

Add international courts to *The Idea of Human Rights* and stir ...

on Charles Beitz' *The Idea of Human Rights* after 10 years

Approximately as appears in
Critical Review of International Social and Political Philosophy
doi.org/10.1080/13698230.2020.1859223

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Abstract

These reflections elaborates the theory of *The Idea of Human Rights* by addressing a topic that theory attempts to bracket: international and regional judicialization in the form of international courts and tribunals. Using the method of reflective equilibrium, the article argues that this exclusion is inconsistent. Including these international courts and tribunals ('ICs') prompts several changes to the original theory, and opens new research questions. The original theory is on the one hand too narrow regarding both the objectives and tools of international mechanisms of corrective concern. The account should consider further subsidiary modes of support. On the other hand the theory is too broad, in that it gives insufficient guidance to the judges of ICs and others able to effect changes. This leaves the theory incomplete, and open to similar criticism as the book raised against others.

Section 1 presents relevant aspects of the theory presented in *The Idea of Human Rights*. Section 2 gives a brief account of ICs and their roles regarding human rights. Section 3 explores some implications of ICs for *The Idea of Human Rights*, while section 4 considers how if at all *The Idea of Human Rights* can guide international judges. Section 5 concludes.

Keywords: Charles Beitz, human rights

Introduction ¹

As so many of his contributions, Charles Beitz' *The Idea of Human Rights* has had a massive impact on international normative political theory (Beitz, 2009; Beitz, 1975; Beitz, 1979). His contributions have been constitutive of the field: he has defended certain profound insights and claims, and established research agendas and spurred the research of others.

These reflections elaborate the theory of *The Idea of Human Rights* in a direction that theory deliberately bracketed: international and regional judicialization in the form of international courts and tribunals ('ICs'). This topic prompts several changes to the original theory, and opens new research questions about the nature of sovereign states and their relations. The original theory is on the one hand too narrow

¹ This article was partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts The Legitimacy of the International Judiciary. I am grateful for comments received at a conference in Minho, Portugal July 14, 2019 and a PluriCourts seminar March 19 2019, and from extensive and constructive comments by David Alvarez and an anonymous reviewer.

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1 Summary of *The Idea of Human Rights*

The theory presented in *The Idea of Human Rights* ('TIHR') holds that we should identify the grounds and contents of human right based on their central function in the international 'human rights practice' in our system of sovereign states. Human rights are

principles for conduct constructed for this arena, taking account of an unsystematic array of ethical and practical considerations, brought into a relationship whose reasonableness is judged by their coherence, fitness for purpose, and capacity to account for pre-reflective judgments of which we feel confident. (7)

I submit that TIHR proposes an explication of the concept of human rights, whose correctness is a matter of whether it contributes to a satisfactory theory of the considered judgments that are part of the relevant practice. The main questions such a theory should illuminate are "about their grounds, scope, and the manner in which valid claims of human rights should guide action." (51). TIHR is created by adjusting certain pre-reflective aspects of the practice, including normative premises, through a process of reflective equilibrium (Rawls, 1971; Daniels, 2003). The starting points are considered judgments - norms

expressed in the main international human rights instruments - the Universal Declaration of 1948 and the major treaties intended to give legal effect to its provisions - though, as we shall see, these formulations are open to interpretation and revision within the practice. (8)

The resulting TIHR interprets human rights as central to a particular *division of responsibilities* within our multi-level political and legal order. *States* have the primary responsibility for respecting, protecting and promoting the interests of individuals, primarily within but also beyond their borders. *The international community* of states and its agents have a range of certain *subsidiary* responsibilities toward a state when it fails to live up to its responsibilities, mainly in how it treats its inhabitants but presumably also when entering into treaties that impact on third parties.

Individuals have a human right if its violation triggers some usually effective international mechanism of corrective concern - ranging from efforts to mobilize domestic civil society by issuing views or recommendations by UN treaty bodies to full scale humanitarian intervention. Theory focuses on the less intrusive mechanisms of

concern, compared to Rawls' and Raz' theories (Rawls, 1993; Raz, 2010b; Raz, 2010a). Human beings have human rights when such *triggers* are parts of mechanisms that are necessary and sufficient in removing or reducing a standard risk of the state's action or inaction, to an important human interest.

The institutional practice perspective: Interests and rules in our multilevel order

THIR differs in substance and in focus from some 'natural' or orthodox theories of human rights— though the differences are sometimes overstated (Griffin, 2009, Tasioulas, 2012, Liao and Etinson, 2012, Maliks and Karlsson, 2017). Some of these other theories may be less explicitly committed to arriving at a reflective equilibrium based on the current international human right practice TIHR delineates.

