other countries followed its lead, 'A norm of customary international law was born'.[77]

This is not to suggest the Truman Proclamation is an example of 'instant custom', a concept first proposed by Bing Cheng in the 1960s in the context of the rapid development of a body of space law.[78] The argument for instant custom is that a single event—the adoption of a resolution by the UN General Assembly is the standard example—can contain the necessary state practice and *opinio juris* for a customary rule to emerge without the passage of any time. The suggestion finds little support in the literature,[79] and is clearly rejected by the International Court of Justice in *North Sea Continental Shelf* cases, when the Court accepted that, whilst the passage of a short period of time was not, in itself, a bar to the formation of a new rule, 'an indispensable requirement would be that *within the period [of time] in question*, [state practice] should have been both extensive and virtually uniform … and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.[80]

[74] Raphael M. Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 *Israel Law Review* 86, 92.

[75] Maurice Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177, 192.

[76] Edwin Borchard, 'Resources of the Continental Shelf' (1946) 40 *American Journal of International Law* 53, 55.

[77] Eric A. Posner and Alan O. Sykes, *Economic Foundations of International Law* (Harvard UP 2012) 61.

[78] Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

[79] Crawford, *Chance, Order, Change* (n. 35) 81 ('There is no such thing as instant custom'). A notable exception is found in Principle 32, ILA Report on Custom (n. 39), p. 61: 'Resolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption.'

[80] *North Sea Continental Shelf* cases (n. 1), para. 74 (emphasis added).

If we reject the possibility of instant custom, we have to accept, in the words of Bernardo Sepúlveda-Amor in his Separate Opinion in *Dispute Regarding Navigational and Related Rights*, that 'Time is another important element in the process of creation of customary international law'.[81] It is only with the passage of time that we can see the required evidence of state practice and *opinio juris*. There is no single test for the time that must pass. As Kotaro Tanaka observed in *North Sea Continental Shelf* cases: 'The time factor, namely the duration of custom, is relative.'[82] It is all, as the International Law Association pointed out, 'a question of accumulating a practice of sufficient density, in terms of uniformity, extent and representativeness'.[83]

The Power of the Event of Apartheid South Africa

Path dependence tells us that, in the absence of some new information, component agents in a complex system, like international law, will not change their behaviour. We have already seen in previous chapters how the Sharpeville Massacre of 21 March 1960 triggered a significant refashioning of human rights, from a non-binding moral code, to a set of legal norms, with a role for secondary agents of justice. These developments also allowed for the emergence of the first customary human right: the prohibition on systematic racial discrimination.

The prohibition on racial discrimination is now recognized as a fundamental norm of *jus cogens* standing, but it is important to remember that reference to the importance of promoting respect for human rights without distinction as to race in Article 55 of the UN Charter represented an innovation in international law practice. The Covenant of the League of Nations had not contained any provisions on human rights because of the refusal of US President Woodrow Wilson, sitting as chair of the Paris Peace Conference, to accept a Japanese proposal that member states should refrain from discrimination on the basis of race, notwithstanding the fact the proposal enjoyed the support of a majority of the delegates.[84] Nor were ideas of racial equality central to the war aims of the Allied Powers. The 1942 declaration of the twenty-six United Nations made no mention of the problem of racial discrimination, [85] leading the Indian independence campaigner Mahatma Gandhi to comment: 'I venture to think that the Allied Declaration that the Allies are fighting to make the world safe for freedom of the individual … sounds hollow, so long

[81] Separate Opinion of Judge Sepúlveda-Amor, in *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, 273, para. 25. For academic support for this position, see G.I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law' (1961) 49 *California Law Review* 419, 420 ('time plays a big part in the process of formation of a customary norm of international law').

[82] Dissenting Opinion of Judge Tanaka, in *North Sea Continental Shelf Cases* (n. 1) 172, 178.

[83] ILA Report on Custom (n. 40), p. 20 (references omitted).

[84] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (2nd edn, Pennsylvania UP 2003) 100 (hereafter, Lauren, *The Evolution of International Human Rights*); also Jan Herman Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century' (1992) 14 *Human Rights Quarterly* 447, 449.

[85] 'The Declaration by United Nations', reprinted in the *Yearbook of the United Nations 1946–47*, 1.

as … America has the Negro problem in her own home.'[86] Further, in a move reminiscent of discussions on the League of Nations Covenant, the 1944 Dumbarton Oaks conference rejected a Chinese proposal that any new world organization should uphold the principle of 'the equality of all states and all races'.[87] It was only at the San Francisco conference, held between April and June 1945, which saw a significant enlargement of the participants and a greater focus on human rights, that it was agreed one of the objectives of the United Nations would be to promote human rights 'without distinction as to race'.[88]

The subject of racial discrimination in South Africa came to the General Assembly in its first session in 1946, but it was not until after the 1960 Sharpeville Massacre that the UN made clear that formal systems of racial segregation would no longer be tolerated.[89] As part of its response to the event of Sharpeville, the General Assembly tasked the UN Commission on Human Rights to prepare a declaration on the elimination of racial discrimination,[90] which, when adopted, included six references to the term 'human rights'.[91] The argument against apartheid was now framed as a specific manifestation of a wider battle for human rights and it is the only political system mentioned in the 1965 Race Convention.[92] Nazism and anti-Semitism are not included.[93] By 1970, thirty-five states had signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination, around one-quarter of UN's membership. Not surprisingly, South Africa was not amongst them and it did not become a party until 1998. To bind South Africa to the prohibition on systematic racial discrimination, it would be necessary to show both the emergence of a customary norm and that the apartheid State could not exempt itself by way of the persistent objector doctrine. The issues are considered in turn.

[86] Quoted Elizabeth Borgwardt, '"When You State a Moral Principle, You Are Stuck with It": The 1941 Atlantic Charter as a Human Rights Instrument' (2006) 46 *Virginia Journal of International Law* 501, 545.

[87] Lauren, *The Evolution of International Human Rights* (n. 84) 161.

[88] Articles 1(3) and 55(c).

[89] See Chapter 3.

[90] Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination, UNGA Res 1780(XVII) (7 Dec 1962), para. 1.

[91] United Nations Declaration on the Elimination of All Forms of Racial Discrimination, UNGA Res 1904 (XVIII) (20 Nov 1963) (adopted without a vote).

[92] International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res 2106 (XX) (21 Dec 1965). The Race Convention was adopted by 106 votes to 0, with 1 abstention (Mexico), which later changed to an affirmative vote. Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (OUP 2016) 1 ('It was not a particularly difficult birth, nor was its gestation prolonged: its emergence from drafting into the light of day was swift by UN standards, propelled forwards by an extraordinary political momentum').

[93] Lerner argues that the reason for this was that 'apartheid was then the only instance of racial discrimination as an official policy of a government': Natan Lerner, *Group Rights and Discrimination in International Law* (2nd edn, Martinus Nijhoff 2003) 51. The lack of reference to any other political ideology of racial superiority makes it difficult to accept the motivation for the adoption of the Race Convention was the epidemic of swastika-painting and other manifestations of anti-Semitism in many countries in the winter of 1959–60. See Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996, 997.

The customary prohibition on racial discrimination

The identification of custom requires evidence of a rule of appropriate behaviour (state practice) and evidence of a belief the rule is part of the international law system (*opinio juris*), with the consequence that states can be held responsible for any violation. In the absence of state responsibility, the introduction of economic and political 'sanctions' to force compliance with a human rights norm constitutes an unjustified interference in the domestic affairs of a sovereign and independent state. The emergence of a customary norm prohibiting racial discrimination, along with the sanctions targeting apartheid South Africa, represented a novel development, and one that was difficult to explain in terms of international law doctrine, as becomes clear from consideration of the evolving case law of the International Court of Justice in the 1960s and early 1970s on the related situation in South West Africa.

South West Africa (Namibia) had been a German colony from the late nineteenth century until the end of World War I, when it became subject to the Mandate scheme under the League of Nations. South Africa was designated the mandatory power and administered South West Africa as a trust territory. South Africa continued to be bound by the terms of the Mandate when the League was replaced by the United Nations, specifically in relation to Article 22 of the League of Nations Covenant, which established, *inter alia*, that the territory was to be governed 'in the interests of the indigenous population'.[94] When the National Party came to power in South Africa in 1948, it extended the discriminatory policy of racial segregation to South West Africa. In 1962, Ethiopia and Libya argued before the International Court of Justice that South Africa was in breach of its international obligations. The Court accepted that it had standing to hear the case,[95] only to reverse its decision in the 1966 *South West Africa* judgment, when it decided Ethiopia and Liberia lacked any legal interest to challenge South Africa's exercise of the mandate power.

The decision in the 1966 *South West Africa* judgment rested on the casting vote of the President, the Australian judge, Sir Percy Spender, with the votes of the judges being equally divided, seven-seven.[96] The judgment of the Court does not deal with the merits of the case, but it does express the view that 'Rights cannot be presumed to exist merely because it might seem desirable that they should'.[97] Humanitarian considerations might constitute the inspirational basis for rules of law but they did not amount to rules of law, with the court concluding that, to be legally effective, moral or humanitarian ideals 'must be given juridical expression and be clothed in

[94] *International Status of South-West Africa*, Advisory Opinion [1950] ICJ Rep 128, 143.

[95] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections [1962] ICJ Rep 319, 347.

[96] Victor Kattan argues that Sir Percy Spender did not want to address the merits because the cases were about self-determination, as much as they were about apartheid. Kattan contends that Sir Percy held the view that self-determination had been hijacked by the Soviet Union and the Afro-Asian bloc at the United Nations: Victor Kattan, '"There was an Elephant in the Court Room": Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the South West Africa Cases (1960–1966) after Half a Century' (2018) 31 *Leiden Journal of International Law* 147.

[97] *South West Africa*, Second Phase, Judgment [1966] ICJ Rep 6, para. 91 (hereafter, *South West Africa*, [1966]).

legal form'.[98] The 1966 judgment followed the dissent by Sir Percy and the British judge Sir Gerald Fitzmaurice in the 1962 *South West Africa* cases, where they had declared: 'We are not unmindful of, nor are we insensible to, the various considerations of a non-juridical character, social, humanitarian and other, which underlie this case; but these … cannot be allowed to deflect us from Our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.'[99]

The 1966 reversal of the 1962 judgment highlights the contingent nature of developments in international law, as it was, in Richard Falk's words, 'largely a consequence of fortuitous factors that allowed the 1962 minority to achieve an artificial and temporary majority in 1966'.[100] Those factors were the election of Judge Ammoun to replace Judge Badawi, who had voted with the majority in 1962 to allow the case to go forward, but too late for Ammoun to participate in the 1966 judgment; the fact Judge Bustamante, who voted with the majority in 1962, became ill; and that Judge Zafrulla Khan was persuaded by Spender to recuse himself on the basis he had spoken on the issue in the UN General Assembly.[101] In the words of Edward McWhinney, 'the combined effects of death, disease and disablement on the Court's ranks, were perhaps more influential on events than any doctrinal-legal [considerations]'.[102]

The minority judgments in the 1966 *South West Africa* cases did, though, examine the merits of the case and, in doing so, shed light on the emergence of the racial discrimination norm. Philip Jessup was, for example, clear that 'the practice of apartheid is a violation of a general rule (norm) of international law'.[103] Padilla Nervo agreed, concluding that, 'Racial discrimination as a matter of official government policy is a violation of a norm or rule or standard of the international community'.[104]

The key dissenting judgment was that of the Japanese judge, Kotaro Tanaka, in which he explained a new methodology for custom formation. After examining the Universal Declaration of Human Rights, the (then) draft covenants on civil and political and economic, social and cultural rights, and the UN Declaration on Racial Discrimination, Judge Tanaka concluded that 'the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law'.[105] The traditional understanding, he explained, was that custom developed by 'the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law'. Tanaka described this as an individualistic process that could take a long period of time. By way of contrast, he pointed to the possibilities of a

[98] Ibid., paras 50–1.

[99] Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections [1962] ICJ Rep 319, 466.

[100] Richard A. Falk, 'The South West Africa Cases: An Appraisal' (1967) 21(1) *International Organization* 1, 18.

[101] Shiv R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart 2007) 119.

[102] Edward McWhinney, 'The International Court of Justice and International Law-making: The Judicial Activism/ Self-Restraint Antinomy' (2006) 5 *Chinese Journal of International Law* 3, 10.

[103] Dissenting Opinion of Judge Jessup, *South West Africa*, [1966] (n. 97) 325, 433.

[104] Dissenting Opinion of Judge Padilla Nervo, *South West Africa*, [1966] (n. 97) 443, 464.

[105] Dissenting Opinion of Judge Tanaka, *South West Africa*, [1966] (n. 97) 250, 293.

new methodology following the establishment of the United Nations Organization, in which a state, 'instead of pronouncing its view to a few States directly concerned, has the opportunity . . . to declare its position to all members of the organization and to know immediately their reaction on the same matter'.[106] Whereas the traditional approach required us to make sense of the amorphous and disaggregated communication acts of states, we could now examine the content of General Assembly resolutions and declarations, which allowed for a structured exchange of views and the emergence of a clear position. Tanaka described this as a 'collective, cumulative and organic process of custom-generation'.[107]

Between 1966 and 1971, the composition of the International Court of Justice changed dramatically as the result of the triennial elections of Judges and increase in number of African judges from one to three, following the rise in Member States from the continent.[108] Only Sir Gerald Fitzmaurice and André Gros remained, and they were the only dissenting justices in the 1971 advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa), where the overwhelming majority of the Court concluded that 'to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race . . . which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter'.[109]

The 1971 advisory opinion does not expressly determine that systematic racial discrimination is a violation of customary international law. This conclusion follows necessarily, though, when it is read with the Court's 1970 judgment in *Barcelona Traction, Light and Power Company, Limited*, which had nothing to do with human rights (it concerned the rights of Belgian shareholders in a Canadian company). In a throwaway line, introduced without explanation, following a proposal by Judge Manfred Lachs,[110] the International Court of Justice distinguished between the obligations a state owes to another state in the field of diplomatic protection, and 'the obligations of a State towards the international community as a whole'. With this brief, *obiter*—by the way—statement, the Court transformed the international law system,[111] from a network of bilateral inter-state relations, to one that also included obligations owed to all other states, who had a legal interest in their protection.[112]

Obligations *erga omnes*, the Court determined in *Barcelona Traction*, derive 'from the outlawing of acts of aggression, and of genocide, [and] from the principles and rules concerning the basic rights of the human person, including protection from

[106] Ibid. 291. [107] Ibid. 292.

[108] John Dugard, *The South West Africa/Namibia Dispute* (California UP 1973) 447.

[109] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, para. 131.

[110] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997) 8.

[111] Christian J. Tams and Antonios Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law* 781, 792.

[112] Arnold N. Pronto, ' "Human-Rightism" and the Development of General International Law' (2007) 20 *Leiden Journal of International Law* 753, 755 ('The trajectory of international law was nudged in the direction of greater emphasis on interests above and beyond those of the state').

slavery *and racial discrimination*'.[113] The Court has reaffirmed the existence of obligations *erga omnes* in subsequent cases and that they concern customary rules.[114] The prohibition on systematic racial discrimination is a customary obligation *erga omnes*,[115] allowing all other countries to introduce sanctions to force a non-compliant state to come into line with the norm.[116] That is, unless the state can claim the status of persistent objector.

The denial of the status of persistent objector to apartheid South Africa

There is widespread acceptance in the literature that the prohibition on racial discrimination is a customary international law norm and that it emerged because of the reactions of states to the situation in South Africa under National Party rule.[117] The United Nations and other international organizations, like the Commonwealth, along with individual states, justified the introduction of economic, diplomatic, and other measures because of the practice of racial segregation, which they considered a violation of international law. South Africa clearly did not agree with the emergent human right prohibiting racial discrimination, or its application to the apartheid State. In other words, South Africa adopted the position of persistent objector.[118]

The persistent objector doctrine establishes an important exception to the rule that all countries are bound by customary international law.[119] The International Law Commission has confirmed the doctrine's existence,[120] and it is accepted in

[113] *Barcelona Traction, Light and Power Company, Limited,* Judgment [1970] ICJ Rep 3, paras. 33–4 (emphasis added).

[114] *East Timor* (Portugal v. Australia), Judgment [1995] ICJ Rep 90, para. 29; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 2004, 136, paras. 155–7.

[115] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 257.

[116] See Article 48(1)(b), International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) *Yearbook of the International Law Commission*, Vol. II(2), 26. The Commentary to the Articles makes the following point: 'All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such' (p. 127). The Draft Articles were welcomed by the General Assembly in 'Responsibility of States for Internationally Wrongful Acts', UNGA Res 56/83 (12 Dec 2001) (without a vote).

[117] See, for example, Theo van Boven, 'Racial and Religious Discrimination' (2007) *Max Planck Encyclopedia of Public International Law*, para. 8 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018 ('There is considerable amount of legal opinion that ranks systematic racial discrimination among the prohibitory rules of customary international law … if practised as a matter of State policy. The policy of apartheid of the former white minority regime in South Africa fell in this category'); American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 702, comment (i) ('Racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa').

[118] Restatement (Third), ibid., para. 1 ('with the exception of the Republic of South Africa in respect of *apartheid*, no state claims the right to commit [customary human rights law violations], and few, if any, would deny that they are violations of international law').

[119] *Anglo-Norwegian Fisheries* case, Judgment [1951] ICJ Rep 116, 131.

[120] Conclusion 15, ILC, Draft conclusions on identification of customary international law (n. 36) ('Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection').

the literature.[121] The persistent objector rule is not concerned with the process of customary law formation, but the opposability of a norm to a particular state.[122] A customary norm emerges where we can see clear patterns of state practice and *opinio juris* evidencing the existence of a rule. Absolute conformity in practice is not required, with the International Court of Justice referring variously to the requirement for state practice to be 'virtually uniform',[123] or 'in general' consistent with the norm.[124] Once the existence of the norm is confirmed, however, it binds all countries, even those that did not participate in the process of its formation—except for a persistent objector.

A state can exempt itself from the application of a new customary norm by clearly and persistently objecting to the rule during its formation, and thereafter consistently maintaining its objecting status.[125] The justification for the doctrine is usually explained in terms of the residual importance of consent in international law, as it prevents the majority from binding a state to a rule it clearly does not accept.[126]

The generally accepted position in the case law,[127] and academic literature,[128] is that the status of persistent objector is available in respect of all customary norms, including human rights,[129] with the exception of those that have attained the status of *jus cogens*, those 'recognized by the international community of states as a whole as a norm from which no derogation is permitted'.[130] A state can object to a new

[121] Maurice H. Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil de Cours* 155, 227; also Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law* 1, 2 ('virtually all authorities maintain that a State which objects to an *evolving* rule of general customary international law can be exempted from its obligations' (emphasis in original)).

[122] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 34.

[123] *North Sea Continental Shelf* cases (n. 1), para. 74.

[124] *Military and Paramilitary Activities* (n. 9), para. 186.

[125] Akehurst, 'Custom' (n. 2) 24; also, Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457, 457 ('a state that has persistently objected to a rule of customary international law during the course of the rule's emergence is not bound by the rule') (hereafter, Stein, 'The Approach of the Different Drummer').

