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Lost in Translation: The Human Rights Ideal and International Human Rights Law
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When political theorists write about human rights they mean a special kind of moral claim (Hart 1967, 55; Raz 1986 181 ff.; Feinberg 1973, 1994; Gewirth 1992 13-14; Nickel 1987: 173). At the same time, lawyers, referring to human rights or International Human Rights, mean the various provisions of international human rights law, IHRL from now on, (Cassese 1990; Buergenthal 1997; Alston 1999; Ratner and Abrahams 2001; Gearty 2004). The assumption, however, seems to be that both traditions are, in the final analysis aiming at the same thing: one group elaborating the normative foundations of rights principles, whilst the other works in the positive, or practical, enforcement of those principles. In what follows, we aim to show that this view of the relationship between foundations and law is simplistic and superficial. This simplification has important consequences for the future study and practice of human rights, and for interpreting human rights law. ‘Human Right’ is an ambiguous term. If critiques, defences and investigations into the notion of human rights are to be intellectually rigorous and fruitful, then it is essential to disentangle divergences in the way the term is understood.

This paper aims to question the assumption that there is a simple division of labour between the foundational, or theoretical perspective, and the legal one, with the subject matter - ‘human rights’ - being fundamentally the same. Below we survey ways in which principles informing international law actually shape the nature of the human rights upheld within it. Features of this version of human rights are not obviously reconcilable with a theoretical and moral understanding of those rights. Yet, moral and political theorists seem oblivious to this. Instead they have concentrated on disputes over which rights should appear on the legal list (Jones 1994 117ff; Griffin 2000, 2001; Tasioulas 2001), with little or no attention paid to what being on the list actually means - even for uncontroversial rights claims - in terms of how those rights are held. Theorists have also worked with a common assumption that human rights and individual moral rights claims amount in principle to the same thing (neither Steiner 1997, nor Griffin 2000, entertain a distinction, whilst others merely distinguish more general from less general rights, Hart 1967; Jones 1994: 86-7). If there is significant divergence between the legal understanding of human rights, and what they imply, and the moral theory of general rights, then these disciplines may be dealing in different subject matters (consider the claim that human rights documents imply duties on “both individuals and governments” Nickel 1987: 3).

It may be objected that criticising IHRL for failing to supply human rights, as understood in the moral ideal, is based on a false expectation. It being no more than one possible practical measure contributing to the securing of human rights (Freeman 2002: 77-8; Waldron 1999: 218). However, our reason for focusing on the comparison between IHRL and moral theory is that a central and explicit aim of human rights law is
the determination of what counts as a human rights violation, on a detailed case by case
basis. Moral theory, being concerned with matters of principle *a priori*, cannot supply
this kind of determination, or the adjudication that it sometimes requires. Thus, human
rights law can easily become designated as the authoritative source for defining and
delimiting individuals’ rights, because it aims to adjudicate on the validity of particular
rights claims.

IHRL is not, however, a value-free medium, but contributes its own features and
internal constraints to the subject matter it governs.\(^1\) Focusing on the key principles of
IHRL and contrasting them to the principles of moral theory will raise important
questions about human rights for both theorists and lawyers. Thus, it should be made
clear at the outset this paper is not hostile to international human rights law, or law
generally, or to moral theory. Rather, we want to question some basic assumptions that
theorists and lawyers alike seem to work with, and to indicate some avenues of
investigation.

Our aims are not purely theoretical. Many human rights-oriented measures, campaigns,
and social policies, tend to focus on law. They see practical legal measures as effective,
and more importantly, accept the legal definition of the rights they seek to champion.\(^2\)
Even non-legal disciplines determine and define the ends in question, by letting law
define the contours of the rights (e.g. Landman 2002: 895; Alston 2000; NORAD 2001:
10; Otto-Sano & Lindholt 2000). Human rights law is also increasingly being used to
provide standards for critically evaluating domestic law and other areas of international

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\(^1\) A similar idea is explored in another context by P. Bourdieu, see his ‘The Force of Law: Toward a
law (Skolgy 2001; Marceau 2002). Because legal bodies have the authority to define and determine the limits and extent of legal human rights, human rights themselves are often understood in terms of the legal provisions—law, and legal judgement, is taken to be definitive on their limits and extent. We call that phenomenon ‘legalization’.

In section I we outline the two perspectives on human rights that we want to contrast. Section II compares these two perspectives using the following questions: 1. Who can infringe a right? 2. Whose rights can be infringed? 3. When can they be infringed? 4. Where can they be infringed? 5. How are human rights provisions applied, and how can they be infringed? 6. How are human rights provisions applied and interpreted? 7. Why are they applied? Section III, defends a key premise of the paper (that there are two distinct accounts of human rights: legal and moral) from three positions in legal and rights theory.

I Two Perspectives

Which Differences Count?

The point of tracing differences between human rights law and theoretical foundations is to explore whether the notions of human rights depicted in these spheres are consistent. However, the differences we are interested in are those which run much deeper than could be accounted for by either mistakes or superficial contingencies. Nor do we want to focus on divergences between what the ideals prescribe and what law as such can deliver. Simply by its nature as law, what human rights law can achieve is of

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2 See for example Article 1 of the Statute of Amnesty International, and also Sen (2004: 2).
course limited (which makes our project different from, say, Douzinas 2000). Our comparison is of principles operating in the two spheres.