On this account, human rights are “goods internal to a practice” in several ways. They are only defined within the complex multi-level practice that is our system of sovereign states, as triggers for beneficial mechanisms. According to TIHR, human right only exists within our system of states insofar as its violation can trigger some possible, necessary and efficacious international mechanisms against risks to individuals' interests wrought by states. Central aspects of human rights are thus to be understood as bundles of legal rights, duties etc. – albeit whose legitimate authority and contents is contested (210). These human rights help delineate and constitute state sovereignty, since they contribute to specify the domain within which states enjoy various forms of immunity and the ability to make agreements under international law:

human rights standards qualify, but do not displace, the sovereignty of states" (Crawford, 2012, 122)

As a legal term 'sovereignty' refers not to omnipotent authority... but to the totality of powers that States may have under international law. " (Crawford, 2005, 33)

The institutional focus of TIHR affects not only the subject matter, but also the premises of the normative arguments, including which *interests* are significant and ground human rights, and what reasons actors have for engaging such mechanisms. The relevant interests at risk are not simply naturally observable and important needs. The interests are specified in more abstract ways to make them broadly recognizable by others as urgent or important for reasonable arguments concerning the rules of institutions and public practices (137-138). The focus of the account is on human rights as rules of these practices. So these rules are shaped in light of who should be authorized to apply these rules within the multilevel system – with due consideration for the “capacities and dynamics of social institutions" (139) and risks of harm, due to abuse or ignorance (140). One argument to focus on international political and civil human rights may thus be that once well-functioning democratic mechanisms are in place, the net value added of international concerns beyond monitoring regarding economic and social needs may be less – given risks of mistakes and abuse (Follesdal, 2009, 295).

Rebutting some criticisms

This presentation of TIHR helps lay to rest some disagreements and criticisms. TIHR addresses certain questions, while other theories address other concerns. It does not aim to generate or assess particular human rights norms, but rather provide a *schema* for

such arguments, on the basis of the proposed trigger function. Other theories address quite different functions, some focusing on military intervention, but using the same term ‘human rights.’ This appears to be one reason why the theories of human rights differ. Some focus more on forceful intervention (Rawls, 1999); protection of normative agency (Griffin, 2009); to regulate how states treats individuals (Buchanan, 2013 p 27);, the pursuit of human dignity (McCrudden, 2014a); a concern to correct pathologies of the international legal order (Macklem, 2015, 1); or seek to justify human rights by natural rather than public reason (Tasioulas, 2013).

Different theories do not simply address different functions, since TIHR also makes claims about what *the* function of human rights is. Several theorists agree that the salient function of human rights practice is to regulate various mechanisms of concern toward states, but Macklem maintains that they have a *broader* scope, namely to alleviate a range of the pathologies of “the international legal deployment of sovereignty” (Macklem, 2015). On Ratner’s interpretation, the international human rights practice is limited to *respect* human rights in the sense of not interfering with basic human rights, rather than any obligations to actively promote their enjoyment (Ratner, 2015). Yet others argue that the actual function of human rights is to be the “handmaiden to the priorities of global capitalism” (Linarelli, Salomon, & Sornarajah, 2018, Ch. 7). So these and other scholars thus appear to offer competing accounts of what the institutional function of human rights is, somewhat incompatible with TIHR. One reason for this disagreement may be that they draw on different sets of ‘considered judgements.’”

Why the state centric focus?

A full defense of TIHR is beyond the scope of this contribution. We might seek to reduce disagreements among the theories in two ways: firstly by identifying reasons that may help justify TIHR’s focus and selection of considered judgements, and secondly by expanding the range of relevant judgments. Consider first a possible justification in favour of TIHR’s “state centric” focus – its interpretation of current human rights practice as applying in the first instance to states, to regulate their treatment of their own citizens (13, 122). We then go on to add to the considered judgments in the next section, which may reduce the disagreements somewhat.

There are arguably some reasons to focus on the primary responsibility of states, and the trigger role of human rights when states fail, rather than more complete standards of global justice, or addressing *all* international regimes directly. Recall that TIHR holds that what makes the human rights practice a practice is “acceptance of a distinctive class of norms as sources of reasons.” (9) I submit that one possible justification for this focus is that the reasons we, and our states, have to act on human rights are *different* than for other moral duties.

I submit that many human rights do not primarily appear to express our obligations to contribute actively to the flourishing of foreigners, but instead a way to reduce the risk that we *benefit* from a global practice of sovereign statehood with extensive immunity that predictably inflicts harm on individuals.