[126] Michael Wood, Special Rapporteur, Third report on identification of customary international law, International Law Commission, Sixty-seventh session, Geneva, 4 May–5 June and 6 July–7 August 2015, UN Doc. A/CN.4/682, para. 90 (The persistent objector rule is justified by the reference to the essentially majoritarian nature of customary law formation, which develops through general practice and its 'essentially consensual nature') (hereafter, Wood, Third report).

[127] *Michael Domingues v. United States*, Inter-American Commission on Human Rights, Merits, Case 12.285, Report No. 62/02 (2002), para. 85 ('As a jus cogens norm, [the prohibition on the execution of children] binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise').

[128] James A. Green, *The Persistent Objector Rule in International Law* (OUP 2016) 190 (and references cited).

[129] Green argues that states have enjoyed, and continue to enjoy, the status of persistent objector in relation to 'non-peremptory human rights', including the United States of America in relation to the customary rights to food and water: ibid. 218.

[130] Article 53, Vienna Convention on the Law of Treaties. Formally, *jus cogens* are a category of norm that operate to invalidate treaties: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Article 53: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and

customary human rights norm, but once the norm attains the character of *jus cogens*, the status of persistent objector is lost. In one sense, the argument has nothing to do with human rights, it is simply that the standing of a persistent objector is not available in relation to *jus cogens* norms and some *jus cogens* norms just happen to be human rights. The preponderance of human rights in the list of *jus cogens* is, though, striking—prohibitions on genocide, torture, racial discrimination, and slavery,[131] and there appears, as Andrea Bianchi points out, to be an almost intrinsic relationship here, 'as if human rights were a quintessential part of jus cogens'.[132]

The norm prohibiting systematic racial discrimination emerged in the 1960s and it was clear the National Party government did not accept its opposability to South Africa.[133] This is significant, as where a country enjoys the status of persistent objector, it does not act in violation of its obligations by behaving contrary to a customary norm. Consequently, any sanctions introduced to force compliance with the norm constitute an unjustified interference in the domestic affairs of the state. Nonetheless, as Jonathan Charney explains, this did not protect South Africa from the pressure exerted by the international community 'to force them to conform' to the new norm prohibiting racial discrimination.[134]

The lack of protection afforded to South Africa by the persistent objector doctrine is normally explained by the *jus cogens* status of the race discrimination norm. Erika de Wet, for example, writes that 'the claim of South Africa's government … was universally rejected with the argument that peremptory law does not exempt persistent objectors'.[135] David Bederman goes further, arguing the *jus cogens* doctrine 'appears to have been developed as the ultimate antidote to the persistent objector, and especially the white-minority government of South Africa's legalistic defense of its apartheid policies from 1945–1994'.[136]

recognized by the international community of States as a whole as a norm from which no derogation is permitted.' See, also, Article 64: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' More generally, *jus cogens* are conceptualized as a kind of super-norm, in that any substantive rule that conflicts with a norm of *jus cogens* will held to be invalid: Erika De Wet, 'The Constitutionalization of Public International Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1209, 1215. The International Court of Justice confirmed the existence of *jus cogens* norms in 2006: *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment [2006] ICJ Rep 6, para. 64.

[131] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 374. The other peremptory norms listed are humanitarian norms (crimes against humanity, the prohibition of hostilities directed at civilian population, i.e. basic rules of international humanitarian law), the prohibition on the aggressive use of force and the right to self-defence, and the prohibition of piracy.

[132] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491, 495.

[133] ICJ Pleadings, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Vol. II, pp. 577–9.

[134] Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law* 1, 15; Stein, 'The Approach of the Different Drummer' (n. 125) 463.

[135] Erika de Wet, 'Jus Cogens and Obligations Erga Omnes' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 541, 543.

[136] David J. Bederman, *Custom as a Source of Law* (CUP 2010) 159 (reference omitted).

The difficulty with these accounts is that the United Nations adopted resolutions condemning the policy of racial segregation as early as 1950, and in 1961 the General Assembly requested that Members introduce sanctions to bring about the abandonment of apartheid, including the severance of diplomatic, trade, and transport relations.[137] In other words, the Organization called on Member States to introduce sanctions before the emergence of the race norm, and before the confirmation of the existence of *jus cogens* and agreement that its content included the prohibition on systematic racial discrimination. Indeed, Egon Schwelb is an almost solitary voice in the late 1960s arguing that the prohibition on race discrimination was a norm of *jus cogens* standing.[138]

The timeline of events makes the position clear. The customary human right prohibiting racial discrimination emerged at some point between its identification by Judge Tanaka in *South West Africa*, Second Phase, in 1966, and confirmation of its existence by the International Court of Justice in *Barcelona Traction* (1970) and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971). This customary norm made lawful the imposition of diplomatic and economic sanctions on apartheid South Africa by international organizations, like the Commonwealth, and individual states. The notion of *jus cogens* emerged in the International Law Commission in its discussions on the adoption of a convention on the law of treaties. The term was first used in 1958 by Sir Gerald Fitzmaurice, although the idea can be found in a 1953 report by Sir Hersch Lauterpacht.[139] In 1963, Humphrey Waldock identified the prohibitions on the slave-trade and genocide as examples of *jus cogens*, but did not extend the idea to include racial discrimination.[140] In the 1966 commentaries on the proposed convention on the law of treaties, the International Law Commission noted that the idea of rules having the character of *jus cogens* was a 'comparatively recent' development.[141] For some members, *jus cogens* included human rights, specifically the prohibitions on slavery and genocide, although the Commission as a whole did not take a position on the content of *jus cogens*.[142] The existence of norms of *jus cogens* standing was confirmed with the adoption of the Vienna Convention on the Law of Treaties in 1969, albeit without any detail on the identity of *jus cogens* norms. At the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969, there was

[137] The policies of apartheid of the Government of the Republic of South Africa, UNGA Res 1761 (XVII) (6 Nov 1962).

[138] See Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996, 1054; and Egon Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission' (1967) 61 *American Journal of International Law* 946, 956. See also Ulrich Scheuner, 'Conflict of Treaty Provisions with a Peremptory Norm of General International Law' (1969) 29 *Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht* 28, 33.

[139] First report on *jus cogens* by Dire Tladi, Special Rapporteur, International Law Commission Sixty-eighth session, Geneva, 2 May–10 June and 4 July–12 August 2016, UN Doc. A/CN.4/693, paras 29 and 30.

[140] Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook of the International Law Commission* (1963), Vol. II, 53.

[141] *Yearbook of the International Law Commission* (1966), Vol. II, 248 [3].

[142] Ibid.

general acceptance of the notion, but little agreement on its content. A few countries referred to slavery and genocide as examples of *jus cogens* norms, but only four (Ghana, Nepal, Netherlands, and Uruguay) mentioned the prohibition on racial discrimination.[143]

We can now explain the human rights exception to the persistent objector doctrine in terms of a more general rule concerning *jus cogens*, but it would be a mistake to make sense of the rejection of South Africa's opposition to the customary norm and its status as a persistent objector in terms of the *jus cogens* standing of the race norm. The denial of the status of persistent objector reflected the view of the international community that states could not exempt themselves from fundamental human rights. This can now be explained in terms of *jus cogens*, but the simple fact is that international law bifurcated in the 1960s, taking a new path to accommodate demands for the opposability of the non-discrimination norm to apartheid South Africa—a country that defined its socio-economic and political identity in terms of the rejection of the equal status of socially constructed racial groups, and resulting in a reformulation of the very notion of the 'sovereign' state.

Customary Human Rights

The first customary human right was the right to be free from racial discrimination.[144] Its recognition followed the adoption by the General Assembly of a Declaration and Convention on the Elimination of Racial Discrimination, as well as other measures targeting South Africa. Whilst the United Nations had denounced the policy of racial segregation as early as the 1950s, it was only following the 1960 Sharpeville Massacre that the international community framed its opposition to racial segregation in terms of legal human rights—and, in doing so, it established a precedent that could be applied more generally. The development of the customary obligation

[143] Ghana, Netherlands, and Uruguay at the first session: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968 (United Nations 1969) 276, 301, and 303 (the statement by Ghana is particularly noteworthy: 'In the twentieth century, some of humanity's most bitter experiences had led it to recognize the peremptory character of an ever-increasing number of rules, [including] the prohibition of … slavery and its bastard son, racial discrimination' (301 [16])); Nepal at the second: Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969 (United Nations 1970) 107 ('A treaty violating the United Nations Charter or stipulating the practice of apartheid or racial discrimination would also be contrary to jus cogens').

[144] Whilst the International Court of Justice had confirmed that genocide was a crime under international law in 1951, and that the Genocide Convention was adopted 'for a purely humanitarian and civilizing purpose' (*Reservations to the Convention on Genocide*, Advisory Opinion [1951] ICJ Rep 15, 23), the Court did not associate the prohibition on genocide with human rights and the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 makes no mention of the term 'human rights'. It was not until the adoption of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) that the General Assembly confirmed that the practice of genocide was also a human rights violation (Article 6(3) refers to a situation 'When deprivation of life constitutes the crime of genocide').

erga omnes prohibiting racial discrimination was confirmed by the International Court of Justice in *Barcelona Traction* (1970) and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971), with the methodology for the formation and identification of the customary race norm outlined by Judge Kotaro Tanaka in the 1966 *South West Africa* cases, focusing on the role of law-making treaties and General Assembly resolutions, although, as Bertrand Ramcharan observes, there is still a 'lively discussion in the literature about the process of passage of provisions of human rights declarations or conventions into customary law'.[145]

There is a now a general recognition that law-making treaties have a part to play in the formation of customary international law. This has been accepted by the International Court of Justice,[146] and the International Law Commission,[147] although the process of transformation of a convention norm into a customary norm is not straightforward. Where a treaty claims to confirm the existence of a custom, there is no reason to find the assertion definitive; nor does widespread acceptance, by signature and ratification, allow us to conclude a treaty norm reflects customary law;[148] nor can we easily recognize conduct in compliance with a treaty as evidence of state practice and/or *opinio juris*.[149] In fact, the existence of convention obligations can make the identification of custom more difficult as states act in compliance with their treaty obligations (the so-called Baxter paradox);[150] nor can we conclude from the establishment of a number of treaties on the same subject that a customary rule exists.[151] The adoption and widespread acceptance of a human rights treaty does not, by itself, establish a corresponding customary norm. The fact there are over 160 states parties to the UN Convention Against Torture does not, *ipso jure*, mean that torture is prohibited under customary international law.[152] What the existence

[145] Bertrand G. Ramcharan, 'The Law-Making Process: From Declaration to Treaty to Custom to Prevention' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 499, 516 (hereafter, Ramcharan, 'The Law-Making Process').

[146] *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment [1985] ICJ Rep 13, para. 27 ('multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them').

[147] Conclusion 11, ILC, Draft conclusions on identification of customary international law (n. 36).

[148] Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 *The Law and Practice of International Courts and Tribunals* 195, 207 ('widespread participation in a codification convention has never, in the jurisprudence of the Court, been sufficient on its own for the confirmation of a customary rule') (hereafter, Tomka, 'Custom and the ICJ').

[149] Hugh Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28 *Leiden Journal of International Law* 495, 501 ('acts by a party to a treaty subsequent to, and consistent with, the treaty must be taken to have been performed pursuant to the treaty, and thus cannot constitute practice in support of an asserted customary rule').

[150] Richard R. Baxter, 'Treaties and Custom' (1970) 129 *Recueil des Cours* 27, 64.

[151] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment [2007] ICJ Rep 582, para. 90 ('The fact … that various international agreements … have established special legal regimes … is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary').

[152] The position of the Committee Against Torture is that the customary status of the prohibition on torture (and its status as a norm of *jus cogens* standing) was established after the adoption of the Convention Against Torture in 1984: General Comment No. 2, 'Implementation of Article 2 by States Parties', UN Doc. CAT/C/GC/2 24 January 2008, para. 1: '*Since* the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition *has become* accepted as a matter of customary international law' (emphasis added).

and widespread acceptance of the Convention Against Torture does do is change the way we approach the task of establishing the status of the prohibition.

A customary rule is established when we can see patterns of state practice that reflect a norm of appropriate behaviour, along with the necessary *opinio juris*. When trying to make sense of the physical and verbal communication acts of states, we can take one of two approaches: examine the various manifestations of physical and verbal communication acts and try and find patterns that reflect the existence of a norm, in the certain knowledge not all the evidence will support our conclusion one way or the other; or apply a template to the communications, to see whether our intuition that a norm exists is supported by the empirical data. The former President of the International Court of Justice, Peter Tomka, has confirmed that where a law-making convention has been adopted, the World Court 'no longer proceeds by distilling a rule from instances of practice through pure induction, but rather by considering whether the instances of practice support the written rule'.[153]

Once a human rights norm has been recognized by UN Member States through the adoption of a global human rights treaty, we can then look for evidence that adherence to the norm is required outside of the treaty system, by, for example, seeing whether the rule is applied to non-states parties.[154] Where this is the case, we can conclude the treaty norm has a corresponding customary norm.

There is also widespread acceptance that General Assembly resolutions play a part in custom formation. Again, this has been confirmed by the International Law Commission,[155] and the International Court of Justice. In *Kosovo Advisory Opinion*, for example, the Court concluded that General Assembly Resolution 2625 (1970), the Declaration on Friendly Relations, 'reflects customary international law'.[156] Formally, of course, General Assembly resolutions are 'recommendations',[157] and recommendatory propositions cannot create law. There is also, as we have seen, no such thing as instant custom. The adoption of a resolution cannot, therefore, by itself, produce a customary norm. That does not mean General Assembly resolutions are irrelevant; as the International Court of Justice observed in *Legality of the Threat or Use of Nuclear Weapons*, 'even if they are not binding, [they] may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'.[158]

[153] Tomka, 'Custom and the ICJ' (n. 148) 206.

[154] Wood, Third report (n. 126), para. 41.

[155] Conclusion 12, ILC, Draft conclusions on identification of customary international law (n. 36).

[156] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] ICJ Rep 403, para. 80. Whilst the relevant paragraph is concerned with the principle of territorial integrity, the International Court of Justice does not limit its characterization of Resolution 2625, as reflecting customary law, to the provisions on territorial integrity. This is significant, as the Declaration on Friendly Relations establishes that states are required to 'co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance': Declaration on Principles of International Law Concerning Friendly Relations, UN GA Res 2625 (XXV) (24 Oct 1970) (adopted without a vote).

[157] Article 10, Charter of the United Nations.

[158] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para 70.

General Assembly resolutions can help confirm the existence of a norm (state practice) and provide evidence of a belief the norm is binding as a matter of international law (*opinio juris*), especially where there are several resolutions on the same subject,[159] the resolution is adopted by consensus,[160] or the term 'Declaration' is used.[161] There are no hard and fast rules here, but, in the words of the former President of the International Court of Justice, Rosalyn Higgins: 'When we shake the kaleidoscope and the pattern falls in certain ways, [General Assembly resolutions] undoubtedly play a significant role in creating norms.'[162]

Of particular interest here is the standing of General Assembly resolution 217(III)A, adopted on 10 December 1948 by forty-eight votes to none, with eight abstaining—the 'Universal Declaration of Human Rights'. At the time, there was little debate over its status: the Universal Declaration was not binding as a matter of law.[163] That position has changed in the intervening years and certain scholars now regard it 'as an authoritative articulation of customary international law',[164] or that 'most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status'.[165] Christian Tomuschat expresses the point this way: 'Originally, therefore, the Universal Declaration did not constitute a set of binding legal rules, but some of its provisions have crystallized as customary international law in the more than 60 years since its adoption.'[166]

In terms of practice, the Universal Declaration has been invoked by applicant states before the International Court of Justice,[167] as well as by individual

[159] Ibid. ('a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule').

[160] Treves, 'Customary International Law' (n. 64), para. 44.

[161] Memorandum of the Office of Legal Affairs of the Secretary General of the United Nations, E/CN.4/L.610, 2 April 1962, referred to in Wood, Third report (n. 126), at fn 126.

[162] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) 28.

[163] H. Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 *British Year Book of International Law* 354, 369.

[164] Richard B. Lillich, 'The Growing Importance of Customary International Human Rights Law' (1995) 25 *Georgia Journal of International and Comparative Law* 1, 2. See also Frederic L. Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146, 147; and American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 701, Reporters' Notes, para. 4.

[165] Olivier De Schutter, *International Human Rights Law* (CUP 2010) 50 ('The growing consensus is that most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status in international law'). See also Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287, 340 ('there would seem to be little argument that many provisions of the Declaration today do reflect customary international law').

[166] Christian Tomuschat, 'United Nations, General Assembly' (2011) *Max Planck Encyclopedia of Public International Law*, para. 22 http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[167] *Nuclear Tests* (Australia v. France) [1974] ICJ Rep 253, 360–1 (Australia argued for recognition of a right to be free from atmospheric nuclear weapon tests and looked for support in provisions of the Universal Declaration of Human Rights); *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment [2006] ICJ Rep 6, 15 (the Democratic Republic of the Congo requested that the Court declare Rwanda had 'violated the sacred right to life provided for in the Universal Declaration of Human Rights'); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 62 (allegation that Yugoslavia had violated the Universal Declaration of Human Rights

judges,[168] with Judge Ammoun concluding that it 'can bind States on the basis of custom'.[169] In the *Hostages* case, the International Court of Justice concluded that wrongful detention in conditions of hardship was 'manifestly incompatible . . . with the fundamental principles enunciated in the Universal Declaration of Human Rights'.[170]

The adoption of a declaration on a human rights issue by consensus in the General Assembly, or by an overwhelming majority of UN Member States, does not, by itself, establish corresponding customary norms, but it does suggest that possibility. The adoption, for example, of UN declarations on race discrimination,[171] torture,[172] enforced disappearance,[173] and the rights of minorities[174] all reflected agreement in the Organization on the required standard of behaviour (state practice). To establish a customary norm, however, it is also necessary to look for confirmatory evidence in the 'patterns of action and inaction outside the UN plaza'.[175]

with respect to the citizens of Bosnia and Herzegovina); and *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment [2007] ICJ Rep 582, 595 (Guinea cited the Universal Declaration of Human Rights and referred to 'various violations of human rights').

[168] Dissenting Opinion of M. Guggenheim, Judge 'Ad Hoc', *Nottebohm Case* (Second Phase), Judgment [1955] ICJ Rep 4, 63 ('The protection of the individual . . . would be weakened [by a lack of diplomatic protection] and . . . this would be contrary to . . . Article 15 (1) of the Universal Declaration of Human Rights'); Dissenting Opinion of Judge De Castro, *Application for Review of Judgement No. 158 of the United Nations Admin. Tribunal* [1973] ICJ Rep 166, 291 (reference to the Universal Declaration of Human Rights, according to which 'No-one shall be subjected to . . . attacks upon his honour and reputation'); Dissenting Opinion Of Judge Stassinopoulos, *Aegean Sea Continental Shelf*, Judgment [1978] ICJ Rep 3, 83 ('the original source of general principles is to be found in the idea of freedom and democracy and, beyond that, in the Universal Declaration of Human Rights'); Dissenting Opinion of Judge El-Kosheri, *Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment [1992] ICJ Rep 3, 111–12 (refers to '[a] clear conflict with the requirement for "a fair and public hearing by an independent and impartial tribunal" provided for under [the] Universal Declaration of Human Rights'); Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, 506 ('basic human rights [in the Universal Declaration of Human Rights] are endangered by nuclear weapons'); and Separate Opinion of Judge Cançado Trindade, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] ICJ Rep 403, 605 ('Grave breaches of fundamental human rights . . . are in breach of the corpus juris gentium, as set forth in the UN Charter and the Universal Declaration').