We do not suggest either that normative human rights theory or international human rights law (IHRL) represent homogenous, univocal, doctrines. There is no single consensus on the justification of human rights, and by normative theory, we mean a general method of justification and some basic parameters for what theories take to be justifying when they propose foundations for moral rights. Normative rights theory covers, then, different and conflicting approaches to supplying theoretical foundations. For our purposes here, we merely need to identify some common features, strategies, and aims, to motivate the contrast with law. That too is not a discipline which speaks with one voice. Thus, we have kept to what we take to be substantive principles, or norms, of human rights law, which, while open to dispute, could not be given up without much controversy.

**The Normative Rights Model**

The theoretical foundations for rights we discuss here is what we shall call the Normative Rights Model (NRM). This has only two distinct features. First, it describes all forms of argument that use considerations about the fundamental wellbeing, or interests, of persons to posit special duties of action on others, sometimes expressed as independent principles of action. It therefore contrasts with positivist views which claim that such rights, or some subset of rights, only truly exist as legal, or institutional artefacts (Bedau 2000; James 2003; Geuss 2001: 146; O’Neill 1996: 132, 2000: 105, 3

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2001: 184; Meckled-Garcia 2004). On that view rights cannot serve to criticise and characterise law, but are themselves explained and specified by it. Secondly, it is supposed to contrast with moral theories which identify duties on others arising from considerations of justice or obligation specifically towards fellow citizens based in reciprocity or cooperation (Hart 1967; Rawls 1971: 4; 1999: 78-8). There are some injustices that fellow citizens can visit on each other which they cannot visit on non-citizens. The Normative Rights Model must explain those duties owed to human persons as such, irrespective of citizenship ties (Gewirth 1982: 3; Jones 1994: 81; Donnelly 2003: 10; Hart 1967: 64).

NRM identifies features or aspects of our humanity which contribute to our wellbeing, and which are vulnerable to the actions of others. These are often referred to as ‘interests’ and their importance is used to justify duties others have towards us. The approach can be monistic, outlining interests that must be secure if the single value at the heart of human wellbeing is to be secure also, such as autonomy or agency (Raz 1986: 203; Gewirth 1982 41-78; Griffin 2000: 4). More pluralistic, versions of NRM might not integrate all human interests into one theory of value, but rather identify a plurality of interests that humans have (Shue 1980/96; Raz 1986: 180; Marmor 1997). Thus, we may believe that human suffering and early curtailment of life are both dis-values to be prevented, without identifying a single value, such as autonomy, at the heart of being human which gives suffering and curtailment of life-length special import. Similarly, essential interests in personal security and personal expression, can be seen as

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4 Raz’s interest theory is compatible with such a view. Henry Shue’s theory of Basic rights, for example, can be understood in this pluralistic way: the plurality of values and interests which lead humans to claim rights (whichever rights they do claim) justifies the protection of some basic human features necessary for the enjoyment of any rights whatsoever.
needing the protection of rights without necessarily serving a specified further end, such as autonomy.

Either way, NRM seeks to justify special non-negotiable duties on agents, which are not created by positive institutions such as law. Everything about the duties NRM identifies, must itself be explained by the moral foundations of the theory: the value of securing the interests in question plus practical considerations about agency. This includes questions of responsibility, or who the duties are to fall on. My right to personal security is based, for example, on the value of my interest in not being aggressed. It identifies a duty falling on any agent capable of undermining my personal security. No principled difference is made between individuals or collectives, who have the power to undermine my secure status. One person, is capable of attacking me, as is my state. Both, therefore, are responsible for my security to the extent they can affect it. It follows, of course, that agent duties depend on what the agent is capable of (Nickel 1993: 81). A state can respect, protect, and promote, whilst a single individual can respect my interest in personal security, but at most contribute towards institutions which protect and promote it. Both have (complex) duties corresponding to my rights simply because their actions can affect my key interests in significant ways, even if the content of their duties reflects what these agents are capable of.

The features explained by NRM, then, include who the rights apply to (who the right holder is), who they impose duties upon (the duty bearer), the content of the duties, and

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5 ‘Respect’ here is used to include the obligations states have to supply remedies in cases where violation has taken place. Many rights theorists seem to assume that rights-based duties are about promotion and protection of interests (Raz 1986: 183) or even reduce ‘respect for a right’ to a form of protective behaviour (Donnelly 2003: 9), which is to understand the operation of rights in consequentialist terms.
what constitutes adequate securing (in line with these respective duties), and the source of interpretation in settling issues of conflict of interests and rights. It is these features that will be shown to diverge substantively from human rights law. To show that this is the case, we will take each apparent divergence and try to bring to bear moral considerations relating to the human rights ideal which might justify the apparent divergence.

**International Human Rights Law**

By human rights law we mean something quite precise: a form of public international law creating rights for individuals and duties for states, as well as domestic and international remedies for violation of rights and failure of duties. International treaties and custom that deal with human rights have a different character to those that deal with War Crimes, Crimes Against Humanity and Genocide. We do not consider the latter to be part of the body of human rights law proper, although they all come under the broad category of humanitarian concern. Their subject matter is often, and in our view wrongly, elided with human rights law, simply because both are concerned with the protection of people against abuses.\(^6\) However, the similarities stop there. Human rights provisions are those which give entitlements to individual persons, individually or in some cases collectively, to make legal claims before public authorities and where the legal support for these claims is said to respect these individual’s entitlements as human persons.