A complex system of sovereign states may be one of several legitimate ways to structure our global order in order to protect and promote individuals’ interests. The sovereign state system as we know it is a complex pattern of practices regulated by public rules, including those that specify sovereignty. The legal powers of sovereignty as regulated by international law include both some forms of immunity from outside interference, and the ability to enter inter-state agreements (Crawford, 2012).

Sovereignty understood as such bundles of legal powers is a global 'social primary good,' which should benefit all who contribute to upholding it. "The state and its citizen therefore benefit from the social practice of non-intervention when they enjoy the social good of national sovereignty." States enjoy the benefits of sovereignty only insofar as these public rules are generally complied with by all other nation states. (Follesdal, 1991).

The particular reasons human rights thus engage is that we have duties not to harm anyone by our practices – otherwise the practice may not be justifiable. In particular, we must prevent negative externalities on anyone from this practice, and must therefore protect those who are harmed - in our present world order, particularly who suffer because they are stateless, or because their state, its agents or trustees, or the system of sovereign states as a whole, expose them to new risks.

Human rights understood along TIHR's account reduce these negative externalities by using the international community of states to tweak, constrain and guide states' immunity – and hence their sovereignty. The human rights practice thus helps constitute more legitimate states within a more legitimate system of sovereign states.

An argument along these lines may justify why the idea of human rights focuses on risks wrought by states and the system of states, rather than to promote global justice more generally. When human rights triggers require concern to protect inhabitants from harm by their own government, these are not the responsibilities of by-standers, but based on the duty to avoid free riding on a system.

2 What are international courts and tribunals?

One way to reduce some disagreements among the theories of international human rights is to expand the range of considered judgments that we seek to modify in the process of reflective equilibrium – both because some disagreements concern precisely the domain of the 'human rights practice', and because the wider reflective equilibrium may resolve some internal inconsistencies within or among the theories. I submit that with regard to TIHR one important reason to expand the practice, to also include the various ICs and their judgments and interpretations, is to avoid an internal inconsistency.

TIHR appears ambivalent or inconsistent about whether to include within the practice regional human rights courts. On the one hand TIHR explicitly seeks to exclude regional human rights ICs for now, since TIHR aims to have a 'global scope' - but acknowledges their place "in a more comprehensive account" (14). Presumably TIHR would also exclude other ICs that adjudicate international human rights with a less than global scope – i.e. whose jurisdiction does not include all states, such as the Court of Justice of the European Union (EJEU), the ECOWAS Community Court of Justice, or even the International Court of Justice (ICJ), possibly also the Appellate Body of the World Trade Organization (WTO AB) and international investment tribunals.

On the other hand, once we consider TIHR's focus on the international human rights practice itself we see that there is good reason to include the interpretations and judgments of ICs in general and regional human rights ICs in particular, as central to the practice. TIHR notes that the human rights "formulations are open to interpretation and revision *within* the practice (8, my emphasis). TIHR should agree with McCrudden and Venzke that ICs serve important tasks in interpreting and specifying many of the vague international legal human rights norms (McCrudden, 2017; von Bogdandy and Venzke, 2014). The ICs are set up to be somewhat independent of states, with important roles

and responsibilities *for* the human rights practices. In particular, they enjoy discretion to apply and develop international human rights law by judicial methods. And ICs are part of the mechanisms that are triggered and trigger other actors when parties suspect human rights violations. States have deliberately established ICs ‘to ensure the observance of the(ir) engagements’ (Council of Europe, 1950, Art 19).

We should therefore include ICs and their interpretations and judgments among the considered judgments of the practice. This leads to important changes to the theory. Consider first some central tasks of ICs.

ICs adjudicate disputes involving human rights violations, by states and non-state actors

ICs serve several important tasks, not least regarding human rights. The most obvious one is that they *adjudicate disputes* brought before them, including complaints by individuals against their own state. Regarding such disputes parties are no longer in a Lockean state of nature: they have an arbiter to settle disagreements (Locke, 1690 (1963), 2.19) – though the enforcement is often left to domestic authorities or other international bodies such as the Council of Europe’s Council of Ministers for the ECtHR (ECHR, Art 46). Thus in many parts of the world it is no longer true that “International human rights institutions lack capacities for authoritative adjudication of disputes” (10).

Even though states create them, ICs must enjoy extensive independence from states in order to adjudicate such cases impartially by proper judicial methods. To prevent domination by the judges they must be constrained. How to design such constrained independence is even more important and difficult due to the law-making task of ICs.