[169] Separate Opinion of Judge Ammoun, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16, 76.

[170] *United States Diplomatic and Consular Staff in Tehran*, Judgment [1980] ICJ Rep 3, 42. Cf. Dissenting Opinion of Judge Morozov, 53 ('unfounded allegation that [the State] has violated the Charter of the United Nations and the Universal Declaration of Human Rights').

[171] United Nations Declaration on the Elimination of All Forms of Racial Discrimination, UN General Assembly 1904 (XVIII) (20 November 1963) (adopted without a vote).

[172] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 3452 (XXX) (9 December 1975) (adopted without a vote).

[173] Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133 (18 December 1992) (adopted without a vote).

[174] Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992) (adopted without a vote).

[175] Jordan J. Paust, 'Customary International Law: Its Nature, Sources and Status as Law of the United States' (1990–1) 12 *Michigan Journal of International Law* 59, 74

Whilst law-making treaties and declarations adopted by the General Assembly demonstrate agreement on a norm of appropriate behaviour and provide some evidence of *opinio juris*, a point confirmed in the 2018 International Law Commission draft conclusions,[176] we cannot be certain there is a binding customary international law norm, unless and until we observe states relying on the rule outside the United Nations, either to explain their own conduct or as the basis of criticism of other states. This becomes clear when we examine the relevant jurisprudence.

In the ground-breaking case of *Filartiga v. Pena-Irala* (1980), before the United States Court of Appeals, the central question was whether the prohibition on torture was a customary norm. The Court observed that the Charter had established the principle that a state's treatment of its own citizens was a matter of international concern, albeit without providing any detail of the scope of protection. There was, the Court concluded, a general acceptance that the prohibition on torture was included in the bare minimum content of human rights and this prohibition had become part of customary international law, 'as evidenced and defined by the Universal Declaration of Human Rights'.[177] The Court also noted the adoption of the General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture, which 'expressly prohibits any state from permitting the dastardly and totally inhuman act of torture'.

The Court of Appeals did not, though, base its conclusion that torture was contrary to the law of nations exclusively on the human rights provisions in the Charter and resolutions adopted by the General Assembly. Other relevant considerations were the universal renunciation of torture by states; the fact many domestic legal systems prohibited torture; and that the prohibition was not disputed by states, with the Court reporting that 'it has been the [US] Department of State's general experience that no government has asserted a right to torture its own nationals'.[178] In other words, there was a correlation between 'rights talk' within the United Nations buildings in New York and Geneva and the 'rights practice' of states outside the Organization.

A similar methodology was applied by the International Court of Justice in *Questions Relating to the Obligation to Prosecute or Extradite*, where it found that 'the prohibition of torture [was] part of customary international law'. In reaching this conclusion, the Court noted that the prohibition appeared in numerous international instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. This was also accompanied by concrete instances of state practice, in particular the introduction of laws prohibiting torture in 'almost all States' and by the fact 'acts of torture are regularly denounced within national and international fora'.[179]

[176] Conclusions 6(2) and 10(2), ILC, Draft conclusions on identification of customary international law (n. 36).

[177] *Filartiga v. Pena-Irala*, 630 F.2d 876, 882.

[178] 630 F.2d 876, 883–4.

[179] *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment [2012] ICJ Rep 422, para. 99.

Where the General Assembly adopts a law-making treaty or declaration on human rights, scholars, and practitioners often suspect a new customary norm has emerged or is in the process of emerging. The adoption of these instruments provides evidence of the existence of a human rights norm that establishes a shared understanding of appropriate behaviour in the international community, especially where there are a number of instruments on the same issue, or there is consensus amongst UN Member States on the subject, or a law-making treaty is adopted, or the term Declaration is used. The adoption of an instrument by the UN General Assembly can also contribute to the belief that conduct in compliance with the norm is required by international law (the *opinio juris* element).

Conduct associated with General Assembly resolutions and law-making treaties contributes then to the patterns of verbal acts (or speech acts) by states from which we abstract customary rules, but this is only part of the picture. There must be sufficient repetition of physical and verbal communication acts to show the existence of a general practice and clear evidence, in diplomatic acts and correspondence, etc., of a belief the practice is regarded as binding as a matter of law, as required by Article 38 of the Statute of the International Court of Justice. The status of a human rights norm is put beyond doubt when states, individually or collectively, introduce economic or political sanctions—without complaint by other states—in an attempt to force a state to come into compliance with a norm outside of the mechanisms provided for in the United Nations system or the global treaties, as this intervention in the domestic affairs of the state can only be justified where there is a violation of a customary international law norm.[180]

Identifying Customary Human Rights Law

International custom results from the performative acts of states in the international community. To demonstrate the existence of custom, we must show there is a settled pattern of behaviour and a belief the conduct is mandatory as a matter of international law. The determination as to whether there is sufficient evidence of state practice and *opinio juris* is, as Josef Kunz observes, 'a task of the competent international authority and, preliminarily of the science of international law'.[181] The identification of custom depends, in the words of James Crawford, on 'the conclusion by someone (a legal adviser, a court, a government, a commentator)'.[182]

The standard list of customary human rights is found in the US Third Restatement of Foreign Relations Law. It includes the prohibitions on (a) genocide, (b) slavery, (c) murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention,

[180] See *Military and Paramilitary Activities* (n. 9) para. 249.

[181] Josef L. Kunz, 'The Nature of Customary International Law' (1953) 47 *American Journal of International Law* 662, 667.

[182] Crawford, *Brownlie's Principles* (n. 26) 23.

and (f) systematic racial discrimination.[183] The inventory is not, in the words of the Restatement, 'necessarily complete, and is not closed',[184] and might, for example, be extended to prohibitions on systematic religious discrimination, interferences with certain private property rights, and gender discrimination.[185] Bertrand Ramcharan points out that the list was drawn up some three decades ago, arguing that we should add systematic gender discrimination and ethnic cleansing.[186] Other claimed customary rights include the right to food,[187] to a healthy environment,[188] and to due process rights in the administration of justice.[189]

Whilst the identification of customary norms will always involve a degree of subjective judgment,[190] with Pierre-Hugues Verdier and Erik Voeten making the point that 'different states, international courts, and scholars often come to opposite conclusions after reviewing the very same practice',[191] the criticism of human rights lawyers, 'do-gooders', in Jörg Kammerhofer's terms,[192] is they have been too willing to see customary human rights in the patterns of state practice and *opinio juris*. Sometimes the criticism has been fair; other times less so, and perhaps the same could be said about Laws of War and Law of the Sea scholars, etc. Human rights lawyers rely on the same methodology as other international lawyers and look at the same materials; they simply, on occasion, draw different conclusions from the evidence.

That is not the end of the matter, of course. The identification of custom is a collective function of the community of international lawyers, the result of the communications of international judges, practitioners, scholars, etc. on the status of a norm. Except for the International Court of Justice, which enjoys the de facto, if not the de jure, right to have the final say on the content of customary international law, the authority of decisions of courts and tribunals and the writings of publicists depends on how their analysis is received by other international lawyers, which in turn depends on their ability to marshal the available evidence and develop a convincing

[183] American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 702. For similar conclusions, see Niles Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 *American University International Law Review* 275, 279–80 ('prohibition of genocide, slavery, torture and other cruel, inhumane or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination').

[184] Restatement (Third), ibid., § 702, comment (a).

[185] Ibid., § 702, comments (j)–(l).

[186] Ramcharan, 'The Law-Making Process' (n. 145) 509.

[187] Smita Narula, 'The Right to Food: Holding Global Actors Accountable Under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691, 791.

[188] John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283.

[189] Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law* (Clarendon 1989) 96–7.

[190] Kolb, 'Customary International Law' (n. 5) 131.

[191] Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 *American Journal of International Law* 389, 415.

[192] Jörg Kammerhofer, 'Orthodox Generalists and Political Activists in International Legal Scholarship' in Matthew Happold (ed.), *International Law in a Multipolar World* (Routledge 2012) 106, 111.

argument to explain the existence of a customary rule. The less robust the research and analysis, the less likely the reasoning is to be accepted. If we want to convince our colleagues that this or that human rights norm is recognized under customary law, we have to point to its acceptance by the international community, invariably in the form of a law-making treaty or General Assembly resolution, we must be able to observe repeated invocations of the norm in diplomatic communications or domestic measures of implementation, and show the norm is accepted as a benchmark for evaluating the conduct of states by other states. None of this involves wishful thinking or ethical pleading, but attempts to make sense of the patterns of performative acts of states on the subject of human rights.

Conclusion

To establish a customary norm, there must be evidence of a general practice of states and evidence of a belief the conduct is required by a rule of international law. State practice is found in diplomatic acts and correspondence, conduct in connection with General Assembly resolutions and treaties, the actions of domestic legislatures and courts, as well as any executive conduct on the ground; *opinio juris* can be established by looking to the communication acts of states, from diplomatic correspondences to national court judgments, that express their positions on the legal status of the norm. The traditional approach was for international lawyers to look for evidence of state practice and *opinio juris* in the actions and reactions, and claims and counterclaims, of states in their international relations, but as Judge Tanaka pointed out in the 1966 *South West Africa* cases, the institution of the United Nations provided a forum in which states could move more quickly to establish rules of appropriate behaviour.

Customary human rights first emerged in the 1960s, when the United Nations justified its interventions in southern Africa by reference to the prohibition on systematic racial discrimination, establishing a precedent that could be applied more generally. This modern approach to the identification of custom looks first to the standard setting activities of states in the Organization and then to practice in the wider international community for evidence that UN standards are binding as a matter of customary law.

Customary international law is the paradigmatic complex law system. There is no sovereign power legislating custom, nor is it the result of processes within concrete institutions. Custom is the result of the physical and verbal communication acts of states that literally speak customary norms into existence, with those norms then binding the very same countries that brought them into being in the first place. It evolves as states respond to new information, meaning its content will reflect contingent decisions taken in the past, without any overarching teleology or underlying objective. The event of the 1960 Sharpeville Massacre and wider response to the situation in southern Africa provided material evidence that racial segregation was unacceptable to the international community. States then introduced a range of

sanctions and further established that the apartheid State could not exempt itself from the race norm by way of the persistent objector doctrine.

International law took a different evolutionary path after Sharpeville—what complexity theorists call a bifurcation—when it accepted that standards of appropriate conduct in the international community could be manifested in the actions and interactions of states within the United Nations, especially activity in connection with the adoption of law-making treaties and declarations by the General Assembly. The development was not restricted to human rights, but it was essential for the development of customary human rights law given the limited amount of inter-state communications on the subject. Reliance on the performative acts of states in United Nations fora allowed for the establishment of norms of appropriate behaviour and provided the basis for the translation of parts of the moral code in the Universal Declaration of Human Rights into customary international law, thereby creating a role for states and international organizations in the protection of human rights through the introduction of sanctions under the regime on state responsibility.

6

On the Idea of Human Rights

Simply because we can identify a body of 'International Human Rights Law' does not therefore mean that 'human rights' exist in the same way, for example, that the 'sea' has a reality as the subject of the Law of the Sea. There remains, then, the possibility that the term 'international human rights' is nothing more than a convenient label for one part of the international law system. Given that the aim of this work is to explain the distinctive character of international human rights law by looking to the influence of the moral concept of human rights on general international law, we have to show that human rights have an objective reality, or we must agree with the critics of 'human rightism' that reference to 'human rights' is simply a rhetorical device to allow the inclusion of subjective ethical preferences in international law arguments.

The philosopher Alasdair MacIntyre once compared faith in the existence of natural rights to a belief in unicorns, because 'every attempt to give good reasons for believing there *are* such rights has failed',[1] and it remains the case that none of the natural law or natural rights accounts has found widespread acceptance in the literature. In contrast to natural law and natural rights theories, in which rights are taken to 'have an objective reality that is independent of human beliefs and practices',[2] this work develops a practice-based account, proceeding on the understanding that we should explain the term 'human rights' by reference to the way it is used in international law communications, on the basis that all human rights practice takes places within international law or under its shadow. The argument is that the meaning of the term 'human rights' emerges from the international law practice on human rights.

The purposes of this chapter are twofold. First, to explain the objective reality of human rights as a moral concept capable of establishing (moral) obligations for states and correlative (human) rights for individuals and to elucidate how that existence might become known. Second, by reflecting on the legal practice, to describe the content of the moral concept of human rights.

The work first reminds us of the different ways the term 'human rights' has been understood, before looking to the work of John Searle to explain the existence of human rights as a fact of the social world. Searle shows how we can give a concrete object or abstract entity the power to allocate rights and duties simply

[1] Alasdair MacIntyre, *After Virtue* (Bloomsbury 2011) 83 (emphasis in original).
[2] Tom Campbell, *Rights: A Critical Introduction* (Routledge 2006) 29.

by saying that this is the case. His standard example is money, which exists because we say it exists, giving me the ability to pay for goods with a piece of paper (say a £20 note) that has no intrinsic value, and no sensible person doubts the existence of money.

Applying this central insight, and in contrast to Searle's own argument for human rights grounded in natural law reasoning, we can show that states created, maintained, and explained a moral concept of human rights, capable of allocating (moral) obligations and (human) rights, by saying that human rights existed when they adopted the Charter of the United Nations and Universal Declaration of Human Rights.

After the Sharpeville Massacre of 21 March 1960, the institutional architecture of international human rights law was added to the moral code, allowing for detailed discussion on the meaning of rights and a role for secondary agents of justice to evaluate the human rights performances of states. This development not only resulted in the adoption of measures to avoid dystopias, like that in apartheid South Africa, but also allowed for the introduction of measures to promote the utopia of 'all human rights for all'. The static moral code reflected in the Universal Declaration of Human Rights was now a dynamic model of political justice, with implications for how we make sense of the idea of human rights.

On Human Rights

We saw in Chapter 1 that the philosophical literature on human rights can be divided into four: accounts of the natural rights we have 'by virtue of being human'; a focus on the function of rights in outlining the proper relationship between the state and the individual; interventionist accounts that concentrate on the relationship between the state and secondary agents of justice; and a recognition of the importance of international law.

The notion we have certain rights simply 'by virtue of being human' is central to the natural rights tradition that considers the implications of the supposedly distinguishing and special nature of members of the genus *Homo sapiens*, either by reasoned analysis or through an essentially emotional response to conditions of injustice. The moral philosopher James Griffin is the best known contemporary proponent of natural rights, which are justified by what he sees as our distinctive capacity for agency, that is 'deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves'.[3] Human rights protect what Griffin calls 'our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency'. To be an agent, an individual must not only choose her path through life (and therefore have the right to agency), but must also enjoy the minimum provision of resources and capabilities necessary to allow her to act on those choices (minimum welfare rights), and others must not

[3] James Griffin, *On Human Rights* (OUP 2008) 32 (hereafter, Griffin, *On Human Rights*).

forcibly prevent her from pursuing what she regards as a worthwhile life (the right to liberty).[4]

The natural rights tradition is primarily focused on the individual. Other contributions concentrate on the relationship between the state and the individual, and the position of the individual in society. Classical natural law accounts, for example, often look to explain the proper function of positive law and the ends of political community, and therefore the purposes of government, in terms of promoting some idea of the good life, again worked out through reasoned analysis.[5] John Finnis is the best known of the writers within this tradition, arguing that law-making should be guided by our shared understanding of the requirements of the good society and that, by way of practical reasoning, we can work out the basic forms of human good. Finnis sees human rights as a contemporary expression of this idea and the Universal Declaration on Human Rights as an attempt to outline an idea of the common good for all political communities.[6]

Related to the orthodox approaches grounded in natural rights and natural law thinking is the Lockean social contract tradition. The argument begins in the state of nature, in which individuals enjoyed certain inherent rights, such as rights to life, liberty and property, but recognized their vulnerabilities in the absence of an organized political community. Freemen, in John Locke's terms, accepted the need to establish a government with coercive political authority to protect their property rights, defined broadly to include 'Lives, Liberties and Estates'.[7] Where a government breaches the trust placed in it, citizens have the right to repudiate the social contact and remove the government, emphasising the conditional nature of political authority. The connection between legitimate political power and human rights is also seen in work that understands rights to be a consequence of the fact of political association, with the state under an obligation not to treat subjects as outsiders and placing a duty on citizens to advocate for just policies and practices.

The work of Niklas Luhmann reminds us that we are more than just *Homo politicus* by explaining the importance of participation in the various aspects of social life—the law, media, economics, politics, etc.—in the construction of our sense of ourselves.[8] Fundamental rights in autopoiesis are not only concerned with our relationship with the state, in terms of our participation in political life and imposing limits on the exercise of coercive political power, but also our ability to participate in the other aspects of social life that give meaning to our self-constructed identity:[9] as a worker in the economic system, student or professor in the education system, consumer or producer in the media system, or doctor or patient in the health system, etc. We need not accept the functional differentiation of society, or the existence of

[4] Ibid. 33.

[5] Brian H. Bix, 'Natural Law: The Modern Tradition' in Jules L. Coleman et al. (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 61, 88.

[6] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 214.

[7] John Locke, *Two Treatises of Government* [1689] edited with an introduction by Peter Laslett (CUP 1960), Bk II § 123.

[8] Niklas Luhmann, *Theory of Society*, Vol. 2, translated by Rhodes Barrett (Stanford UP 2013) 20.

[9] Niklas Luhmann, *Law as a Social System*, translated by Klaus Ziegert (OUP 2004) 135.

closed autopoietic social systems that decide for themselves which individuals will be allowed to participate and which will be excluded, to recognize the importance of the insight that human rights must protect our ability to participate in all relevant aspects of social life for us to fully develop our personality and potential.

The natural rights, natural law, Lockean social contract and social systems theory approach of autopoiesis are all focused, if only by implication, on the role of human rights within the state. (The arguments do not make sense if we remove the context of an organized political community.) This means they have nothing specific to say about the function of human rights in the international community, beyond the requirement that human rights should be recognized in all organized political communities. This is not the case with the interventionist accounts that explain human rights by their role in justifying outside interest and intervention in the domestic affairs of a sovereign and independent country.