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\(^6\) Some do not employ the distinction e.g., “International criminal law should be viewed as one of the alternatives along a continuum to enforce international human rights or humanitarianism, with criminality a means of enforcement when other methods prove inadequate.” (Ratner and Abrams 2001: 12). See also
IHRL is constituted by that set of international instruments and institutions which explicitly determine the human rights of persons. It includes the international and regional human rights obligations of states, either stemming from international treaties or customary international law. What is significant about this area of law is that it gives specific entitlements to individuals as such, against states, and provides for civil type remedies when a mechanism exists to adjudicate claims. We exclude from our analysis constitutional law, domestic civil, criminal or public law. These bodies of law represent either mechanisms of ‘implementation’ for international human rights law provisions, or the rights they provide are limited to citizens of the state in question rather than proffered to persons as such.

II Divergences of Law and Ideal

1. **Who can infringe a right?**

Beginning with the obvious, the most important divergence for our discussion, is in terms of responsibility. In IHRL, only the state can violate the rights of individuals, whether directly, or indirectly, and no individual as such can be held responsible for human rights violations. Direct and indirect state violations together exhaust the ways that human rights can be violated. This contrasts, at least prima facie, with NRM, which

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Mayerfield who cites the establishment of international criminal courts and tribunals as part of an increasing “world wide enforcement of human rights” (2003: 94).

7 In this respect, we focus on the provisions, and interpretation, of international human rights treaties by the competent judicial and quasi-judicial organs, particularly drawing examples from the International Covenant on Economic Social and Cultural Rights (ICCPR), International Covenant on Civil and Political Rights (ICESCR), Convention Against Torture (CAT), Convention on the Elimination of All Forms of Racial Discrimination (ICERD), European Convention on Human Rights and Fundamental Freedoms (ECHR), Inter-American Convention on Human Rights (IACHR) and the African Convention on People’s and Human Rights (ACHR), and the authoritative interpretation of these treaties by their respective monitoring bodies and Courts.
does not offer an obvious basis for limiting the capacity to violate rights to one type of agent.

Human rights law has the features of civil and public law, it regulates relations between individuals and states and offers civil remedies. If private persons or entities infringe the enjoyment of rights of an individual, it is nevertheless the state who commits a violation. This is only if it blatantly fails to protect the individual by legislative, judicial or administrative means, fails to investigate her claim, or fails to bring justice the perpetrators.º

These violations cannot be traced back to natural persons or non-state institutions in international human rights law. Nor can they be traced to the specific public institution that is involved in the violation. Put simply, in the reasoning of IHRL, only states—whatever their nature, composition or efficacy—can violate human rights. Consider, for example, the reasoning in the well known case of UK v. Osman case before the European Court of Human Rights, which involved the killing of Mr. Osman and wounding of his son by his son’s teacher. The Court held that the failure of the state to effectively investigate the complaints of Osman’s family prior to the attack justifies looking at whether there was a violation of the right to life. The person who committed the attack, however, is simply a criminal, not a human rights violator per se. The reason for a case to be made of a violation of human rights is the negligence of police officers to adequately protect the right to life when there is an immediate and pressing danger. If such a link of negligence, by omission to protect, to investigate, to bring to justice, to
provide effective remedies (Mowbray 2004) cannot be established, the issue will not fall under the scope of human rights law. Which was indeed the outcome in the Osman case.

There is no obvious basis in NRM, for only holding the state alone accountable (directly or indirectly) for violations. On a prima facie reading of NRM, what is described here as a criminal act on the part of Osman’s killer is also a violation of Osman’s human right. For, according to NRM, any agent capable of undermining a person’s interest in life and security, has a standing duty to avoid doing so. A killer violates this duty, and thereby violates the right in question.

This same reasoning also means a corporate body, even with enough power to influence and affect governments, does not carry human rights responsibilities for its actions, enforceable through IHLR. The Alien Torts Claims Act, a piece of United States domestic tort law, may be seen as a departure form this understanding, as it permits civil remedy if a private person, individual or multinational company, violates “the law of nations”. No distinction is made between a public and a private agent but only if victims demonstrate that the abuses belong to a narrow set of extreme crimes, such as genocide, crimes against humanity, extrajudicial killing, torture, and slavery. The private agent has to either actively commit or knowingly aid or abet these crimes to be

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8 See especially paragraph 8 of the General Comment 31 on The Nature of the General Legal Obligations Imposed on States Parties to the Covenant of the Committee on the International Covenant on Civil and Political Rights, adopted on 29 March 2004 at the 2187th meeting.
9 The same principle is applied to economic, social and cultural rights, see The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (1998).
10 Alien Tort Claims Act (ATCA) of 1789 provides that US district Courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” and was part of the original Judiciary Act of 1789, enacted by the first
charged for damages. This piece of law does not adjudicate on human rights as such, but on the most serious international crimes and the involvement of any agent in them.\textsuperscript{11}

The responsibility of private actors depends on the severity of the crime and degree of involvement. The threshold for responsibility for a non-state actor is criminal involvement rather than a public duty. The Act in its current form can hardly, then, be held up as support for the presence of a principle of non-state actor responsibility in international human rights law.

This ‘statist’ feature of IHRL has some paradoxical consequences. If state agents from one state aid, abet, or perpetrate, abuses on foreign territory, they will not be held responsible for human rights violations, unless it can be proven that the agents have effective control of the territory or they have effective jurisdiction over individuals through acquiescence of the state in control of that territory.\textsuperscript{12} Aiding or abetting assassination of foreign politicians, or for that matter the encouragement and material assistance given to a coup which involves the ‘disappearance’ of dissidents and torture are not covered by current IHRL. In such cases IHRL does not address the ultimate chain of responsibility for perpetration and negligence which involves agents of more than one state. The responsibility only extends to citizens abroad through consent of the Congress of the United States. It provides a civil remedy - meaning that victims can seek damages for the wrongs inflicted on them, but that defendants are not subject to criminal prosecution.


host state and territories under effective jurisdiction, most likely only as a consequence of military occupation.\(^{13}\)

According to NRM, this is at least prima facie inconsistent with the purpose of human rights. That is to describe duties that, adhered to, will respect fundamental human interests. Who the duties fall on depends on whose actions can have significant repercussions for these interests. If an individual’s life and security can be significantly affected by a state, then a state is one source of agency on which obligations will fall. If, and here is an important divergence with human rights law, another individual, group of individuals, or private body, can affect a person’s fundamental interests, then the right will correspond to duties on their part too. Furthermore, there can be grades of responsibility and culpability which are not employed in human rights law.

There are a number of answers which can be given to this quandary. Some, but very few, have attempted to justify the position of IHRL, using means available to moral theory (One notable exception: Pogge 2002: 56). Others will point to the history of NRM to show that this is a vestige of a central concern to earlier theorists of rights which as been left unexamined (Jones 1994: 77; Donnelly 2003: 35). Others again may point to practical reasons for the divergence, and claim that it is not itself of great importance, or at least not sufficient importance to question the depiction of human rights in human rights law (Donnelly 2003: 33).

\(^{13}\) The inadmissibility decision in the *Bankovic and Others v. Belgium and 16 Other Contracting States* (2001) Application No. 52207/99 taken by the European Court of Human Rights suggests that aerial bombing leading to civilian casualties does not engage extra-territorial human rights law responsibilities.
All proposed justifications of this feature from the point of view of NRM face the same problem. No justification of duties from the point of view of the value or dis-value of behaviour can limit those duties in principle to the state. Other agents have the capacity to undertake the behaviour in question. Furthermore, the duties are limited to the particular state which has jurisdiction over the persons in question. The state is, indeed, everywhere and powerful, and such power is particularly dangerous. Yet all of these characteristics can be attributed to other agencies as well as other states impacting on persons not under their jurisdiction.

The one special capacity possessed by states is their ability to determine the status of individuals, by, for example, withdrawing citizenship rights or by defining which rights citizens have. That is a very special, and very dangerous power, if no protections exist outside of those offered to citizens. So the state focus of human rights might be explained by the need to ensure protections against this specific form of power (Pogge ibid.). Yet, as state-specific as this power might be, there will be agents, as in the multinational cases mentioned, who can knowingly affect the wielding of this power in ways detrimental to fundamental human interests. Similarly, armed groups, and insurgency movements, vying for political power, can have such effects. This also does not explain the impact on persons of states other than the one currently with jurisdiction over them. This seems to conflict with a foundational moral theory which sees only the capacity to impact on key human interests as relevant to rights-based responsibility.

The judgment of the European Court of Human Rights in the Issa and Others v. Turkey (2004) Application No. 31821/36 case reiterates that jurisdiction is a primarily territorial.
The obvious reason for the state-centred nature of international human rights legal obligations is the states system. International relations are built around a dominant norm, with some significant but marginal exceptions: the international “state consent supernorm” (Buchanan 2001: 688). That norm, and the notion of state sovereignty (however conditional) operative in the current states system is a recurrent principle shaping international human rights law in many ways. Whether that norm, and its accompanying notion of sovereignty, is justified or not is not important for our purposes, so long as we note that it is not a norm inherent to human rights ideals and principles themselves, whilst it shapes IHRL. An interesting observation is that whilst many commentators have claimed that human rights provisions alter state sovereignty, here and below we see in fact that the norms of state sovereignty alter and shape human rights provisions.

2. Whose rights can be infringed?

By the reasoning behind NRM, no distinctions should be made in respect of the content of the rights held by individuals, against whatever body they hold them. The sole condition for receiving protection is being human, and the consequence of satisfying that condition is equal treatment in terms of human rights. IHRL requires that a state respects the human rights of those individuals under its jurisdiction. However, it does not require that the full set of rights described in IHRL are extended to all persons under its jurisdiction on an equal basis. Some ICCPR rights, IACHR and ACHR rights, such as taking part in the conduct of public affairs, voting, standing for election to public office, accessing public services, are only fully extended to citizens.\(^\text{14}\) Article 2(3) of the

\(^{14}\) ICCPR Article 25; IACHR Article 23; ACHR Article 13. ACHR also places citizenship duties on individuals in Articles 27 and 29, such as ‘to have duties towards his family and society’ ‘to serve his
ICESCR leaves it up to developing countries to determine the extent to which they will guarantee economic rights to non-nationals. Article 16 of the ECHR enables states to impose restrictions on the political activity of aliens.