Joseph Raz, for example, argues that human rights are 'those rights respect for which can be demanded by anyone' and it is not possible for a government to say to an outsider, on the subject of human rights, 'this is none of your business'.[10] Rather than understand human rights by reference to some a priori moral or political theory, Raz concludes that we should define the notion by the practice of intervention in the name of human rights. Charles Beitz develops a more normative reading, arguing that the objective of human rights is to protect urgent individual interests against certain predictable dangers or standard threats that we are all vulnerable to in a world of sovereign states. Outsiders can only intervene where a country fails to comply with its human rights obligations or is incapable of doing so. The fact that external actors may have *pro tanto* reasons for intervention is, for Beitz, 'the most distinctive feature' of contemporary human rights practice.[11]

The interventionist accounts represent a significant development in our thinking on human rights, not least because of the shift in focus from rights practice in the state, to a more global context, recognizing a role for, what Onora O'Neill calls, 'secondary agents of justice'.[12] The downside is the concentration on the practice of intervention and by implication forcible or military intervention, which is only one part of the practice of human rights. Other scholars contend that we must be attentive to the wider legal practice, with Allen Buchanan, for example, arguing that, 'International human rights law is central to human rights practice'.[13] He further makes the point that legal human rights are not necessarily the embodiments of corresponding natural rights, rather, they 'are what they are: legal rights; and legal rights need not be embodiments of corresponding moral rights'.[14]

There is no agreement then in the literature on the meaning of 'human rights'. The expression is variously used to develop a contemporary account of natural rights, outlining the conditions of justice or injustice; to explain the proper relationship

[10] Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31, 42.
[11] Charles R. Beitz, *The Idea of Human Rights* (OUP 2009) 115.
[12] Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* 180, 181.
[13] Allen E. Buchanan, *The Heart of Human Rights* (OUP 2014) 3.
[14] Ibid. 11.

between the state and the individual, either by detailing the nature and purpose of good government (the natural law argument), or by imposing limits on bad government (Lockean social contract theory); or to explain when outsiders can take a legitimate interest in the domestic affairs of the state (interventionist accounts); or as a discrete area of international law practice. Reading the works, it seems that each has something to offer our understanding of the term 'human rights', but none fully captures its characteristic nature.

Making the Social World

Rather than explain the term 'human rights' by reference to moral philosophy or political theory, the argument here is that we should develop a practice-based account of the idea of human rights—a notion that allows us to say, for example, that systematic racial discrimination is objectively morally 'wrong'.

By looking to the work of the American philosopher of language, John Searle, we can show the reality of human rights, that is the objective existence of a moral code capable of influencing general international law. The aim of Searle's work is to explain the social world, specifically to understand the role of institutional facts ('a £20 note *is* money', for example) and institutional objects ('*my* £20 note') in human social relations. In developing his argument, Searle distinguishes between 'brute facts' that exist independently of any human involvement (the earth just is a certain distance from the sun—whatever words we use to describe that reality) and 'institutional facts', such as a £20 note being money, that only exist because people believe they exist, often following the application of constitutive rules within an institutional framework (the printing of money by a central bank).[15]

Searle argues that a distinctive feature of human existence is that *Homo sapiens* have the capacity to impose functions on objects which cannot be explained by the physical properties of the object in question, but only by the collective recognition that the object has, by virtue of a particular status, the ability to carry out those functions.[16] The function of a piece of paper as something to be written on does not depend on what we think about the item; it is inherent in the object. The function of a piece of paper 'as money', on the other hand, depends on the acceptance the item has a certain 'status function' within a community. It is the result of, what Searle calls, 'collective intentionality'.[17] Thus, I can buy goods with a £20 note, because there is a general recognition the piece of paper is of some value and that worth is not intrinsic to the object.

A 'status function' gives an object certain 'deontic powers', that is, the power to create desire-independent reasons for action on the part of others, reasons independent of a person's inclinations at a moment—deontic is a term used in logic

[15] John R. Searle, *The Construction of Social Reality* (Free Press 1995) 27 (hereafter, Searle, *The Construction of Social Reality*).

[16] John R. Searle, *Making the Social World* (OUP 2010) 7 (hereafter Searle, *Making the Social World*).

[17] Ibid. 8.

concerning duties, obligations, etc., a notion that includes both 'positive deontic powers (e.g., when I have a right) and . . . negative deontic powers (e.g., when I have an obligation)'.[18]

Searle explains the creation of status functions, such as a £20 note 'being money', in terms of the work of 'Status Function Declarations'. Whilst some forms of speech act say something about the world ('the cat is on the mat'), or express an intention to change the world ('I will give you a lift tomorrow'), a form of speech act that Searle calls Declarations 'change the world by declaring that a state of affairs exists and thus bring that state of affairs into existence'.[19] By saying that something 'is money', whether that something be notes, coins, stones or shells, we produce new institutional realities by assigning the collective recognition of a status to an object in a particular context, giving, Searle argues, all Status Function Declarations the abstract structure 'X counts as Y in context C'.[20] So, my Bank of England £20 note ('X') counts as legal tender ('Y') in England and Wales ('C'). People can, then, create new institutional facts, such as something 'being money', simply by declaring their belief in the factual existence of an institution with deontic powers, that is the power to allocate rights and duties. By saying that money exists and acting as if it exists, we literally speak 'money' into existence, and no sensible person doubts that money exists as an objective fact of the social world. Thus my £20 note gives me the right to settle my debts with a piece of paper, even if my creditor would prefer payment by bank transfer.[21]

Searle on Human Rights

Searle makes the point that 'we do not *discover* that people have universal human rights the way we discover that they have noses on their faces'. One of these is a brute fact, the other an institutional fact, the result of collective recognition. The existence of the institutional fact of human rights is then 'no more mysterious than the existence of money, private property, or friendship' and 'Nobody says that the belief in money, private property, or friendship is nonsense'.[22] Recall that, for Searle, institutional entities with deontic powers, that is the ability to allocate rights and duties, are created by Status Function Declarations in the form 'X counts as Y in context C', so my £20 note ('X') counts as legal tender ('Y') in England and Wales ('C'). It is, he contends, 'no more logically absurd to assign a status function of a right directly to humans than it is to assign a status function of being money to a piece of paper'. By recognizing human rights, we treat 'being human' as a status, like 'being money', so in the abstract formula 'X counts as Y in context of C', the term 'Y' is 'a human being', with the consequence that 'if you qualify as a human being you are automatically guaranteed human rights'.[23]

[18] Ibid. 9. [19] Searle, *Making the Social World* (n. 16) 12. [20] Ibid. 13.
[21] Bank of England, 'What is Legal Tender?' edu.bankofengland.co.uk/knowledgebank/what-is-legal-tender, accessed 7 February 2018.
[22] Searle, *Making the Social World* (n. 16) 176 (emphasis in original). [23] Ibid. 181.

There is then an unexpected shift in Searle's approach.[24] Whereas his main point is that 'human rights' allocate rights and duties in the same way as money, private property, and friendship, Searle grounds his argument *for* human rights in the natural law tradition and in doing so he looks to provide a justification for their existence:[25] 'If you think that the law maker or law giver in the ideal state should formulate laws in accordance with natural laws, laws of the natural order, then it is a very short step to say that human rights are also a form of natural law.'[26]

Individuals, he argues, have rights simply by virtue of being human, so someone ('X') counts as a human being ('Y') in context 'C'. In contrast to money, private property and citizenship, however, there is no institution to tell us what rights follow the status of 'being human'. Consequently, the justification for any rights assigned to us solely by virtue of us being human will depend on our subjective conception of the nature of the members of the species *Homo sapiens*, that is of the 'biological conception of what sorts of beings we are [and] a conception of what is valuable, actually or potentially, about our very existence'.[27] Searle explains that the existence of a human right is a matter of the imposition of a status function, but given the status functions of human rights 'do not derive from some other institution … the justification for any rights assigned to beings solely in virtue of being human will have to depend on our conception of what a human being is'.[28]

Human rights, Searle concludes, protect those things that are, in his opinion, 'essential in our achieving our full potential as human beings'.[29] This leads him to argue for a rather limited list of human rights, based on the rights we individually owe each other: the negative rights to life, physical integrity, personal property, free speech, association, religion and belief, travel, privacy, and silence(!),[30] along with the positive obligation to 'help other people when their very survival is at stake and they have no way of helping themselves'.[31]

The problem is that, for Searle, the institutional reality of status functions is established through collective recognition, often within an institution with rules for creating institutional facts. Where, for example, the Bank of England says a £20 note 'is money', and the population of England and Wales recognize the ability of the Bank to establish this fact, then, as an objective reality, I can settle my debts with a £20 note. The *justification* for the allocation of the status function of 'being money'

[24] Frank Hindriks, 'Restructuring Searle's Making the Social World' (2011) 43 *Philosophy of the Social Sciences* 373, 385. ('Given the institutional account he provides of them, Searle's existence claim about human rights in the absence of recognition is problematic.')

[25] Searle, *Making the Social World* (n. 16) 177. It is possible to make the case that an institution is justified (or legitimate) where it is accepted by the subjects of the regulatory regime—and Searle seems to accept this in relation to the government of the state: 'In stable societies, governments tend to be the most highly accepted system of status functions' (ibid. 161). This sociological conception of legitimate authority is though different from a normative conception, whereby an actor or institution that claims the right to rule can be judged against some external benchmark. For Searle's understanding of the 'good' of democratic government, see ibid. 172.

[26] Ibid. 179. [27] Ibid. 190. [28] Ibid. 192. [29] Ibid. 190.

[30] Ibid. 185 and 191. ('[I]n an increasingly noisy world I would suggest the right to silence as a strong candidate for inclusion [in the list of human rights].')

[31] Ibid. 194.

to a piece of paper is a different issue, that is, whether the existence of money produces a more just or unjust society, or paper provides a more sensible mechanism of exchange than a finite material such as gold. So, when Searle argues that the recognition of human rights depends on the acceptance that all persons ('X') count as human beings ('Y') in context 'C' (although is never really clear in what context the formula would apply) and that the content of human rights can be explained and justified by natural law reasoning, he is shifting the focus of analysis, and the fact he does not defend his notion in any detail has resulted in significant criticism of his position.[32] But, if we follow the logic of Searle's argument for the creation and explanation of institutional facts, without reference to the traditional methodologies of natural law and natural rights, we can develop a more compelling account to explain the existence of human rights as a fact of the social world.

Human Rights as Abstract (but Real) Entities

Searle's basic argument is that some objects (and some people, like the US President) have—as an institutional (but not a brute) fact—the capacity to carry out certain functions which cannot be explained by the physical properties of the object (or person) in question. They can only be explained by the fact of the collective recognition of their 'status functions'.

Take his example of a partition between two villages. A stone wall is a brute fact of the world that has the function of separating land, as long as it is wide enough and high enough. But if the wall decays over time, so there is only a line of rocks on the ground, all we have is the institutional fact of a boundary separating the communities, as long as there is a shared understanding the rocks mark the division.[33] But now suppose a court confirms the line of stones constitutes the border between the villages and orders the local police to enforce the rights and obligations that flow from the prerogatives in the lands. The institutional fact of the boundary is now explained by the institutional practice of law. There is, of course, no requirement for judicial determination and coercive enforcement. The villages can themselves, with or without legal counsel, consult the statute books, judicial decisions, and academic writings and agree the dividing line, without the involvement of formal legal institutions. The institutional fact of the boundary is now established by the abstract institution of 'law'.[34]

[32] See, for example, J. Angelo Corlett, 'Searle on Human Rights' (2016) 30 *Social Epistemology* 440, 454.

[33] Searle, *The Construction of Social Reality* (n. 15) 39–40.

[34] The legal theorist, Neil MacCormick, draws on Searle to explain the existence of law as an 'institutional normative order' that allocates (legal) rights and responsibilities. MacCormick makes the point that institutional facts 'are facts that depend on the interpretation of things, events, and pieces of behaviour by reference to some normative framework'. So, the institutional fact that I can buy a soft drink with a £20 note does not only depend on collective recognition of the value of money, but on 'a formidable body of legal or other rules [on] the definition of money and legal tender in the context of contracts and debts': Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 11–12. The notion of law as an institutional normative order has also been applied to the international law system, with Andrea Bianchi drawing on Searle to argue that 'the law is what actors as society considered to be

The illustration makes clear that the institutional fact of a boundary does not necessarily depend on the existence of formal institutions—the shared understanding between the villages is sufficient, although Searle recognizes that most institutional objects and facts are produced by institutions, including governmental institutions (the legislature and executive, etc.), special purpose institutions (such as hospitals and universities), economic institutions (partnerships and companies), general-purpose structural institutions (including money, private property, and marriage) and unstructured, informal, and mostly uncodified institutions (like friendship and family).[35]

Searle amended his concept of an 'institution' after the philosopher Barry Smith pointed out that some ('Y') entities with deontic powers did not always have a physical existence, in contrast to objects (my £20 note, for instance) or persons (the President of the United States). Examples include corporations and universities, which 'have a physical realization that is partial and also scattered', and others, 'such as debts, [that] have no physical realization at all'.[36] These 'free-standing Y terms' are 'sustained by records and representations and by associated patterns of activities'.[37] Following Smith, Searle accepted that there can be status functions which are 'not imposed on any particular object or person'.[38]

The clearest example of a free-standing Y term, capable of allocating rights and obligations is the institution of friendship. Consider the possibility that you are walking home and still have two miles to go, and a car drives past. A stranger may draw up and offer you a lift for egotistical or charitable reasons, but there is no obligation for her to stop. (The situation is different if the stranger is a taxi driver you have booked.) But if a friend drives past, surely, they are required to pull over and offer you a lift—unless there is some strong countervailing reason not to do so, even if they prefer their own company. You will not find this rule written in any authoritative text. The 'rights and duties of friendship',[39] as Searle calls them, are an emergent property of the practice of friendship within a society, with social norms developing through practice, creating (moral) obligations for the members of the community to act in a particular way and allowing criticism in cases of non-compliance.

the law. In fact, collective beliefs play a central role in international law as they direct the use and the understanding of fundamental legal categories': Andrea Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher' in Joost Pauwelyn et al. (eds), *Informal International Lawmaking* (OUP 2012) 200, 211. Iain Scobbie concurs, and, following MacCormick, concludes the following: 'Because international law, like any form of law, is a social institution, its modalities, as well as understandings of it, are not immutable. Although it subsists through time, its contours change as the social conventions and the social and political concerns underpinning it change': Iain Scobbie, 'Legal Theory as a Source: Institutional Facts and the Identification of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 493, 496.

[35] Searle, *Making the Social World* (n. 16) 91.

[36] Barry Smith, 'John Searle: From Speech Acts to Social Reality' in Barry Smith (ed.), *John Searle* (CUP 2003) 1, 21.

[37] Ibid. 25.

[38] John R. Searle, 'Social Ontology: The Problem and Steps to a Solution' in Savas L. Tsohatzidis (ed.), *Intentional Acts and Institutional Facts* (Springer 2007) 11, 20. See, also, John R. Searle, 'What is an Institution?' (2005) 1 *Journal of Institutional Economics* 1, 15.

[39] Searle, *The Construction of Social Reality* (n. 15) 88.

Through the collective recognition of a status function, concrete institutional objects, such as my £20 note, can possess powers they would not have without the status of 'being money', but, status functions can also, as we have seen, be allocated to abstract institutional entities, like the institution of friendship.

The philosopher Amie Thomasson gives the further example of law, which does not function by allocating deontic powers to a material object, but by accepting that, in certain conditions, undertaking concrete activities, such as writing words in a court judgment or voting in a legislature, can establish a new institutional entity. Law is not created by writing words on a piece of paper, or vellum in the traditional practice of the UK Parliament: 'The law created is not itself identical with (or materially constituted by) any of these concrete activities or instances of it, so it cannot be accounted for merely in terms of new properties applied to old material objects.'[40] Law is an emergent property of the performative acts of law-makers, an abstract institutional entity that nonetheless has the power to allocate (legal) rights and duties. Law does not have a physical existence, you cannot touch the law system or a law norm. The existence of law depends on the collective recognition of the deontic powers of certain institutions, like Parliament and the courts, with the communications of those institutions resulting in the law system, with its rules for the creation of valid law norms. Law norms, with power to allocate rights and duties, are made within a network of institutions with constitutive rules for creating institutional facts, including the laws of contract that require the taxi driver in our earlier example to give me a lift, even if she would prefer not to.

Institutional entities can be divided between concrete, physical, touchable objects, like a £20 note, and abstract, non-physical, non-touchable notions, like laws. All institutional entities have the power to allocate rights and duties, establishing desire-independent reasons for action, that is reasons for action unrelated to a person's inclinations at a moment. Institutional entities do not, however, always create *legal* rights and duties—not all norms of appropriate behaviour are law norms, and rights and duties can be imposed on individuals by institutions such as hospitals, universities, and business partnerships, etc., and by the institutions of marriage and friendship.[41] Institutional entities can be formal and structured, like the law system, with its rules for the production and evaluation of valid law norms, or informal and unstructured, like the institution of friendship, which obliges you to help a friend, even if you do not feel like doing so at a particular time.

This gives us four possibilities. First, there can be concrete institutional objects with deontic powers, the power to allocate rights and duties, created by formal and structured institutions, like the printing of £20 notes by the Bank of England. Second, there can be abstract institutional entities produced by formal and structured institutions, such as the adoption of laws by the legislature. Third, concrete institutional objects brought into being by informal and unstructured institutions, such as the traditional cultural practice of the Mi'kmaq First Nation people

[40] Amie L. Thomasson, 'Realism and Human Kinds' (2003) LXVII, No. 3 *Philosophy and Phenomenological Research* 580, 587.

[41] Searle, *The Construction of Social Reality* (n. 15) 27.

indigenous to Canada of using a Talking Stick, entitling the holder to speak without interruption when problems are being discussed.[42] Finally, there can be abstract institutional entities generated by informal and unstructured institutions, including the social norms around friendship created by the social practice of friendship.

This typology is helpful when thinking about the difference between moral human rights and legal human rights. The abstract institution of International Human Rights Law, which establishes *legal* rights and obligations, is—in the main[43]—created through the work of formal and structured institutions, like the United Nations General Assembly and the UN human rights treaty bodies (the second possibility in out typology). The *moral* concept of human rights, which allocates (moral) obligations to states and (human) rights to individuals is, on the other hand, an emergent property of the unstructured communications of states, international organizations, treaty bodies, non-state actors and international lawyers on the subject of human rights (the fourth possibility). In the same way the objective social reality of friendship emerges through the practice of friendship, the objective reality of moral human rights emerges through discursive practices on human rights. In the language of Barry Smith and John Searle, the abstract notion of moral human rights is 'a free-standing Y term', an entity with no concrete physical reality, which is nonetheless capable of possessing deontic powers and thereby allocating (moral) obligations to states and (human) rights to individuals.

The Reality of Human Rights

Searle's theory is primarily concerned with an explanation of institutional facts within the state, a point reflected in his formulation that 'X counts as Y *in context of* C', that is 'X counts as Y (in this or that country)'. So, for example, '£20 notes count as money (in the United Kingdom)'. But, of course, the defining feature of human rights is that the idea is intended to apply to all persons, in all places. Consequently, as the philosopher Nicholas Fotion observes, if, as Searle argues, the existence of human rights depends on its collective recognition by individuals, we would have to show 'there are enough users of the modern sense of human being to allow him to argue that we (humans as users) have constructed a set of universal rights from that concept'.[44] In other words, we would have to demonstrate the people of the world had, through collective recognition of natural rights, brought human rights into existence.

But human rights were not created by individuals and they were not established by the orthodox methodologies of natural law and natural rights reasoning. The

[42] Laura E. Donaldson, 'Writing the Talking Stick: Alphabetic Literacy as Colonial Technology and Postcolonial Appropriation' (1998) 22 *American Indian Quarterly* 46, 57.

[43] Customary human rights law is different. There are no formal and structured institutions responsible for the production of customary law norms, which are the result of the performative acts of states in international law (see, generally, Chapter 5). Custom is then an abstract institutional entity generated by informal and unstructured processes (the fourth possibility in our typology).

[44] Nicholas Fotion, 'Searle on Human Rights' (2011) 71 *Analysis* 697, 701.

institutional fact of human rights was brought into being by states as one part of the political settlement that followed World War II, along with the establishment of the United Nations—and no one doubts the reality of an Organization instituted by the declaration of its existence by the Member States, with the preamble to the Charter proclaiming, 'We the peoples of the United Nations . . . do hereby establish an international organization to be known as the United Nations.'[45] The original signatories established the institutional fact of the Organization by saying there was such a thing as the 'United Nations' and then acting as if this was the case.[46]

In the same way that states established the objective reality of a United Nations Organization with the ability to allocate legal rights and duties to Member States (what Searle would call deontic powers), they also brought into being 'human rights'.

The expression was first used by US President Franklin D. Roosevelt in his 'Four Freedoms' Address to Congress in 1941, when he declared that 'Freedom means the supremacy of human rights everywhere'.[47] The related concepts of freedom and human rights were then relied on to define the Allied cause against Fascism, a point made clear in the 1941 Atlantic Charter, when the United States and United Kingdom expressed the hope of seeing established a peace in which 'all the men in all lands [could] live out their lives in freedom from fear and want',[48] and the 1942 Declaration by United Nations, in which the US and UK, along with the Union of Soviet Socialist Republics and China, expressed the view that victory by the Allied Powers was essential 'to preserve human rights'.[49] Human rights provisions were introduced into the Charter at the 1945 San Francisco conference, after pressure from small and medium-sized nations, with Article 1(3) establishing that the purposes of the United Nations included 'promoting and encouraging respect for human rights' and Article 55(c) requiring that the Organization 'promote . . . universal respect for, and observance of, human rights'.

An abstract moral concept of human rights now existed as a social reality, a notion that could in principle allocate rights and duties, allowing for legitimate criticism in cases of non-compliance, but not the imposition of legal sanctions. The content of the moral notion was explained when the General Assembly adopted the 1948

[45] See *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 185 ('fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone').

[46] Searle makes a similar argument in relation to the establishment of the United States of America by the 1776 Declaration of Independence, accepting that there was no institutional structure of the form 'X counts as Y in context of C'

> whereby a group of the King's subjects in a British Crown Colony could create their independence by a performative speech act. But the founding Fathers acted as if their meeting in Philadelphia was a context C such that by performing a certain declarative speech act X they created an institutional fact of independence Y. They got away with this, that is, they created and sustained acceptance of the institutional fact because of local community support and military force': Searle, *The Construction of Social Reality* (n. 15) 118–19.

[47] Franklin D. Roosevelt, State of the Union Address to the Congress, January 6, 1941. The 'Four Freedoms' were the freedom of speech, freedom of religion, freedom from want, and freedom from fear.

[48] 'The Atlantic Charter', reprinted *Yearbook of the United Nations 1946–47*, 2.

[49] 'The Declaration by United Nations', reprinted in the *Yearbook of the United Nations 1946–47*, 1.

Universal Declaration of Human Rights,[50] which recognized both 'traditional' civil and political rights, as well as economic social and cultural right. Core civil and political rights included the rights to life, liberty,[51] property,[52] and political participation.[53] The economic, social, and cultural rights in the Declaration encompassed the rights to work and to favourable conditions of work,[54] to social security,[55] and to participate in the cultural life of the community.[56]

At the same time, the Commission on Human Rights was working on the Universal Declaration, UNESCO established a committee on the Theoretical Bases of Human Rights, chaired by the political historian, E.H. Carr, and including the neo-Thomist social philosopher, Jacques Maritain. The committee began its work by sending a questionnaire to political leaders and scholars around the world asking for their views on the idea of a declaration on human rights. From the results, the committee was able to conclude that there was a shared understanding of the nature and scope of human rights, albeit that this was often expressed and explained in different theoretical, ethical, and religious terms.[57] Maritain later wrote that the adoption of the Universal Declaration reflected a paradox, in that agreement on human rights required rational justification, in the sense that each of us 'only wishes to give his consent to what he has recognized as true and rationally valid', yet there were different reasons for individuals accepting human rights. He expressed the point this way: 'we agree about the rights, *providing we are not asked why*. With the "why," the dispute begins.'[58]

Mary Ann Glendon observes that, notwithstanding the eminence of its participants, the report of the committee on the Theoretical Bases received little official attention from the drafters of the Universal Declaration in the Commission.[59] This makes it difficult, then, if not impossible, to argue that the Universal Declaration of Human Rights was developed in line with some coherent moral or political philosophy. The first ('Humphrey') draft, which drew on the practice of rights protection within states, proved to be highly influential in the drafting process and when asked what approach informed the Declaration, John Humphrey replied, 'no philosophy whatsoever'.[60]

There was no essential way of thinking underpinning the Universal Declaration of Human Rights and no reason to think that, if the drafting process were to be repeated, a different group of experts would settle on the same set of rights. For this reason alone, looking to the Declaration to inform discussions on natural law and natural rights appears misguided.

[50] See Chapter 3.

[51] Article 3, Universal Declaration of Human Rights, UNGA Res 217(III)A (10 Dec 1948) (adopted 48 votes to nil, with eight abstentions).

[52] Article 17. [53] Article 21. [54] Article 23. [55] Article 22.

[56] Article 27.

[57] See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 77 (hereafter, Glendon, *A World Made New*).

[58] Jacques Maritain, *Man and the State* (Chicago UP 1951) 77 (emphasis in original).

[59] Glendon, *A World Made New* (n. 57) 83. [60] Ibid. 58.

The point becomes clear when we consider the academic debate on the importance of the designation of the cardinal statement on human rights as a *Universal* Declaration of Human Rights, with the implication, so it is said, that universal human rights are those enjoyed, or which should have been enjoyed, by all persons, in all places, 'at all times'.[61] John Tasioulas, for example, contends that universal rights 'must be just as imputable to Stone Age cavemen as to denizens of advanced, twenty-first century societies'.[62] The problem, of course, is that whilst it might make sense to speak about the cavemen's right to life, the same cannot be said about his right to a fair trial, given the lack of courts in prehistory. But, as Glendon has shown, the only significance in the decision to adopt a *Universal*—rather than an *International*—Declaration of Human Rights, was that the instrument was intended to be 'morally binding on everyone, not only on governments that voted for its adoption'.[63] The objective was, and remains, to explain those rights actually existing individuals have, or should have, today.[64]

The enduring appeal of the Universal Declaration of Human Rights, as the canonical statement on human rights, is explained by what economists call path dependence: having agreed a moral code on the proper relation between the state and the individual, it is simply easier for the international community to continue to work with this formulation than to revisit the issue, and, on the fiftieth anniversary of the Universal Declaration, the UN General Assembly declared its 'commitment to the fulfilment of the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations and as a source of inspiration for the further promotion and protection of all human rights and fundamental freedoms'.[65] Consequently, whilst the practice of human rights has evolved in significant ways over the past seventy years, the idea of human rights has remained faithful to the original conception in the Universal Declaration. The moral concept of human rights which emerges from the practice includes, then, all the elements in the Universal Declaration, including the right to 'periodic holidays with pay' (Article 24), regardless of the widespread criticism of its inclusion in any list of human rights (properly so-called),[66] by, it must be said, well-paid academics, with flexible working patterns. The right to periodic holidays with pay is a human right, according to the practice of human rights. The function of human rights theory, according to practice-based methodologies, is to explain the reasons for its inclusion, not to give an account as to why Article 24 should not be there.

[61] Maurice Cranston, *What are Human Rights?* (Basic Books 1962) 36. It is not clear why philosophers focus on the temporal aspect of human rights, after all, the *Oxford English Dictionary* does not include this requirement when it defines the word 'universal' as including 'the whole world': OED Online. June 2017. Oxford University Press.

[62] John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 *Ethics* 647, 669.

[63] Glendon, *A World Made New* (n. 57) 161 (see also 121).

[64] Joseph Raz attempts to resolve the problem by referring to synchronic universality of human rights, 'the claim that all people alive today have the same human rights': Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 *Transnational Legal Theory* 31, 41.

[65] Fiftieth anniversary of the Universal Declaration of Human Rights, UNGA Res 53/168 (10 December 1998).

[66] See for example, Griffin, *On Human Rights* (n. 3) 186.

The Five Moral Principles Underpinning Human Rights

A practice-based account looks to explain the meaning of the term 'human rights' by examining the actual practice of global human rights, focusing on the work of the United Nations, the 'international bill of human rights' (the Universal Declaration of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights),[67] the other core human rights treaties, and customary human rights law. The practice of international human rights law evolved out of the Universal Declaration of Human Rights, which provides the starting point for any discussion of the meaning of human rights. Two things become clear: the Universal Declaration is primarily concerned with the relationship between the state and the individual; and there are five moral principles underpinning the Declaration, and therefore the moral concept of 'human rights': (1) the equal status of human persons; (2) the need for the protection of the physical and psychological integrity of the person; (3) the right to meaningful agency; (4) the requirement for full participation in the political, economic, social, cultural, scientific, etc. life of the society; and (5) the right to minimum welfare.

When the Universal Declaration of Human Rights was adopted on 10 December 1948, it was proclaimed as 'a common standard of achievement for all peoples and all nations'.[68] The focus was the relationship between the government and the individual,[69] with human rights conceptualized as rights within an organized political community.[70] In this context, Article 15 affirms the 'right to a nationality',[71] what Hannah Arendt called the basic 'right to have rights'.[72] The Universal Declaration shares much in common then with natural law theories that define the function of government in terms of promoting the welfare of subjects, as well as the Lockean social contract tradition, which imposes limits on the powers of the state. The preamble to the Universal Declaration establishes, for example, that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion

[67] The 'international bill of human rights' consists of the Universal Declaration of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). See OHCHR, Fact Sheet No. 2 (Rev. 1), 'The International Bill of Human Rights' www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf accessed 8 February 2018.

[68] Preamble, Universal Declaration of Human Rights (n. 51).

[69] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Pennsylvania UP 2000) 325.

[70] Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* 180, 185.

[71] Article 15, Universal Declaration of Human Rights.

[72] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1968) 296–7.

against tyranny and oppression, that human rights should be protected by the rule of law'.[73]

A practice-based account reverses the foundational equation underpinning the natural rights tradition, which holds that we have, or should have, certain rights simply 'by virtue of being human', and that to establish the content of natural rights, we must first establish, as a (claimed) objective fact of the world, the distinctive characteristics of members of the species *Homo sapiens* that justifies the recognition of a discrete body of natural '*human* rights'. Rather than looking to make sense of what it means to 'be human' and then deducing the rights required to protect that notion, a practice-based methodology focuses on the recognized rights to see what this infers about the importance of the human person deemed worthy of protection.

The importance of equal status is reflected in Article 1 of the Universal Declaration of Human Rights ('All human beings are born free and equal in dignity and rights'), along with Article 2 (non-discrimination in the enjoyment of rights) and Article 7 (equality before the law).[74] Human rights are to be enjoyed by all members of the species *Homo sapiens*, that is we have rights simply 'by virtue of being human' (nothing more is required). Any theory that excludes any human person including the infant child or persons with severe learning disabilities is, then, a deficient theory of human rights from the perspective of a practice-based account.[75]

The Universal Declaration also affirms the importance of physical and psychological integrity. Physical integrity concerns harm to 'me', interferences in my bodily integrity or restrictions to my person, including my freedom of movement. Physical integrity is protected, inter alia, by the rights to life, liberty, and security of person,[76] by the prohibitions on slavery or servitude,[77] torture and cruel, inhuman or degrading treatment or punishment,[78] arbitrary arrest, detention, and exile,[79] and the right to freedom of movement.[80] Psychological integrity concerns harm to things that are an extension of 'me', my personal space and property, for example, with the

[73] The international bill of human rights is not only concerned with human rights injustices committed in the name of the state, it also requires the state take positive measures to protect individuals from violations committed by third parties. This is reflected in the obligation on states to 'respect, protect and fulfil' human rights, that is to refrain from interfering in their rights, to protect them from interference by third parties, and to take the necessary positive measures to guarantee the enjoyment of human rights. The formula 'respect, protect and fulfil' was first suggested by Henry Shue and Asbjorn Eide. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton UP 1980) 52; and 'The Right to Adequate Food as a Human Right', Report prepared by Mr A. Eide, E/CN.4/Sub.2/1983/25 (1983). See Olivier De Schutter, *International Human Rights Law* (CUP 2010) 280. It has been given official validation by the Committee on Economic, Social and Cultural Rights in its General Comment No. 12 on 'The right to adequate food (art. 11)', UN Doc. E/C.12/1999/5 12 May 1999, para. 15; see, also, General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017.

[74] Universal Declaration of Human Rights (n. 51).

[75] For James Griffin, as we saw in Chapter 1, the justification for rights is explained by the distinctiveness of the human species, which lies in our personhood, but that necessarily excludes some members of the species ('I am inclined to conclude that human rights should not be extended to infants, to patients in an irreversible coma or with advanced dementia, or to the severely mentally defective'): Griffin, *On Human Rights* (n. 3) 95.

[76] Article 3, UDHR. [77] Article 4. [78] Article 5. [79] Article 9.

[80] Article 13.

Declaration prohibiting arbitrary interference with my privacy, family, home, or correspondence,[81] and protecting my right to my property.[82]

The Universal Declaration and subsequent human rights treaties further protect the right to personhood, defined by James Griffin as 'the right to choose one's own path through life' (the notion of autonomy or meaningful agency), with the necessary requirement that 'one's choices must be real; one must have at least a certain minimum education[;] [and] one must have at least the minimum provision of resources'.[83] The Universal Declaration of Human Rights recognizes the right of individuals to make material decisions over important aspects of their lives by affirming the rights to freedom of opinion and expression,[84] to peaceful assembly and association,[85] and to marry and found a family.[86] It further recognizes the right to education, which 'shall be directed to the full development of the human personality'.[87]

The connection between education and personhood, or meaningful agency, becomes clear in the human rights of children, who are largely absent from the international bill of human rights—the Universal Declaration and International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. Where they are included, the focus is on the standard threats that children face to their well-being.[88] This protective element is also found in the 1989 Convention on the Rights of the Child, which recognizes that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'. The Children's Convention makes clear, however, the importance of developing the child's capacity for meaningful agency, referring to the importance of the 'full . . . development of [the child's] personality' and need for the child to be 'fully prepared to live an individual life in society'.[89] Childhood is conceptualized as a stage of life in which the human person develops her personality as she grows older,[90] a point that becomes clear in Article 29, which establishes that education shall be directed

[81] Article 12. [82] Article 17. [83] Griffin, *On Human Rights* (n. 3) 33.
[84] Article 19, UDHR. [85] Article 20. [86] Article 16. [87] Article 26(2).

[88] See for example, Article 25(2), Universal Declaration of Human Rights, which provides a right to an adequate standard of living for health and well-being, and notes that 'childhood [is] entitled to special care and assistance'. Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights reaffirms the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and refers to the important of 'the healthy development of the child'; Article 10(3), ICESCR recognizes the importance of ensuring that children are protected from economic and social exploitation, and that their employment in work harmful to their 'morals or health or dangerous to life or likely to hamper their normal development should be punishable by law'. Article 24 of the International Covenant on Civil and Political Rights provides more generally that 'Every child shall have . . . the right to such measures of protection as are required by his status as a minor'.

[89] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), preamble. Article 3 establishes the basic principle of children's human rights, i.e. that 'the best interests of the child shall be a primary consideration', and that states parties shall 'ensure the child such protection and care as is necessary for his or her well-being'.

[90] Article 5, CRC establishes that states parties shall respect the rights of parents 'to provide, in a manner consistent with the *evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention' (emphasis added); Article 12(1) that a child 'capable of forming his or her own views' has the right to express those views freely in all matters affecting them, with 'the views of the child being given due weight in accordance with the age and maturity of the child'.

to '[t]he development of the child's personality, talents and mental and physical abilities to their fullest potential'.[91]

Meaningful agency, the ability to make important life choices within the capacities of the individual concerned, is reaffirmed in the rights of persons with disabilities. The only mention of disability in the international bill of human rights is in Article 25(1) of the Universal Declaration, which affirms the right of everyone to an adequate standard of living 'and the right to security in the event of . . . disability'.[92] By way of contrast, the 1989 Convention on the Rights of the Child establishes that 'a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'.[93]

The Convention on the Rights of Persons with Disabilities, adopted 13 December 2006—the first UN human rights treaty for nearly twenty years and the first of the new millennium—reaffirms the core human rights principles of equal status,[94] physical and psychological integrity,[95] personhood, participation, and minimum welfare. Meaningful agency is central to the Convention, with the preamble affirming the importance to persons with disabilities 'of their individual autonomy and independence, including the freedom to make their own choices'.[96] The significance of education is recognized in Article 24, which establishes that this should be directed to the 'development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential'.[97]

The Universal Declaration of Human Rights and other human rights instruments recognize that selfhood, that which forms our individual identity, is not constructed in isolation from other members of the political community. Article 29(1) of the Universal Declaration makes the point that 'Everyone has duties to the community in which alone the free and full development of his personality is possible'. The right to personhood, or meaningful agency, is the right to pursue a life plan in community with others and we develop our personality by participating in the various aspects of society.

This was a point made by Niklas Luhmann, who observed that following the emergence of specialized areas of social life, that is, politics, the economy, education, media, health, etc., that to fully develop her personality and potential an individual

[91] Article 29(a), CRC. [92] Article 25(1), Universal Declaration of Human Rights.

[93] Article 23(1), Convention on the Rights of the Child.

[94] Article 4(1), Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) (persons with disability have the right to 'the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability').

[95] Including the rights to life, liberty, and security of the person, freedom from torture and other forms of exploitation, violence and abuse, and rights to privacy and family life. See Articles 10, 14, 15, 16, 22, and 23, CRPD.

[96] Preamble, sub-paragraph (n), CRPD. The same point is made in Article 3.

[97] Article 24(b), CRPD. See, further, Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016) on the right to inclusive education, UN Doc. CRPD/C/GC/4, 25 November 2016, para. 16.

must be able to choose those aspects of life she wishes to take part in to construct her identity,[98] including, for example, as a citizen in the politics system or a worker in the economic system, etc. Article 21 of the Universal Declaration recognizes the right to take part in the government of the country, directly or through freely chosen representatives; Article 23 that everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment; whilst Article 27 establishes that everyone has the right to participate in the cultural life of the community, including the arts.