Of course, there is good justification for not granting some rights to non-members of a particular political community, or at least not granting those rights fully. A community shapes itself democratically and develops its own terms of cooperation. In order to do so its seems reasonable to grant some additional rights to citizens, not granted to non-citizens. However, the above provisions seem less justified once one places them in the context of the right of the state to absolute discretion over whom it grants citizenship. States have no obligation to grant full citizenship to residents, however long they have lived in their territory, and for however long they have contributed (through taxes) to the state’s economy. In fact the criteria states use in granting citizenship are one area in which public authorities have no human rights obligations. This means that individuals can indefinitely be excluded from a set of rights on an arbitrary and discriminatory basis. Non-citizens can also be deported from the country they live in based on criteria human rights considerations have limited impact or none at all. 15

What criteria are used depends on the dispositions of the state in question, and states accord themselves an absolute right to decide these criteria. Any justification on the basis of control of resources and safeguarding community, then, misses the point that actual right of states is not relative to resources or aims. One practical justification for

15 Canepa v. Canada, Communication No 558/1993, Views of the UNHRC, 3 April 1997, confirms for example that a long-term resident can also be deported.
state control over citizenship is that it permits the rational allocation of duties to look after individuals’ rights interests. But, as we see here, this allocation incorporates a form of discretion which, from the point of view of NRM, is arbitrary.

3. When can the rights be infringed?

IHRL employs a distinction between peacetime responsibilities and non-peace time responsibilities. In an appropriately determined ‘state of emergency’ a state can derogate from many of its human rights responsibilities (Roy 1989). In war time, IHRL operates together with the provisions of International Humanitarian Law (IHL). As a consequence an individual’s human rights entitlements also depend on considerations of military exigency. During actual combat international humanitarian law is the exclusive law governing individual protections (Provost 2002).

IHL is not the same, nor reducible to the same principles, as human rights law. It places limits on the means employed by military powers in seeking legitimate military objectives. However, in the achievement of military objectives, no obligation is placed on the military power to safeguard life, outside of the constraint that it must not solely, indiscriminately and excessively target civilians. The only robust constraint outside of this requirement is that its actions are necessary, proportionate, and do cause unnecessary suffering, in the achievement of its declared military goals (Fenrick 1982). But this threshold is lower than the one employed on powers acting in peacetime, even when carrying out dangerous security operations (Hampson).

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16 ICCPR Article 4; ECHR Article 15; IACHR Article 27.
17 See on this point, Articles 51, 52 and 53 of the 1967 Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts.
example, in the *Neira Alegria et. Al v. Peru*, a case before the Inter-American Court of Human Rights, Neira Alegria and two others were detained for the alleged offence of terrorism. They were found to be missing after the armed forces suppressed a prison riot. As a result of the violence of the operation, the bodies of Neira and others were unidentifiable from amongst 111 dead inmates. The court concluded that they lost their lives due to the quashing of the riot, and as a consequence of the disproportionate use of force. The fact that the prisoners were highly dangerous and armed were not considered sufficient reasons to justify the amount of force employed. If these individuals were combatants in a civil war, their deaths would not have raised any of the above considerations.

Operations in peacetime are more constrained (by IHRL) as a matter of principle. Thus, the goal in a security operation may include securing public order, but it will also include arresting those against whom the operation is carried out. The operation is constrained to safeguard these individual’s right to life as much as the circumstances allow, whether they are armed or not. The goal in military operations is a military one, and so not constrained in this way. Within the earlier mentioned constraints (IHL), an operation can kill all opposing combatants. It can also kill civilians, even if this is avoidable, so long as it is not done with the intention of targeting the civilians, but as part of an attack on the enemy which is proportionate and necessary to the achievement of military goals. Similarly, the right to life prevents a civil authority from evicting persons from their homes, save in circumstances necessary for the protection of their safety, or for reasons of public order and health imperatives. A military authority, on the

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other hand, can evict civilians if this is necessary and proportionate to the achievement of its military goals, such as securing a strategic position.

It might be argued that the principle of proportionality, which operates in both spheres (IHRL and IHL), mitigates the gap between the protections provided by IHL and IHRL. This principle is employed in interpreting whether actions towards achieving a legitimate goal might be said to infringe the provisions of either type of law (Schwartze 1992). It works by distinguishing means and ends and asking if the action is ‘proportionate’ to the ends aimed at. If an action does more harm than alternative actions which could have achieved the goal, for example, then proportionality is violated. However, given that the legitimate purpose is constrained differently in IHRL from IHL, which actions are proportionate will differ radically in each case. The permissions of IHL include actions militarily necessary for winning specific battles, securing areas, or achieving strategic advantages. They include the maximal killing of combatants. Even with the constraints in place, these actions are more permissive in their effects on human life and well-being than human rights law permits.

From the point of view of NRM, it could be argued that different circumstances will justify different standards. However, given that goals being pursued in such circumstances are not limited to the protection of innocent human life and achieving security for all persons concerned, the lowering of standards cannot follow from the circumstances. As no higher moral cause is necessarily served by the expediency of ‘military necessity’, then NRM cannot justify the lower standards accepted in international law. It may be the case that if we accept that these kinds of circumstances,

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war, states of emergency, will occur anyway it is important to regulate their effects realistically—it is unreasonable to demand respect for freedom of assembly in the middle of an invasion. Yet, NRM can only judge military actions legitimate if they themselves serve a higher moral purpose, such as securing human life. Otherwise we must say the limitations, expedient or not, are less than morally satisfactory. The only kind of argument that could be used to justify employing one set of norms over another is a consequentialist one that showed more well-being is secured by adopting IHL for conditions of war (Kamm 2001).

These distinct purposes are not ones that NRM can accommodate, for the appropriate moral treatment of persons. Whilst it should be sensitive to circumstances, NRM cannot be constrained or annulled by purposes (those which create the circumstances of war) which do not themselves serve equivalent moral goals.