Effective participation in the various aspects of social life is central to the 1979 Convention on the Elimination of Discrimination Against Women.[99] The preamble makes the point that 'extensive discrimination against women continues to exist [and this] is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries . . . and makes more difficult the full development of the potentialities of women'.[100] Article 3 requires that states parties take all appropriate measures to ensure 'the full development and advancement of women . . . on a basis of equality with men'.[101] Other provisions highlight the importance of effective participation in political and public life,[102] education,[103] employment,[104] health care,[105] and recreational activities, sports, and all aspects of cultural life,[106] whilst Article 5 requires that states parties take all appropriate measures to 'modify the social and cultural patterns of conduct of men and women [that reinforce] stereotyped roles for men and women'.[107]

In addition to the principles of equal status, physical and psychological integrity, personhood, and participation, the Universal Declaration of Human Rights affirms the need for minimum welfare rights, with Article 25(1) recognizing the right to an adequate standard of living adequate, including food, clothing, housing, and medical care, and the right to social security in the event of circumstances beyond the individual's control (e.g. unemployment, sickness, etc.).[108] The right to minimum provision is also found in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, which provides for 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and

[98] Niklas Luhmann, *Theory of Society*, Vol. 2, translated by Rhodes Barrett (Stanford UP 2013) 20.

[99] The importance of removing structural barriers to participation is central to the 2006 Convention on the Rights of Persons with Disabilities, with the preamble confirming that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'. A primary objective of the CRPD is to promote the participation of persons with disabilities in the political, economic, social, and cultural life of the state. Article 3 sets out the general principles, including, '(c) Full and effective participation and inclusion in society . . . (e) Equality of opportunity; [and] (f) Accessibility [the removal of barriers to participation]'.

[100] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

[101] Article 3. [102] Article 7. [103] Article 10. [104] Article 11.

[105] Article 12. [106] Article 13. [107] Article 5(a).

[108] Article 22 of the Universal Declaration of Human Rights reaffirms the right to social security, providing that 'Everyone, as a member of society, has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

housing'. In the same context, Article 27(1) of the Convention on the Rights of the Child recognizes 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'.

A Dynamic Code

When the General Assembly proclaimed the Universal Declaration of Human Rights 'as a common standard of achievement for all peoples and all nations' (preamble), there was agreement that it was not binding as a matter of international law. That changed with the 1968 Proclamation of Tehran, which established that the Declaration explained the human rights commitments of UN Member States, a point reaffirmed in 2006, with the introduction of the Universal Periodic Review, which established that the human rights performance of all Member States would be reviewed against the minimum standards in the Declaration. In the mid-1960s, the General Assembly began the process of transforming the moral rights in the Universal Declaration into legal rights in the form of the Convention on the Elimination of Racial Discrimination and International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights, which also allowed for the development of customary human rights norms that justified intervention in the domestic affairs of sovereign and independent states.

The emergence of a body of international human rights law was significant. Whereas there are no authoritative mechanisms to determine the meaning of a moral code, international lawyers are broadly agreed on the methodologies for explaining the content of international law norms; moreover, they accept that the meaning of terms can change over time. Given our understanding that the moral concept of human rights emerges from the practice of human rights, the centrality of law to that practice allows for a clearer articulation of the moral concept, and the possibility that the moral code of 'human rights' can change over time with changes in the practice.

This can be seen in relation to the core human rights treaty systems. The 1965 Race Convention was introduced in response to the Sharpeville Massacre, but it also broke the Cold War deadlock, which had prevented agreement on an international bill of human rights, allowing for the adoption of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights in 1966. No new global human rights treaty was agreed until the 1979 Women's Convention, with the 1984 Convention Against Torture coming soon after. The Women's Convention was followed by other treaties focused on the enjoyment of human rights by certain groups: the 1989 Children's Convention, 1990 Migrant Workers Convention, and 2006 Convention on the Rights of Persons with Disabilities. The Torture Convention was followed by the 2006 Convention on Enforced Disappearance, which also dealt with a specific human rights problem. These core human rights treaties not only provided more detail on the content of human rights, defining, for example, the meaning of 'discrimination',[109] and

[109] Article 1, Convention on the Elimination of All Forms of Discrimination Against Women.

'torture',[110] etc., they also introduced bespoke supervisory bodies that could, through the adoption of General Comments and Recommendations, explain the meaning of convention rights and the wider structure of international human rights law, with, for example, contributions on the binding nature of human rights treaties, as well as the subject of reservations.

Communications on human rights also occur as part of the Universal Periodic Review in the Human Rights Council. Because Member States are held to account against the standards in the Universal Declaration of Human Rights, the process allows for deliberation on the scope and content of human rights, with the possibility of a clearer understanding emerging. Walter Kälin makes the point that every time a country makes a recommendation, it implicitly recognizes the validity of the proposed understanding and will, therefore, be prevented from rejecting the same conceptualization of the norm when it is subject to Review. What develops is 'a formal, albeit weak, consensus on the meaning and content of human rights'. [111] The process of Universal Periodic Review also allows for new meanings of human rights to be articulated and contested, with, for example, some countries promoting sexual orientation and gender identity rights, although, as Rosa Freedman notes, this has met with resistance by others, with Pakistan for one arguing that these do not concern 'universally recognised human rights principles'.[112]

The ongoing practice of human rights law, through the adoption of General Assembly resolutions and treaties, the work of the Human Rights Council, along with activities outside United Nations buildings, has also allowed for a broadening of the scope of customary human rights, from the initial recognition of slavery and racial discrimination,[113] to a list that now also includes, as a minimum, prohibitions on murder or enforced disappearance, torture, and prolonged arbitrary detention.[114] Through communications on human rights, states expanded the bare minimum core of protection, as customary law does not depend on state consent for a norm to be opposable to the state, a point emphasized by the denial of the status of persistent objector to apartheid South Africa. Customary rights are obligations *erga omnes*—the responsibility to comply is owed to all other countries in the international community, even though 'the primary beneficiary of the obligation breached is not a State',[115] allowing any state to invoke the responsibility of the state and introduce political or economic sanctions to force a country to come into line with its human rights obligations.

[110] Article 1(1), Convention Against Torture.

[111] Walter Kälin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 25, 33 (hereafter Kälin, 'Ritual and Ritualism').

[112] Rosa Freedman, 'New Mechanisms of the UN Human Rights Council' (2011) 29 *Netherlands Quarterly of Human Rights* 289, 310.

[113] *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, paras 33–4.

[114] American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987), § 702.

[115] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) *Ybk International Law Commission*, Vol. II(2) 87 [3] (commentary on Article 28).

A Role for Secondary Agents of Justice

Agreement on human rights in the form of the Universal Declaration of Human Rights established a moral code that outlined the notion of good government, but it was for each state to decide on the necessary measures to promote human rights. That changed following the shock of the Sharpeville Massacre of 21 March 1960, when UN Member States introduced oversight mechanisms in the form of the Committee on the Elimination of Racial Discrimination and the '1235' (1967) and '1503' (1970) procedures of the UN Commission on Human Rights, and called for the imposition of political and economic sanctions to force South Africa to come into line with the norm prohibiting systematic racial discrimination. After Sharpeville, a two-level model of 'human rights' emerged, with states having the primarily responsible for the protection of rights and secondary agents of justice, principally the UN charter bodies and treaty bodies, having a role in monitoring the human rights performance of states. The requirement for secondary agents of justice is explained by the moral philosopher, Onora O'Neill, in the following way: Whilst states 'have been seen as the primary agents of justice[,] [a]ll too often they have also been agents of injustice'.[116] The two-level model was the direct consequence of the emergence of international human rights law, which not only established what *shall* be done, as opposed to what *should* be done, but also introduced bodies ('secondary agents of justice') to help avoid dystopias, like that in apartheid South Africa, and eventually promote the utopian ideal of 'all human rights for all'.

Dystopia Avoidance and Utopia Promotion

Samuel Moyn describes human rights as *The Last Utopia*, an idea or ideology that, he claims, displaced all other transnational political utopias to establish itself as the common vocabulary of global justice.[117] Moyn took the terminology from Henry Steiner's distinction between human rights as catastrophe prevention and human rights as utopian politics. Some human rights, Steiner explained, were expressed in terms of the 'anti-catastrophe' goal of stopping the massive disasters that have plagued humanity, whilst others were focused on the 'utopian dimension' of giving people the freedom and capacity to develop their lives.[118]

The etymology of *Utopia* derives from the title of the 1516 novel by Sir Thomas More; it is taken to mean an imagined place 'in which everything is perfect, [especially] in respect of social structure, laws, and politics'. The term dystopia is a compound of the prefix 'dys', with the connotation of hard, bad, unlucky, etc.,

[116] Onora O'Neill, 'Agents of Justice' (2001) 32 *Metaphilosophy* 180, 182.
[117] Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap 2010) 214.
[118] Ibid. 226. On Utopias in international law more generally, including human rights, see Akbar Rasulov, 'The Concept of Utopianism in Contemporary International Law' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar, 2019) (SSRN).

and 'topia', as in *Utopia*. Dystopia is the opposite of utopia: 'An imaginary place or condition in which everything is as bad as possible.'[119] As Professor of English literature, John Carey, explains, utopia is usually taken to mean '*good place*', with the consequence that dystopia denotes '*bad place*',[120] although it is often the case, as the political scientist Peter Stillman points out, that utopia refers to 'a no place (or a "not-here" or "not-yet" place)',[121] whereas, in the words of the historian Michael Gordin, 'dystopia places us directly in a dark and depressing reality'.[122] In other words, utopia is some idealized version of a never to be reached future condition; whereas, dystopia speaks to the brutal realities of the lived experiences of people in the here and now.

Human rights practice is largely a consequence of the reaction of the international community to lived dystopias. First, in the invention of the idea to define the Allied cause against the tyranny of the Nazi regime; and, second, in its transition from a moral code to a body of international law, with a role for secondary agents of justice, following the 1960 Sharpeville Massacre. The Universal Declaration of Human Rights itself refers to the fact that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind',[123] and Johannes Morsink argues that, with the introduction of this passage, the drafters 'captured the moral epistemology of human rights, according to which basic human rights are discovered from the obvious wrongs we encounter in our experience'.[124]

The distinction between human rights as utopian idealism and dystopian reality has been taken by some to require that we limit our understanding of human rights to a set of 'minimal constraints on responsible politics'.[125] Michael Ignatieff, for one, argues that people from different cultures may disagree about what is good, 'but nevertheless agree about what is insufferably, unarguably wrong'.[126] The problem with this human rights minimalism[127] is that it ignores those aspects of human rights practice that look to move states towards the greater recognition of 'all human rights for all'. The Universal Declaration of Human Rights is not expressed in terms of human rights minimalism; it outlines an idealized version of the good society,

[119] OED Online. Oxford University Press, June 2017. Web. 24 August 2017.

[120] John Carey, *The Faber Book of Utopias* (Faber and Faber) xi (emphasis in original).

[121] Peter G. Stillman, ' "Nothing Is, But What Is Not": Utopias as Practical Political Philosophy' (2000) 3: 2–3 *Critical Review of International Social and Political Philosophy* 9, 18.

[122] Michael D. Gordin et al., 'Utopia and Dystopia beyond Space and Time' in Michael D. Gordin et al. (eds), *Utopia/Dystopia: Conditions of Historical Possibility* (Princeton UP 2010) 2.

[123] Universal Declaration of Human Rights (n. 51).

[124] Johannes Morsink, 'The Universal Declaration and the Conscience of Humanity', Paper for Conference: 'Rights That Make Us Human Beings. Human Rights as an Answer to Historical and Current Injustice', Nuremberg, 20 November 2008 http://menschenrechte.org/wp-content/uploads/2013/05/The-Universal-Declaration-and-the-Conscience-of-Humanity.pdf, accessed 26 January 2018.

[125] Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043, 2075.

[126] Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited and introduced by Amy Gutmann (Princeton UP 2001) 56.

[127] See, generally, Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope for?' (2004) 12 *Journal of Political Philosophy* 190.

explaining the responsibilities of states and correlative rights of individual in the same way as the natural law tradition associated with the work of John Finnis, who sees the function of human rights as explaining the requirements of good government in all societies.[128]

The moral code represented by the Universal Declaration now forms the basis for the Universal Periodic Review in the Human Rights Council, with Member States agreeing to have 'presented and openly discussed their human rights record before the international community'.[129] The process has been described variously as a secular trial,[130] a truth-telling mechanism,[131] and a public audit ritual, in which the state under review gives an account of its performance.[132] Christian Tomuschat explains the idea this way: The Universal Periodic Review 'is a procedure that seeks to advance the cause of human rights by persuasion. It cannot be called an enforcement procedure. The states under review are not defendants … However they are made accountable'.[133] Likewise, the review of states parties' reports by the supervisory bodies established under the core UN human rights treaties not only involves the passing of negative judgments, it also allows for public dialogue on the promotion of human rights, concerning, for example, the sharing of best practices and emphasizing the desirability of the removal of reservations so that a country can come into full compliance with the treaty regime.

Under both the Universal Periodic Review and the core UN treaties, states are required to give an account of their human rights performance. Accountability is different from responsibility. State responsibility in international law involves the application of binding law norms to facts, with a determination following as to whether a country is in violation of its international law obligations or not. Accountability is the process of being called to account for one's actions. Increasingly, as Richard Mulgan explains, it is seen as a 'dialogical activity', requiring officials to 'answer, explain and justify, while those holding them to account engage in questioning, assessing and criticising'.[134] Accountability in human rights practice imposes an obligation on states to detail the measures they have taken to avoid abuses and the steps taken towards the achievement of the utopian ideal of 'all human rights for all'. Human rights includes both a dystopia-avoidance component that looks to prevent intolerable abuses and a utopia-promotion element that seeks to encourage moves

[128] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 214.

[129] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 87, 87.

[130] Kälin, 'Ritual and Ritualism' (n. 111) 26.

[131] Julie Billaud, 'Keepers of the Truth: Producing "Transparent" Documents for the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 63, 73.

[132] Jane K. Cowan, 'The Universal Periodic Review as a Public Audit Ritual' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review* (CUP 2015) 42, 45.

[133] Christian Tomuschat, 'Universal Periodic Review: A New System of International Law with Specific Ground Rules?' in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 609, 626.

[134] Richard Mulgan, '"Accountability": An Ever-Expanding Concept' (2000) 78 *Public Administration* 555, 569.

towards the protection of 'all human rights for all' persons in all political communities, in the never to be realized future.

Conclusion

The objective of this chapter was to explain the moral concept of 'human rights' by developing a practice-based account drawing on the ways the term has been employed in international law communications, on the understanding that words are given meaning through usage. Drawing on the work of John Searle, the work demonstrated the objective reality of human rights, showing how the communication acts of states resulted in the introduction of a moral code capable of allocating obligations to states and rights to individuals, thereby allowing us to say, for example, that systematic racial discrimination is objectively (morally) 'wrong'. Whilst Searle's attempt to link human rights to the natural law tradition appears misguided, his more general argument around the construction of social reality provided the basis for showing the existence of human rights as a fact of the social world.

We can, then, explain the objective reality of human rights in terms of a more general philosophy of emergence, grounded in complexity theory.[135] A philosophy of emergence emphasizes the importance of the relationships between the emergent whole and the component parts, the way the emergent entity is dependent on the lower-level elements, but at the same time influences those elements; it also stresses the significance of events, along with the possibility of fundamental change, and the power of unseen forces. A philosophy of emergence is required to account for phenomena that cannot be understood without considering the behaviours of lower-level actions, where something new is seen to emerge from activities below. Thus, we cannot make sense of ant colonies without examining the activities of individual ants, or the international law system without considering the performative acts of states, the General Assembly, the International Court of Justice, etc. A philosophy of emergence can also explain how a shared understanding, or paradigm or mainstream position, can develop within a knowledge community—like international law—as a result of communications (publications, talks, conversations, etc.) on a problem facing the discipline.

By looking to a philosophy of emergence grounded in complexity theory and drawing on John Searle's work that shows how abstract institutions can have real deontic powers, we can see how social norms can emerge as an objective reality with the ability to allocate (moral) rights and duties, without the need for formal institutions, as individuals react to the actions of others, resulting in a shared understanding of 'right' and 'wrong' behaviour.

Communications on social norms establish the objective reality of social norms by way of collective recognition. The institution of friendship, for example, creates

[135] On the possibilities of a philosophy of emergence (what he calls a theory of assemblages) grounded in complexity theory, see Manuel Delanda, *Philosophy and Simulation: The Emergence of Synthetic Reason* (Continuum 2011) 185–6.

rights and obligations for the members of a community without the requirement for a concrete and formal institution to legislate the norms of friendship. Social norms are an emergent property of the communication acts of the members of the community, who literally speak social norms into existence by talking about acceptable norms of behaviour and commenting on actions which are norm-breaking. These moral obligations do not enjoy recognition by, or the protection of, the law but they do create desire-independent reasons for action on the part of subjects and allow for criticism of behaviour not in compliance with the norm. The same point can be made about rules of appropriate behaviour in the international community which have not been recognized as international law norms. These are the result of the communication acts of states, with the emergent norms then establishing *moral* obligations for the same states that brought them into existence.

Complexity serves to remind us of the characteristics of normative systems that emerge from the interactions of component agents, without the need for a controlling power. First, existing norms are the result of contingent decisions taken in the past. Second, new norms will only emerge as agents change their behaviours in response to the unexpected actions of other actors or to developments in the outside world. Third, significant change in accepted standards of behaviour will occur from time to time, but this cannot be predicted in advance. Finally, in the case of complex social systems, constructed first in the minds of the flesh and blood human participants, ideas and concepts can influence the development of social norms over time.

Understood in this way, we can make sense of the emergence of a moral concept of human rights through the legal practice of human rights. Whilst the communication acts of states, the General Assembly, the Human Rights Council (and before that the Commission on Human Rights), and the treaty bodies all take place within a given context and must be understood primarily by reference to the significance attached to these performative acts by international lawyers, they also contribute to our conceptualization of the moral concept of human rights, which emerges in these patterns of human rights communications. States created the moral concept of human rights by speaking about 'human rights', recognizing its deontic powers in terms of allocating (moral) obligations to states and (human) rights to individuals and they explained, and continue to explain, its structure and content through their discursive practices on the subject.

Whilst there had been some rights-talk during World War II, the key development was the incorporation of the term in the Charter of the United Nations. By including reference to 'human rights' in the constituent instrument of the new World Organization, the original signatories manifested their belief in the existence of something called 'human rights', and they maintained that conviction through the invocation of the language of human rights in their international law communications, establishing the objective fact of 'human rights' in the social world.

The content of the notion was explained with the adoption of the Universal Declaration of Human Rights, which outlined an idealized model of good government in an organized political community and highlighting the importance to the individual of equal status, physical and psychological integrity, personhood, participation, and minimum welfare rights. There was no underling rationale for the set

of rights included, and the Universal Declaration was not based on any elementary moral or political philosophy, or foundational conception of human nature. The rights in the Declaration were identified by John Humphrey and his team at the UN Human Rights Division, following an audit of the practice of rights in domestic constitutions, with the list being approved by the members of the Commission on Human Rights and states in the General Assembly. Attempts to link the UDHR moral code to natural law and natural rights traditions appear, then, to be misguided.