4. **Where can human rights be infringed?**

IHRL clearly delimits where human rights can be infringed, making the duties of states sensitive to where abuses can take place. A state can only infringe human rights in its own territory, or in a territory, or circumstance where it can be shown that it has effective jurisdiction either of the territory itself or over the individuals whom it can affect in that territory. Secondly, within the territory of the state, IHRL distinguishes between public and private spaces. So that a claim to freedom of expression made for an action performed, say, on private property, is not counted as a legitimate human rights claim, for only the public sphere is regulated by human rights law.
The first constraint means that states can perpetrate, or allow the perpetration of, abuses outside of their jurisdiction, which will not count as violations of human rights law. An example of this is the carrying out of assassinations by state agents in the territory of another jurisdiction, provided that the host state did not agree to the action (see endnote 12). They can also manipulate boundaries of the public and private spheres to reduce their liability. The more public space traditionally used for public expressions and communications, for example, that states can privatise the more they can reduce their responsibilities to secure freedom of expression in those spaces. For example, in the Appleby and others case, the UK privatised a previously publicly owned town centre.20 As a result of this the private purchaser of the shopping area had, under domestic law, the power to exclude anyone conducting unauthorised activities on its land. The applicants, who were running an environmental campaign, were subsequently prevented from collecting signatures by the private owner, even though, on many occasions other groups have exercised the identical right. The ECHR, in this instance, treats the galleries of the town centre exclusively as private property.

This notion of jurisdictional liability seems alien to the kinds of considerations present in NRM. For that must base any claim to violation on the merits of the events, and on responsibility based in capacity to act, not on juridical qualifications or contractual arrangements—especially where these are under the control of the state. If the agents of a state carry out, or are involved in the death of a person in another jurisdiction, that abuse merits exactly the same characterisation as if it were to take place within the state’s own borders. Nor can NRM accommodate the manipulation of the line between

private and public space in order to reduce human rights responsibilities. The state has the capacity to decide where that line falls, and so to determine the entitlements of persons under its jurisdiction. With such a capacity to affect rights, responsibility should also follow. Moral rights, being based on important human interests, are not alienable either by the holder or anyone else. In deciding to privatise public spaces governments are deciding whether to prioritise an increase in property rights over their continued stewardship over rights to freedom of expression, assembly and association in a given space. They are also handing discretion over the use of those spaces for these purposes to private owners. NRM cannot accommodate such decisions as legitimate, unless they serve a higher human rights aim.

5. How are human rights provisions applied and interpreted?

The theories that try to elaborate the NRM, as moral theories of personal entitlement, employ principles derived from the aims of the theories themselves. They cannot, then, justify contamination of those principles by other principles belonging to the operation of law which are not themselves justified on a moral basis, or are justified on a different moral basis than rights principles. IHRL, however, employs a number of key concepts and doctrines in interpreting the extent and limits of rights provisions which cannot obviously be derived from individual moral rights. The most central among these are the principles of state discretion (in the case of the ECHR: the ‘margin of appreciation’) and the concept of legitimate aim. These concepts are used in human rights legal reasoning to arrive at concrete decisions on particular cases. For this practice to be consistent with NRM, however, the use of such principles in determining the extent of human rights entitlements would itself need to be justified by moral rights theory.
The criterion of legitimate aim, for example, is used to determine whether some restrictions or limitations, of rights are pursued for good reason, and therefore permissible.\(^\text{21}\) However, good reason can include public safety, order, health, morals, as well as national security, the economic welfare of the country, and protection of the rights and freedoms of others. Apart from the last on this list, it is not laid down that each of these aims be morally justified to an equivalent degree as human rights, and even the most fundamental of Human rights treatises, such as the ICCPR, have explicit provisions for reasons of ‘morals’, by which they mean the dominant cultural sensitivities of a society. These restrictions need not have a human rights aim at their basis.\(^\text{22}\)

Furthermore, the European Court of Human Rights’ use of the doctrine of the ‘margin of appreciation’ is another form of concession away from pure rights considerations (Brems 2003; Arai-Takahashi 2002; Yourow 1996). This doctrine allows that in certain cases international human rights law (the ECHR) is not above domestic law, but rather domestic courts are better placed to decide on the matter. The kind of reasons for employing the doctrine will include cases where there are issues of public order, morals,

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\(^\text{21}\) E.g., ICCPR, Articles 18, 19, 21, 22, ACHR Article 27, ECHR Articles 8, 9, 10, 11; IACHR Articles 12, 13, 15.

\(^\text{22}\) On ‘national security’ trumping expulsion decisions, Celepli v. Sweden (1994) [Communication No 456/1991] [UNHRC] [7/18/1994];
national security, and the allocation and management of national resources.\(^{23}\) Again, none of these need include human rights aims as such.\(^{24}\)

There is also an appeal to consensus across the signatories to human rights treaties in interpreting IHRL or establishing the existence of provisions (as in customary international law).\(^{25}\) This doctrine of appeal to consensus is a recognition of the place of a common understanding of human rights legal provisions. Consensus is appealed to either in the drafting process for those treaties or in the development through time of the understanding of the provisions. That is, the expectations of the community of states in terms of what concrete rights they agreed at the time of signing an instrument, or could agree to at the present time, is deemed relevant to decisions in particular cases. Once again, the appeal to this doctrine is not itself based in moral human rights aims, but rather limits those aims.\(^{26}\)

Essentially, the above listed permitted constraints on rights claims are concessions to the value of sovereign, autonomous and separate political communities (Weil 1983). Bodies entrusted with adjudication of human rights law must accommodate both the aims that might be derived form pure individual rights standards (NRM), and this value.


\(^{24}\) For example, the aim of the ‘protection of morals’ provision in imposing restrictions on human rights, whilst not invoked frequently, is particularly problematic. The restriction appeals to the moral convictions of the society in question rather than principles related to human rights. On the use of this justification, see for example, *Muller v. Switzerland* (1988) ECtHR, Application No. 10737/84.


\(^{26}\) One could appeal to fairness to community here, but morally speaking rights are supposed to be a limit on measures aiming at communal fairness. (Dworkin 1977: 199).
Yet, from the point of view of NRM, it is precisely against the interests and aims of a community that the rights are supposed to be held. They are supposed to ultimately protect the individual’s interests, allowing adjudication or balancing between communal and individual interests, on a case by case basis, gives rights provisions themselves a shifting character they should not have, one sensitive to communal history and interests rather than principles of individual treatment. The only way this could be justified by NRM would be where the individual rights of one were being balanced against the individual rights of others. However, as we have shown, with these provisions of IHRL in place, that is not the implied judgement, nor the practice of the courts.

It might be argued that the limitation or restriction of a right does not mean that one ceases to have the right to the full extent, for it is remedies and not rights themselves that are limited by these, non-rights-based, considerations. The relationship between rights and remedies is a complicated one, and for the purposes of this paper we shall not try to develop a view on it. However, in establishing whether a legal right exists, we have focused on the explicit decisions of courts as to whether certain acts constitutes violations, and the cases we have looked are ones where rights have been limited by considerations external to human rights themselves. Which is to say that human rights provisions according to IHRL have differed from human rights requirements according to NRM.

This is not to say that the restriction of rights is always unjustified. It is plausible that they may be restricted by some principles demanding balancing with community interests.
III Objections

Theories of Law and Rights

There are three views which might be used to question the comparative project we have pursued in this paper, by questioning our starting point. We have assumed at the outset that there are two distinct perspectives on human rights, NRM and IHRL, yet these views can be used to reject that distinction.

The first view, which we call ‘sociological positivism about rights,’ holds that there is no independent notion of rights, even less of human rights, outside of identifiable practices of claiming and responding to claims. A narrow version of this view, and the one we need to respond to, holds that the distinct practice which supplies us with our notion of human rights is the practice of law, in particular IHRL (Walters 1996; Merry 1997; Stammers 1999).

The main problem with the positivist view is that it cannot supply an account of what makes any particular positive law into human rights law, or any particular positive right into a human right for that matter. If there is nothing more to human rights than human rights law, or legal rights, then the special role of these rights, which of necessity makes reference to extra-legal aims and objectives, cannot be explained, nor can they be differentiated from other types of legal right. If the sociological positivist accepts that such aims and objectives are a necessary component of the concept, then she is accepting that beyond law there are ideals which define our understanding of human
rights claims and permit us to adjudicate whether some claims are legitimate or not as such, independently of their legal enforcement. Furthermore, the interpretation of human rights legal instruments themselves demands an extra-legal perspective. This is because the principles involved in human rights law are interpreted from often divergent sources and legal histories, requiring a decision not determined by legal sources.\(^{27}\) There are potentially conflicting principles present in IHRL that need to be clarified through interpretation. Thus, human rights law is, in this respect, continually being made by interpretations and judgements. Such a practice could not take place in any coherent or consistent way, unless there was more beyond positive human rights law than positivists concede: an idea about the point and purpose of this area of law.

A second way of questioning our starting premise, is through what we call the ‘sceptical position,’ which holds that no distinct subject matter lies behind the use of the term human rights. Instead human rights ‘discourse’ is a mish-mash of different concerns, interests and historical agendas, which just happen to get grouped under this particular name for political or rhetorical reasons. Yet, why grouping something under the tent of human rights gives it rhetorical force or power is not explained by this view. We identify the strategies at the heart of the ideal (NRM) and try to contrast these with key features of IHRL as it stands when interpreted in its most coherent light. To do so does

not require us to draw up a balance sheet for the whole of what goes by the name of human rights, and prove its overall coherence. The burden of proof is, then, on the sceptic to show that the two perspectives we have identified are actually incoherent in the case of NRM, or fail to represent a plausible interpretation in the case of IHRL.

The natural law model also rejects the distinction between law and moral ideals, but on the basis that the very meaning of the term ‘law’ requires reference to such ideals. A more sophisticated version of this view, ‘interpretivism’, does not advance a semantic argument. Instead it holds the appropriate interpretation of law to necessarily make reference to its point and purpose (Dworkin 1986: 87-8). In the case of human rights law, that, the view says, is to give effect to human rights claims, and human rights are moral concepts. Thus law and morality cannot be separated, for to interpret law correctly requires reference to these moral concepts (Dworkin 1986: 258, Chapt. 8, esp. 312; Letsas 2004: 302).