UN Member States relied on the moral code reflected in the Universal Declaration of Human Rights to condemn the practice of apartheid in South Africa, with, for example, the General Assembly expressing its regret in 1953 that South Africa had introduced legislation 'contrary to the Charter and the Universal Declaration of Human Rights'.[136] Violation of a moral code does not, though, imply any consequences as a matter of law and there was no possibility of legal sanction against the apartheid State. The moral code of human rights was transformed into a nascent body of international human rights law in the 1960s as states responded to the situation in southern Africa by declaring, in the Proclamation of Tehran, that the Universal Declaration of Human Rights was binding on UN Member States; introducing the '1235' (1967) and '1503' (1970) procedures; and adopting the Race Convention and Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. The International Court of Justice relied on these developments to confirm that international custom included a prohibition on systematic racial discrimination. The United Nations subsequently adopted conventions on the rights of women, the child, migrant workers, and persons with disabilities, as well as conventions dealing with the problems of torture and enforced disappearance (each with its own supervisory body), and in 2006 introduced the Universal Periodic Review, whereby the human rights performance of states could be evaluated against the standards in the Universal Declaration of Human Rights.

Through legal practice, the fixed moral statement in the Universal Declaration, which explained the proper relationship between the state and the individual, became clearer. The establishment of a body of human rights law further saw the introduction of secondary agents of justice to supervise the performance of states, resulting in a two-level infrastructure and allowing for the possibility of dialogue on the meaning, scope, and content of human rights—transforming a static code of morality into a dynamic model of political justice that evolves with alterations in the behaviours of states and human rights bodies. Dystopia avoidance took the form of oversight by the UN on situations of gross and systematic violations and the introduction of economic and political sanctions in cases of violations of customary norms. The promotion of the utopia of 'all human rights for all' is seen in the Universal Periodic Review and the work of the treaty bodies in encouraging states to accept new commitments or new understandings of existing obligations.

Because the practice of human rights changes over time, both in its normative content and institutional architecture, it makes little sense to ask, 'What does the

[136] UNGA Res 719(VIII) (11 Nov 1953), para. 5

term "human rights" mean?' All we can realistically enquire is 'What does the term "human rights" mean *today*?' The answer will depend on the patterns of communications on human rights, although these must keep faith with the original notion in the Universal Declaration of Human Rights and its underlying principles of equal status, physical and psychological integrity, personhood, social inclusion, and minimum welfare. The moral concept of human rights, the idea of human rights, is understood to be a dynamic moral code that tells us what it means to be human in a political community like the state. But that conception changes with alterations in practice, as states and UN bodies respond to new information about the threats faced to the well-being of the individual in new circumstances, reshaping what, in the view of the international community, it means today to 'be fully human'.

7

The Idea of International Human Rights Law

We began this book by observing the emergence of International Human Rights Law as an academic discipline in its own right and the sense it is, in some ways, unalike general international law—although the extent of the divergence is the subject of ongoing and heated debate. One consequence is that equally talented human rights lawyers and general international lawyers can look at the same documents and reach radically different conclusions as to the status, scope, and content of 'the law'. This is clearly unhelpful to the cohesion of the profession and problematic in terms of legal certainty. One thing is clear. Because human rights law grew out of general international law, any dissimilarity must be explained by the influence of the moral concept of human rights on general international law.

Rather than conceptualize the idea of human rights in line the subjective argument of a particular theorist, this work developed a practice-based account that explained the meaning of 'human rights' by reference to its use in international law discourses, on the understanding that all human rights practice takes place within the law, or under its shadow. It looked to complexity theory to provide the intellectual scaffolding, allowing us to make sense of those performative acts in international law, to adapt the terminology of the linguistic philosopher John Austin,[1] that have resulted in the development of a body of International Human Rights Law. John Searle's related analysis of the way abstract institutional entities can emerge through communication acts,[2] with deontic powers, helped to explain how the moral concept of human rights could materialize from the practice, showing that systematic racial discrimination is legally and morally 'wrong'.

By drawing on the insights from complexity theory, we saw in Chapters 3, 4, and 5 how the history of human rights unfolded without any grand plan or underlying philosophy.[3] As Julian Webb observes, 'complexity serves to remind us of the inevitability of the truism that the law delivers justice as much by accident as by

[1] J.L. Austin, *How to Do Things with Words* (2nd edn, OUP 1975) 6.

[2] For the influence of Austin on Searle, see John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969).

[3] The clearest exposition of the application of complexity theory to history is developed by Yale history professor, John Gaddis. The key insights Gaddis takes from complexity are the sensitivity of historical events to initial conditions; the notion of self-organization, i.e. that history develops without any guiding hand; and the possibility of phase transitions, or bifurcations, when moments of instability give rise to new patterns of stability that cannot be predicted in advance. John Lewis Gaddis, *The Landscape of History: How Historians Map the Past* (OUP 2004) 79–98.

design'.[4] From passing reference in Roosevelt's 'Four Freedoms' Address, to the Charter provisions, to discussions on the content of the Universal Declaration of Human Rights, to United Nations action against apartheid South Africa, including the adoption of the Race Convention, to recognition of customary human rights, the activities of the treaty bodies, and establishment of the Human Rights Council and introduction of the Universal Periodic Review, the history of human rights, to paraphrase the economic historian Paul David, describes a scenario in which 'one damn thing follows another'.[5]

Complexity theory provided the underpinnings for a philosophy of emergence that showed how the idea of human rights could materialize—as an objective reality—from the discursive practices of states and UN bodies. This moral code, reflected in the Universal Declaration of Human Rights, established (moral) obligations for states, and by extension state-like entities, and correlative (human) rights for individuals, affirming the importance of equal status, physical and psychological integrity, personhood, participation, and minimum welfare rights. After the Sharpeville Massacre of 21 March 1960, the moral code was transformed into a set of international law obligations in the form of United Nations human rights law, the core UN human rights treaties, and a body of customary human rights law. This new practice of international human rights law also allowed a role for secondary agents of justice to protect against dystopias and promote the utopia of 'all human rights for all'. Along with human rights law came the international (human rights) lawyers with their rules for making sense of the content of human rights—and the recognition that the meaning of human rights could change over time. The idea of human rights was transformed from a static moral code into a dynamic model of political justice capable of evolving with alterations in the behaviour of states, the work of the human rights bodies, and wider developments in science, technology, societal attitudes, and regulatory approaches.

This final chapter has two objectives: to remind the reader of the main arguments in the previous chapters, and to explain the characteristic qualities of International Human Rights Law, which, as we have already noted, must be the result of the influence of the moral concept of human rights on the international law doctrine and practice on human rights. Whilst the moral and legal notions of human rights are closely entwined, they are not synonymous. Legal practice operates within the disciplinary constraints of international law, often within concrete institutions; the abstract notion of 'human rights' emerges in the patterns of communication of states and non-state actors. The main point here is that the emergent moral concept of human rights, which is manifested in the legal practice, then influences the legal practice of human rights. In the language of complexity, the moral concept of human rights emerges from the legal practice and then functions as an attractor, pulling the legal practice away from human rights dystopias and towards the greater recognition

[4] Julian Webb, 'Law, Ethics, and Complexity: Complexity Theory & The Normative Reconstruction of Law' (2005) 52 *Cleveland State Law Review* 227, 239.

[5] Paul A. David, 'Clio and the Economics of QWERTY' (1985) 75(2) *The American Economic Review* 332, 332.

of 'all human rights for all'. This is not the result of the success of 'do-gooding' human rights lawyers imposing a subjective ethical reading on open-textured international law instruments, but the influence of the idea of human rights on the legal practice—and let us not forget the idea emerges from that legal practice. This explains the fragmentation of international law, reflecting the influence of the moral concept of human rights on general international law.

The Debate on Human Rights

Our examination of writings on human rights highlighted the division between the traditional (or orthodox) accounts which see human rights as a contemporary idiom for natural rights and political versions that look to explain its function either in terms of evaluating the legitimacy of the practices of governments or the possibilities of intervention in the domestic affairs of sovereign and independent states.

The traditional writings normally proceed by developing a reasoned argument to show we have certain rights simply 'by virtue of being human', explaining the power of rights-talk by linking it to natural rights or natural law traditions. There is then a related critique of the legal practice for its inadequacies in reproducing an authentic statement of rights—the inclusion of the right to paid holidays in the Universal Declaration of Human Rights is the standard target—but nowhere is it explained why we should understand the expression 'human rights' as a contemporary idiom for natural rights and the more the orthodox accounts point out the differences, the less reason there is to conclude that human rights should be conceptualized as a deficient rendering of the traditional (or orthodox) view.

There was no underlying philosophy when the term 'human rights' was invented in the 1940s and it was not understood at the time as an idiom for natural rights or natural law. Scholars can continue to write about natural rights and natural law in the discipline of moral philosophy, but they should stop making the case that human rights is a contemporary expression of natural rights or natural law: it is not, as the history and practice makes clear. Human rights are what they are: an abstract notion created by states at a specific moment in time and carrying deontic powers that allocate (moral) responsibilities to states and (human) rights to individuals.

Whilst the state often provides the context for discussion in the traditional accounts or constitutes the primary threat to the enjoyment of natural rights, the orthodox arguments do not see natural rights and the state as being conceptually conjoined—natural rights are held by each person, or at least everyone that counts as 'human', and are opposable to all. This is not the case with those writings focused on the relationship between the individual and the state, which include natural law versions that understand rights as a guide for good government policy and the Lockean social contract tradition that sees human rights in terms of limits on bad governments. These ideas can be globalized by requiring some minimum level of constitutional rights protection in all countries, but this does not capture the distinctive claim of human rights: to be considered a violation, the act must be a transgression of human rights norms, whether committed here *or* there.

Neither the traditional nor the political accounts have anything to say then about the role of human rights in world society, beyond calling for the globalization of natural rights or fundamental rights. This deficiency led Joseph Raz and Charles Beitz to define the idea of human rights by reference to the practice of intervention in the name of human rights. These interventionist accounts shifted the focus to the function of human rights in the international community, explaining the way human rights justify interventions in the domestic affairs of the state, disabling any claims that the treatment of citizens is not the business of outsiders. The key innovation was the introduction of a third party into the relationship between the state and the individual, with the recognition of the need for secondary agents of justice to guarantee the protection of rights.

The problem with the interventionist scholarship is the focus on dictatorial, often military, intervention, with the necessary conclusion that the catalogue of rights suggested by the interventionist accounts is much shorter than the list in the Universal Declaration of Human Rights. But, as we saw in Chapters 3, 4, and 5, the practice of human rights includes much more than forcible intervention, encompassing, for example, criticisms by the United Nations General Assembly of the performance of Member States; the Commission on Human Rights reporting on gross and systematic violations; the introduction of the core UN treaties and the work of the supervisory bodies; and the promotion of 'all human rights for all' by way of the Universal Periodic Review in the Human Rights Council. By examining the overall picture, it becomes possible to develop a genuinely practice-based account, drawing on the legal doctrine—on the understanding that other forms of practice, including, for example, the 'naming and shaming' of governments by non-governmental organizations, takes place within the shadow cast by legal human rights, which explains the standards against which states will be judged.[6]

Making Sense of Human Rights

To make sense of what we mean when we talk about 'human rights', this work followed other practice-based accounts to explain the term by reference to the actual practice of human rights, rather than developing a subjective definition of 'human rights', and then looking for instances of human rights practice that matched, or did not match, that understanding over time. The analysis looked to complexity theory to make sense of the patterns of international law communications in the United Nations system, the core human rights treaty systems, and customary international law on the basis that the meaning of the term 'human rights' will be revealed through its use in these areas of legal practice. Complexity highlighted the importance of focusing on the behaviour of states and non-state actors and emphasized the power of events on human rights practice, in particular the 1960 Sharpeville Massacre, and the possibilities of fundamental change—seen, for example, in the transition

[6] Emilie M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62 *International Organization* 689, 689.

of human rights from a moral code focused exclusively on the state, to a two-level model with a role for secondary agents of justice.

Chapter 3 showed how the term 'human rights' was introduced into international law on 1 January 1942 in 'The Declaration by United Nations', following a suggestion by US President, Franklin D. Roosevelt, to define the Allied cause against the lived dystopia of the Nazi tyranny and 'the savage and brutal forces seeking to subjugate the world'.[7] The expression was included in the constituent instrument of the new World Organization, but, as Mary Ann Glendon pointed out, the United Nations Charter 'did not say what those rights might be'.[8] The meaning of the term only became clear when the General Assembly adopted the Universal Declaration of Human Rights, drafted by a small group of people and drawing largely on the experience of constitutional rights protection within the state.

Human rights remained a moral concept only until the 1960s, when, in the aftermath of the Sharpeville Massacre and the expansion of UN membership to include the newly independent African states, the United Nations shifted its approach from an abstract commitment to the promotion of human rights to a determination to bring an end to the practice of systematic racial discrimination in southern Africa. The Organization framed its intervention in South Africa in terms of the need to avoid 'gross and systematic' violations of human rights, but importantly did not limit the application of the '1235' (1967) and '1503' (1970) procedures to the apartheid State. Between 1967 and 2006, the United Nations focused on the most serious cases, but in 2006, the Commission on Human Rights was replaced by the Human Rights Council, allowing the institution of the Universal Periodic Review, whereby Member States evaluated the performance of all other Member States against the standards in the Universal Declaration of Human Rights.

Chapter 4 demonstrated that the innovation of the human rights treaty system also followed the shock of the Sharpeville Massacre, starting with the adoption of the 1965 Convention on the Elimination of Racial Discrimination, which established a model followed by the other core UN treaties, outlining obligations for states parties and creating a bespoke supervisory body with the responsibility for reviewing the reports of states parties on implementation measures and (where permitted) examining complaints by individual victims. The UN's approach was largely reactive in nature, responding to the problems of racial discrimination, discrimination against women, torture, the difficulties faced by migrant workers, and the practice of enforced disappearance. The only exceptions to this problem-response template were the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, introduced to give effect to the rights in the Universal Declaration of Human Rights, and the 1989 Convention on the Rights of the Child and 2008 Convention on the Rights of Persons with Disabilities, adopted to explain the implication of universal rights for these two groups.

[7] 'The Declaration by United Nations', reprinted in the *Yearbook of the United Nations 1946–47*, 1.

[8] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001) 19.

To make sense of human rights treaties, we need to first understand the interconnections between the states parties and the treaty, the relationships between the states parties inter se, and their relationships with the treaty body, as the meaning of convention rights emerges and evolves through the interactions of these component agents in the treaty system. The opposability, that is, binding nature, of convention rights depends, in large part, on signature and ratification, along with the law on denunciation, and the rules on reservations, where we see a divergence from general international law, with supervisory bodies simply requesting states parties withdraw invalid reservation, thus keeping the state within the human rights system. On the issue of interpretation, whilst the approach in general international law tends to prioritize the ordinary meaning of words, which are presumed to reflect the intention of the parties, a *pro homine* ('in favour of the individual') method is considered more appropriate in the case of human rights treaties, focused on the object and purpose of the treaty as an instrument for the promotion of human rights. We must also be aware that the meaning of convention terms can change over time. This is seen most clearly in the evolutionary approach to interpretation, whereby innovations in technical and scientific knowledge, alterations in societal attitudes, or developments in regulatory approaches can lead to new understandings of convention rights. We are also required to consider any subsequent practice under the treaty, allowing us to examine the behaviours of states parties, along with the pronouncements of the supervisory bodies. Looking at the text, then, provides only part of the picture.

Human rights treaties evolve as states parties and supervisory bodies respond to new information. Thus, for example, the rule on non-withdrawal from the International Covenant on Civil and Political Rights was developed following the purported denunciation of the Covenant by North Korea. The key event in the generation of a distinctive body of human rights treaty law was the judgment by the European Court of Human Rights in *Golder v. United Kingdom*, which, to the surprise of the international lawyers on the Court, adopted a *pro homine* approach to interpretation.[9] *Golder* sent the European Convention system on a different path, establishing a precedent that could be applied more generally, including in the core UN treaties. This divergence from the expected approach to interpretation—at least that expected by general international lawyers on the bench, such as Sir Gerald Fitzmaurice—is explained by the pull that the moral concept of human rights exerted on the judicial reasoning of the majority on the Court.

Chapter 5 turned to the issue of customary human rights law. Whilst treaties only bind the states parties, creating correlative convention rights, custom binds all countries, allowing for the introduction of sanctions to force a recalcitrant state to come into compliance with its international law obligations. To show the existence of custom, we must be able to provide evidence of state practice and *opinio juris*. The problem for human rights is that the practice has often been the violation of rights (the practice of torture, etc.), leading to arguments for a deductive approach to customary law, building on the norms contained in instruments adopted by the

[9] *Golder v. United Kingdom*, A18, para. 36.

General Assembly. But if we think of custom as a complex system that emerges through the performative acts of states, the creation of customary human rights is no different from any other area of international law. States literally speak customary human rights norms into existence where they talk or write about the existence of a norm of appropriate behaviour and evidence a belief that the norm is binding as a matter of international law. Before the 1960s, there was no argument for the existence of customary human rights, but the adoption of a series of General Assembly resolutions on race discrimination and the introduction of the Race Convention, along with moves to transform the Universal Declaration of Human Rights into a legally binding code, allowed Judge Tanaka, in the 1966 *South West Africa* cases, to sketch out a contemporary methodology for customary law formation. This modern custom focuses on the performative acts of states in the adoption of law-making treaties and resolutions on human rights, but it also looks for evidence the norm is regarded as binding in the wider practices of states, both in its implementation through domestic legislation and in the invocation of the responsibility of other countries.

On the Existence of 'Human Rights'

Whilst it might be possible to argue that belief in natural rights is as rational as a belief in unicorns, looking to the practice, it is clear that states and international organizations act as if they believe in the existence of human rights. By saying that human rights exist, and acting as if human rights exist, states have created and maintained the objective reality of 'human rights'. The philosopher John Searle has shown how this kind of collective recognition can create concrete objects (like money) and abstract notions (like friendship) with the (deontic) power to change the rights and duties of others.[10] Deontic powers give an entity the right to determine the normative position of individuals and non-human actors, creating desire-independent reasons for action. An entity has deontic powers where there is collective recognition that it has those powers—nothing more is required.

Whilst Searle does not use the terminology of complexity, he has, in the past, relied on emergence to examine the mind–body problem,[11] and the creation of institutional facts can be explained using the language of complexity theory. Take his example of the existence of money as a fact of the social world. The objective reality of money does not depend on my—or your—subjective attitude to a coin or note. Provided people say that money exists and then act as if money exists, they can exchange something that has no inherent worth, a piece of metal or paper, for example, for something of intrinsic value, say a bunch of bananas. The institutional fact of money is then an emergent property of the behaviours of the members of a

[10] John R. Searle, *Making the Social World* (OUP 2010).
[11] John Searle, *Minds, Brains, and Science* (Harvard UP 1984) 21.

group, who literally speak into existence the institutional fact of money.[12] People speak and write into existence the social facts that structure their daily lives through a form of speech act that Searle calls Status Function Declarations. Entities with deontic powers are, then, an *emergent* property of those communication acts, and they have the power to determine the normative position of the same individuals that brought them into being in the first place (what complexity theorists call downward causation).

No serious person doubts the existence of money, and anyone who says that my £20 Bank of England note is not money is factually wrong. The same point can be made about human rights. By saying that human rights existed when they adopted the Charter of the United Nations, states established the social reality of the moral concept of human rights—'the idea of human rights', and they have continued to act as if human rights exist. Consequently, anyone who says that 'human rights' do not exist is also factually incorrect—and we can say that systematic racially discrimination is objectively morally 'wrong'.