This view, its general merits aside, does not, however, fit the practice (actual or ideal) of international human rights law. Admittedly, one principle at play in this practice is the advancement of individual human rights. But this is not the only principle at play. There is also a principle at the foundations of international law incorporating the value of state or community autonomy. This manifests itself in a number of ways, which have arisen in our above discussion. They include the voluntarist element in international law (the right to decide which treatises to sign up to, pull out of, or enter reservations to); the

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40 (A/45/40) (1990) and Hatton and Others v. the United Kingdom (2003), ECtHR Grand Chamber Judgment.
rights of states to control membership by controlling citizenship status; and the right of states to jurisdiction over territory and persons. These principles of state or community autonomy are independent of human rights ideals, whilst shaping human rights provisions in international law. The principles are not put into play in order to advance such ideals, so any restrictions and shaping that it leads to will not necessarily support human rights as understood in NRM. Which is not to say that human rights ideals play no role, but rather that the meta-, or higher, principle at play is a constraint in IHRL to strike a balance between the rights ideals as individual protections, and the demands of state autonomy.

Thus, the presence of human rights aims in international law does not by itself show that no real separation exists between NRM and IHRL. Much more is in play in IHRL, in the form of principles that must be balanced in interpretation. No judge or court can legitimately wish away those fundamental principles.

An interpretivist could respond to our case with the claim that human rights principles would incorporate appropriate concessions to community and fairness. Thus, the best view of human rights is one which incorporates the other principles present in international law. The principle which accommodates community interests such as public order, for example, can be seen as part of the best theory of rights because public order, or the economic well being of the nation are both matters that have a bearing on people’s human rights. One could not have those rights, without public order or economic well being.

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28 We do not imply this is Dworkin’s own position, as he has never elaborated a theory for International Law, although some supporters of the view have attempted to apply it to IHRL (Dworkin 1986, Chapter 3
The problem with this argument is that state autonomy, as a principle and value, is not reducible to human rights concerns. It is an independent value in international law.\textsuperscript{29} Thus, provisions which go towards it, such as the requirement to accommodate the economic well-being of a society, are not human rights provisions. There is no imperative to read economic well-being as ‘only that economic well-being that advances human rights.’ Indeed the ECHR has never read it that way, nor has the HRC has never read public order, or public health and morals, as only measures in those categories which advance human rights. Secondly, as interpretivists themselves admit, a key role of human rights is to act as a break or limit on the autonomy of a political community or considerations of communal fairness (Dworkin 1977: 194; Letsas 2004: 304-5). Thus, to see them as in themselves limited by communal autonomy seems to forego one of their key roles. We can therefore conclude that, applied in the way described above, the interpretivist approach fails to undermine our distinction between NRM and IHRL.

**Conclusion**

The differences we have focused on, we believe, demonstrate that the relationship between international human rights law and human rights moral theory is not simply reducible to the latter giving practical effect to the former. It is not the case that there is a smooth transition from the moral concepts to the legal provisions. For, *international* law, by its nature, contains traits which alter the nature of human rights provisions. There is a continuous attempt to balance the interests identified by human rights claims,

\textsuperscript{‘Jurisprudence Revisited’; Letsas 2004}
with the interests of political community, the state and nation. That continuous attempt is characteristic of IHRL. It is also the source of discrepancy between human rights ideals, and IHRL.

This conclusion touches on two positions present in the field of human rights campaigning. The first is the idea that the normative framework of human rights law is complete, only the phase of implementation being important at this stage. We hope to have shown that the normative framework is incomplete, and necessarily so, within the current IHRL paradigm. The second position seeks a solution to some of the limitations of human rights law through further codification. Yet it would be wrong to conclude from the above discussion that the discrepancies are due to imperfect laws and that continuing the project of codification can fill in gaps. The source of the discrepancies is such that it will not be removed by further codification in IHRL. It is part of the identity of international human rights law that two principles, sometimes pulling in different directions are made to coexist in its practice. Courts, where they exist, are given the role of adjudicating not only between persons and states, but between these principles.

There have been a number of discussions around IHRL, which appear more motivated by concepts whose origins are found in NRM than existing IHRL principles. In fact, a number of contemporary debates focus on the issues that we have raised in this paper. For example, there has been an argument to redefine human rights responsibility in terms not of state jurisdiction, but rather in terms of capacity (the capacity of an agent to

\[29\] This value or principle can be seen as playing an analogous role to that played by the internal communal value of ‘integrity’, advanced by interpretivists (Dworkin 1986: Chapt. 6)
affect the fundamental interests of persons).\textsuperscript{30} Other examples include arguments to extend human rights law applicability to times of armed conflict\textsuperscript{31}, and the idea that states’ right to expel individuals from their territory should be limited where those individuals are facing torture.\textsuperscript{32} Whilst these arguments are clearly inspired by one element in IHRL principles (the individual moral entitlements one), they should not underestimate the other principles present and available in IHRL which can limit such changes.

As we hope to have shown that transformation of a moral right into a legal right, as desirable as it may be, comes at price. A compromise must be struck with other principles in law. It is through this compromise, and only this compromise, that NRM-type rights get legalised. It is also an upshot of our analysis that claims hailing the demise of state sovereignty, and the rise of human rights, are premature. Whilst the state, and traditional forms of sovereignty, have been modified by human rights norms, it is just as true that human rights norms are shaped and limited by the state and its accepted sovereign powers.

\textsuperscript{30} See, for example, \textit{Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights}, adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights (2003) which notes that ‘transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations…’

\textsuperscript{31} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (Request for advisory opinion), Advisory Opinion of the International Court of Justice (2004) especially paras 123-137.

Bibliography


Notes