States explained the content of the moral concept of human rights with the introduction of the Universal Declaration of Human Rights, establishing a code that outlined a notion of good, human rights respecting, government, reflecting the importance of equal status, physical and psychological integrity, personhood, participation, and minimum welfare rights. After the 1960 Sharpeville Massacre, states accepted the need for concrete action, introducing measures to monitor and supervise the performance of states, transforming a moral code that explained the relationship between the state and the individual into a two-level model of moral human rights that also included a role for secondary agents of justice.

Emergent human rights law systems then developed to include measures to avoid situations of lived dystopias by focusing on gross and systematic violations and the introduction of special procedures dealing with particularly problematic places and issues, and permitting states and international organizations to introduce sanctions in case of violations of customary rights. Human rights mechanisms also allowed for the introduction of measures to promote human rights utopias, by encouraging countries to sign up to the core UN human rights treaties and engage with the treaty bodies and requiring them to account for their human rights performance across the range of rights in the Universal Declaration by way of Universal Periodic Review.

On International Human Rights Law

The moral concept of human rights, as an objective fact of the social world, emerged through the discursive practices of states to establish a code for good government and

[12] The creation of money does not necessarily require the involvement of a central bank or legal system, notwithstanding this is usually the case (although consider the creation of 'Bitcoin' as a digital payment system), but for 'money' to be created by the central bank, within the context of the legal system, the population must recognize the deontic powers of the institution of the central bank and the institution of law. In the end, all facts of the social world depend on collective recognition.

correlative (human) rights for individuals. Originally it was left to the state to decide what, if any, measures of protection were required. That was until the 1960s, when we saw a transformation of the notion, with the introduction of the '1235' (1967) and '1503' (1970) procedures targeting gross and systematic violations, the adoption of the Race Convention and creation of the Committee on the Elimination of Racial Discrimination, and the recognition of the customary prohibition on racial segregation. The international law system was now set on a new path that recognized a subsidiary[13] role for international organizations and other secondary agents of justice in the promotion and protection of human rights.

The new institutional architecture allowed the meaning of the term 'human rights' to change over time. This is seen most clearly in the work of the bodies established under the core UN treaties, with, for example, the Human Rights Committee reading a right to sexuality into the International Covenant on Civil and Political Rights,[14] the Committee on Economic, Social and Cultural Rights identifying a 'minimum core' in the Covenant on Economic, Social and Cultural Rights,[15] and the Committee on the Elimination of all Forms of Discrimination against Women determining that states parties are required to take action on domestic violence, notwithstanding the absence of this obligation in the Convention.[16]

The divergent approach of human rights bodies from that expected by (some) general international lawyers is usually explained in terms of fragmentation, literally the breaking into separate fragments,[17] although it is important to be clear this is not taken to imply the disintegration of international law into separate systems. The International Law Commission's study group on the issue explained the point this way: 'International law is a legal system',[18] albeit a system with 'special (self-contained) regimes' concerned with particular subject matters, often with their own institutions.[19] The notion of 'human rights law', the study group maintained,

[13] See, generally, Gerald L. Neuman, 'Subsidiarity' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 360, 363; and Samantha Besson, 'Subsidiarity in International Human Rights Law: What is Subsidiary about Human Rights?' (2016) 61 *American Journal of Jurisprudence* 69.

[14] *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[15] Committee on Economic, Social and Cultural Rights, General comment No. 3, 'The Nature of States Parties' obligations (Art. 2, para. 1, of the Covenant)', adopted at its Fifth session (1990), para. 10 ('the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party').

[16] Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, UN Doc. CEDAW/C/GC/35, 26 July 2017, para. 10 ('gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated [and] a critical obstacle to the achievement of substantive equality').

[17] See, generally, Joost Pauwelyn, 'Fragmentation of International Law' (2006) *Max Planck Encyclopedia of Public International Law* http://opil.ouplaw.com/home/EPIL, accessed 22 February 2018.

[18] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Conclusions of the Work of the Study Group, Ybk ILC 2006, Vol. II(2) 175, para. 251(1).

[19] Ibid., para. 251(11).

gives expression to this idea,[20] concluding that the significance of a special regime 'often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose'.[21]

The object and purpose of International Human Rights Law is the protection and promotion of 'human rights', an idea that emerges from the practice of human rights. The interpretation and application of human rights law will, as the International Law Commission observed, tend to promote the greater protection and promotion of the moral concept. Complexity theorists explain this in terms of the related phenomena of path dependence and increasing returns. The fragmentation of international law into specialized regimes with different functions leads inevitably, as Margaret Young points out, 'to path dependency'.[22] In the case of human rights, the greater the protection of rights, the more likely that activists and lawyers will look to rely on human rights instruments in litigation and legal arguments. Where these are seen to be successful, other activists, lawyers, and academics will make similar claims in related and analogous cases. The more human rights are accepted, the easier it is to recognize the demands of human rights over competing requirements.

The conclusions of the International Law Commission's study group on fragmentation followed a report by its Chair, Martti Koskenniemi, in which he observed: 'One of the features of late international modernity has been what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts.'[23] The notion of functional differentiation was taken from autopoiesis, and Koskenniemi draws directly on the work of Gunther Teubner to claim that the 'fragmentation of the international social world has attained legal significance … by the emergence of specialized and (relatively) autonomous … spheres of legal practice'.[24] These specialized law systems 'do not emerge accidentally but seek to respond to new technical and functional requirements'. Thus, international environmental law results from concerns about the environment, whilst world trade law develops to regulate international economic relations. Each regime 'comes with its own principles, its own form of expertise and its own "ethos" '.[25] Thus, a ban on the importation of tuna from a country that does not insist on dolphin-friendly fishing practices looks very different when viewed from the perspective of International Environmental Law than it does from World Trade Law.

Whilst autopoiesis can be used to explain the specialized body of World Trade Law, given the emergence of a global economic system, it cannot—as we saw in Chapter 2—be applied to human rights. The functional differentiation of society describes, according to the theory of autopoiesis, the fragmentation of society into

[20] Ibid., para. 251(12). [21] Ibid., para. 251(13).

[22] Margaret A. Young (ed.), 'Introduction' in *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 1, 11.

[23] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 7.

[24] Ibid., para. 8. [25] Ibid., para. 15.

autonomous function systems, including an economics system that allocates resources, a science system which produces knowledge, and an education system that teaches and tests, etc. Gunther Teubner argues that the process of functional differentiation can now be seen at the global level, with the emergence of autonomous social systems in world society, such as markets, new technologies, and sport, and we see professional communities transforming their specialized and technical norms into law in the form of the *lex mercatoria, lex digitalis*, and *lex sportive*, etc.[26] Teubner identifies a process of constitutionalization of these global systems, allowing the development of regime specific fundamental rights,[27] whose role is to protect flesh and blood individuals from the deleterious consequences of the ways that systems function, and ensure the inclusion of individuals in all relevant social systems. The theory of autopoiesis tells us, however, that it is for each system to decide on the introduction of fundamental rights and Teubner concludes this will only happen when the system is sufficiently irritated by public discussions and protests, or at moments of constitutional crisis when its very survival is at stake.[28]

Even if we accept Teubner's thoughtful analysis of the possibilities of constitutionalism beyond the state, it is not clear where human rights fit within the scheme, because there is no human rights system in autopoiesis.[29] Fundamental rights are introduced by function systems (economics, science, etc.) as an act of self-limitation. But, if the regime can only make sense of things, including the worth of human individuals, in its own terms—if, for example, the global economic system can only understand the world in terms of price—how can this be compatible with any concept of human rights?[30]

Complexity theory, on the other hand, does allow us to develop an account of fragmentation to explain the distinctive nature of International Human Rights Law, by showing the influence of the moral concept of 'human rights' on general international law.

The first point to note is that our analysis of the work of the United Nations, the core human rights treaties, and customary international law showed that human rights law relies on the same processes for law-making, law-applying, and law-interpretation as general international law. The practice of international human rights law is the practice of international law. Moreover, we should not understand human rights law as a deviation from general international law, given the influence of human rights on international law in such areas as the structure of international obligations, including the emergence of obligations *erga omnes* and *jus cogens* norms; the formation of custom; the law of treaties, on questions of interpretation,

[26] Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1006.

[27] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, translated by Gareth Norbury (OUP 2012) 104.

[28] Ibid. 83.

[29] See Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40 *Rechtsfilosofie & Rechtstheorie* 191, 214.

[30] See, on this point, Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 *Indiana Journal of Global Legal Studies* 629, 661–2.

reservations, and succession, etc.; and the international law on state responsibility.[31] Arnold Pronto, Principal Legal Officer in the United Nations, makes the point that 'the very success of human rights law in infiltrating contemporary general international law undermines claims of the "specialness" of the human rights legal framework'.[32] The International Law Commission's rapporteur on reservations, Alain Pellet, originator of the disparaging term 'human rightism',[33] has, himself, adopted a position on reservations that looks to accommodate general international law with the practice of the human rights treaty bodies,[34] whilst the International Law Commission's work on the identification of custom, led by Sir Michael Wood, gives a nod to modern custom, by allowing direct reference to General Assembly resolutions.[35] As a former member of the International Court of Justice Bruno Simma has commented, 'the human rights genie has escaped from the bottle', and it is possible for international lawyers to 'handle human rights in a way considered respectable also by the "*droits de l'hommistes*" '.[36]

Whilst human rights law emerges from the doctrines and practices of international law, and indeed influences the evolution of general international law, there is no doubt it exhibits characteristics not commonly associated with general international law. We saw this with the introduction, without debate, of a supervisory regime in the form of the Universal Periodic Review to evaluate the performance of all UN Member States against the standards in the Universal Declaration of Human Rights; in the practice of evaluating reservations and development of an evolutionary and largely *pro homine* approach to the interpretation of treaties; and the emergence of

[31] See, generally, Committee on International Human Rights Law and Practice, 'Final Report on the Impact of International Human Rights Law on General International Law', Rio de Janeiro Conference (2008) www.ila-hq.org/index.php/committees accessed 8 February 2018.

[32] Arnold N. Pronto, ' "Human-Rightism" and the Development of General International Law' (2007) 20 *Leiden Journal of International Law* 753, 753–4.

[33] Alain Pellet, ' "Human Rightism" and International Law [Gilberto Amado Memorial Lecture (2000)]' alainpellet.eu/bibliography/articles accessed 8 February 2018.

[34] The International Law Commission concluded that a reservation contrary to the object and purpose of the treaty was 'null and void, and therefore devoid of any legal effect': Guideline 4.5.1, 'Guide to Practice on Reservations to Treaties', Report of the International Law Commission, GAOR UN Doc. A/66/10, p. 12. The legal nullity of an invalid reservation is an objective question; it does not depend on the objections of other states parties: Guideline 4.5.2 (1). Pellet argues that this 'new' rule of international law '[did] not come out of the blue', referring to the practice of the European Court of Human Rights and the Human Rights Committee. This is, however, a selective reading, and Pellet accepts that the practice of human rights bodies does not always follow the 'null and void' position: Alain Pellet, 'Reservations to Treaties and the Integrity of Human Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Handbook of International Human Rights Law* (Routledge 2013) 323, 329–30. To take just one example (the other human rights treaties exhibit a similar pattern), whilst there a many objections to reservations to the Convention on Discrimination against Women on the grounds of incompatibility with the object and purpose of Convention, only Sweden uses the formula 'null and void', and only in its response to the reservation by North Korea.

[35] Conclusion 12 (2), 'Text of the draft conclusions on identification of customary international law', in Report of the International Law Commission, Seventieth Session, UN Doc. A/73/10 (2018), p. 119. ('A resolution adopted by an international organization . . . may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.')

[36] Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal of International Dispute Settlement* 7, 25.

a body of customary human rights, and denial of the status of persistent objector in the case of fundamental rights.

The trajectory of international human rights law has seen the doctrine and practice move away from general international law. This is explained by the influence of the moral concept of human rights on the legal practice. Thus, for example, human rights treaties develop a *pro homine* approach to interpretation because their object and purpose is the protection and promotion of the moral concept of human rights. The invisible power of the moral concept of human rights pulls the legal practice away from the position of tolerating human rights dystopias, towards the recognition of 'all human rights for all'.

Complexity theorists explain the power of unseen forces that influence the development of complex systems in terms of the pull of attractors. In a complex social system, like international law, constructed first in the minds of its human participants, the way individuals working within the system think about the system will influence its evolution and we can think of ideas, ways of conceptualizing the world, as attractors that pull the system in a particular direction as it evolves over time. The clearest example of an idea influencing the development of the international law system is that of 'sovereignty', but we have also seen the influence of the socially constructed moral concept of 'human rights'.

Where a complex system is under the influence of two related attractors—here 'sovereignty' and 'human rights', the outcome is a three-dimensional torus, or doughnut with a hole in the middle.[37] The system is understood to sit somewhere on the surface of the imaginary doughnut, but its exact position at any point in time will not be clear, as it moves around under the influence of the two forces pulling it in different directions. In language more familiar to international lawyers, questions of international human rights law cannot be resolved only by looking to expressions of sovereign will (the pull of 'sovereignty' attractor) or the demands of the moral concept of human rights (the pull of 'human rights'), but only by considering the related, and sometimes conflicting, demands of sovereignty and human rights.

States created the moral concept of human rights when they adopted the Charter of the United Nations; they then explained its content in the Universal Declaration of Human Rights, highlighting the importance of equal status, physical and psychological integrity, personhood, participation, and minimum welfare rights. The Universal Declaration introduced the utopian ideal of a political community in which the government protects the individual from avoidable harms and creates the conditions in which each person can reach her full potential within society, telling us what, in the view of the international community, it means to 'be human' in a political community like the state.

Human rights were originally expressed as a moral code that explained the requirements of good government, with the objective of realizing the full potential of each individual. This remains the basic objective, but the moral concept of human

[37] Stuart A. Kauffman, 'Principles of Adaption in Complex Systems' in Daniel L. Stein (ed.), *Lectures in the Sciences of Complexity* (Addison-Wesley 1989) 619, 630.

rights has evolved with changes in the discursive practices of states and human rights bodies, along with our knowledge of what it means to 'be human', as we develop new sensibilities about the diversity of the human condition and see developments in science and technology, and novel regulatory approaches. New conceptions of human rights then influence the way secondary agents of justice see the relationship between the state and the individual, impacting on the practice of legal human rights. In other words, the moral concept of human rights that emerges from the legal practice then influences the very same international law system that created the idea of 'human rights' in the first place, explaining the fragmentation of international law, as the body of International Human Rights Law is pulled into a different evolutionary trajectory from general international law, albeit within the room for manoeuvre (or state space or phase space, in the language of complexity) provided by international law doctrine.

In Summary

International human rights law has emerged in the past two decades as an academic discipline in its own right, connected to, but also different from, general international law. For some international lawyers, the doctrine, practice, and academic literature on human rights represents an unconscionable divergence from general international law. For others, the distinctive character of international human rights law reflects the necessary and justifiable influence of the moral concept of human rights on the international law system, but to evaluate these claims, we need to be clear what we mean when we talk about 'human rights'.

The traditional division has been between those writers who see human rights as a contemporary idiom for natural rights, a moral code that applies to all persons; and those who view it as defining the purposes of good government or imposing limits on bad governments. A more recent interventionist strand highlights the importance of secondary agents of justice to our models, whilst theoretical works increasingly recognize the significance of international law to any conceptualization of human rights.

Given the absence of agreement on the term 'human rights', this work explained its meaning by looking to the way it is used in legal discourses, on the understanding that words are given meaning by use and that human rights law also frames the non-legal practice, providing, for example, the criteria for the 'naming and shaming' of human rights violating countries. The investigation relied on complexity theory to make sense of the practice, showing how we can think of the United Nations, the core United Nations human rights treaties, and customary international law as complex self-organizing systems that evolve with changes in the practices of states and non-state actors, highlighting the contingent and dynamic nature of human rights doctrine and practice.

The analysis showed how the term 'human rights' was created in the 1940s to differentiate the Allied powers from Hitler's Nazi regime and to provide a vision for the post-war world. The expression was eventually included in the Charter of the United

Nations and its meaning explained with the adoption of the Universal Declaration of Human Rights, with its five underlying principles of equal status, physical and psychological integrity, personhood, participation, and minimum welfare. Human rights was now a moral code outlining the utopian ideal of the good, human rights respecting government and establishing correlative moral rights for individuals, and by implication giving an account of the distinctive nature of 'being human' that was worthy of protection.

Looking to the work of John Searle, we could see how this abstract notion of 'human rights' could emerge as an objective social reality from the discursive practices of states on human rights. By saying that human rights existed and then acting as if human rights existed, states created a moral concept (the idea of human rights) capable of allocating (moral) obligations to states and correlative (human) rights to individuals.

The moral code of human rights was transformed into a nascent body of human rights law, with a role for secondary agents of justice, following the shock of the Sharpeville Massacre of 21 March 1960, changing the structure of human rights. Within the United Nations, the Commission on Human Rights took a direct interest in situations within Member States with the introduction of the '1235' and '1503' procedures and the General Assembly adopted the first global human rights treaty, the Convention on the Elimination of Racial Discrimination, which included a bespoke body to supervise the states parties—a model followed in the other United Nations human rights treaties. Relatedly, a new methodology emerged for the identification of customary human rights, focusing on the adoption of resolutions and law-making treaties by the UN General Assembly, along with enforcement measures outside of United Nations buildings. The prohibition on racial discrimination was the first to be recognized and the denial of the status of persistent objector to South Africa confirmed the existence of limits on the internal sovereignty of the state.

The function of secondary agents of human rights justice, like the United Nations, was originally to prevent dystopias like that in the apartheid State, but, over time, the promotion of the utopian ideal of 'all human rights for all' became a central objective of international human rights practice, particularly in the work of the UN treaty bodies and the process of Universal Periodic Review in the Human Rights Council.

The shift from a fixed moral statement in the Universal Declaration of Human Rights to a body of international human rights law allowed for agreement on the scope and content of human rights norms through an application of international law doctrine, which also recognizes the possibility that the meaning of human rights can change over time with alterations in the behaviour of states and human rights bodies.

Examining the practice, we saw that the moral concept of human rights (the 'idea of human rights') includes both a dynamic code that explains the proper relationship between the government and the individual, giving expression to the value of the human person; and a role for secondary agents of justice in the protection and promotion of human rights. This moral conception in turn influences the legal practice, pulling the United Nations, the human rights treaty bodies, and

international human rights lawyers towards the greater recognition of 'all human rights for all', and thereby drawing the doctrine, practice, and scholarly writings away from the position under general international law—what international lawyers call fragmentation.

This divergence is not explained by the imposition of the subjective opinions of 'human rightists' or 'do-gooders' masquerading as international lawyers. The moral concept of human rights, which influences the legal practice, is an emergent property of the international law practice, which remains, ultimately, under the control of states. The distinctive nature of International Human Rights Law, which is the observable fact of the influence of the moral concept of human rights on the legal practice, is then a consequence of the discursive practices of states, along with human rights bodies, and as such, remains firmly a part of general international law, albeit a part with special characteristics.

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