ICs develop and make international law, including international legal human rights

In order to adjudicate, ICs must often engage in judicial law making when they develop and interpret international human rights norms that states have left unspecified or not mentioned in the treaties. Thus even though the EU treaties did not include legal human rights norms, the Court of Justice of the EU (CJEU, then called the European Court of Justice) interpreted the EU treaties so as to include them as constraints on the secondary legislation of the – a non-state actor (Weiler, 1999, 107). The IC judges’ discretion is also visible when they develop vague treaty norms for new circumstances, such as regulating freedom of speech versus privacy for social media, to protect sexual minorities against discrimination, or when they identify an ‘emerging European Consensus’ in support of such developments (Dzehtsiarou, 2015). This law-making role is one reason why regional human rights ICs should be included among the considered judgments of TIHR (McCrudden, 2014a).

A positive aspect of the extensive discretion of IC judges is that cumbersome formal treaty reforms may not be necessary to improve human rights practices. It may suffice to convince the international judges to change their interpretive practices. To illustrate: Margot Salomon and others argue that present international human rights law – including protections against abject poverty – has implications for interpreting and applying international economic law (Salomon, 2008, Howse and Teitel, 2010, Linarelli, et al., 2018). Were such changes in interpretation to occur, for instance regarding WTO rules, they would appear to be within the scope of discretion of the relevant ICs.

3 Implications for *The Idea of Human Rights*

To include the ICs and their jurisprudence among the considered judgments has several implications for TIHR.

a ICs place and contributions to the division of responsibility

ICs are difficult to place within the ‘division of responsibility’ between states and international society that is central to TIHR. This is not so much a challenge to TIHR, but points to a topic that a more fully developed theory should attend to. States establish these ICs within international society to help determine whether other states abide by certain rules about how to treat their citizens. So their role might be mainly thought to apply and adjudicate those rules. Yet at the same time the ICs contribute to specify the international legal human rights - which they then apply to states. The ICs are thus both rule makers and players using those rules. How can they do so responsibly?

b ICs contribute to constitute the system of states

When ICs develop international legal human rights, they contribute to constitute the system of states. “Human rights ... subvert the concept of state sovereignty” (Schlüter 2016: 264) – more precisely, “human rights standards qualify, but do not displace, the sovereignty of states” (Crawford, 2012, 122). ICs are thus not only the creations of states, but also the custodians of state sovereignty. ICs delineate their scope of immunity concerning how states may treat inhabitants and the range of treaty obligations they may consent to. When effective, ICs thus specify the scope of sovereignty states have – and thus what they are. “A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.” (Crawford, 2005, 5).

Indeed, the directives of authoritative ICs may profoundly change not only what states have reasons to do, but even what states and the system of states are. ICs remove one obstacle H.L.A. Hart saw against regarding international law as a system of law, namely that it lacked a system of adjudication (Hart, 1961, 233). Optimists may thus claim that ICs fundamentally transform international relations, lamented for centuries as a nasty state of nature, toward a legal order among states with a “common superior on earth, to judge between them.” (Locke, 1690 (1963), 2.19). These changed relations among individual human beings, and among our states, arguably affect what justice requires among us – and hence what we and our states have reason to do. Again, this is not a criticism of TIHR, but rather a further intriguing implication of the account that merits elaboration.

c How guide and constrain the discretion of ICs to avoid domination?

The tasks of ICs show that they challenge the received standards of separation of powers: they exercise not only judicial functions but also engage in some legislation within the bounds of interpretation. This requires that they enjoy broad discretion and independence from states. They create new risks of domination, not the rule of law but the rule of international judges. How to constrain and guide the international judges’ discretion while maintaining sufficient independence from states is an important

challenge of institutional design. One important new risk is their role and discretion in addressing the *fragmentation* of international law (Koskenniemi, 2006) – including international human rights law and its relations to other international law (Scheinin, 2019).

International law has largely developed in response to particular problems in specific issue areas – witness the plethora of treaties and ICs that address investment, trade, crimes against humanity, human rights etc. The treaties and ICs have developed without anything like a ‘global constitutional convention,’ so they are fragmented, and lack any clear hierarchy in cases of conflicts. One result is that several ICs, not only those set up to adjudicate human rights treaties, contribute to interpret human rights and seek to harmonize them with other norms of international law. They will however often differ in their interpretation and ‘weight’ of human rights. Their choice of how to ‘harmonize’ amongst international treaties and their bodies is a value laden choice, often overlooked (Alvarez, 2016). There is currently no arbiter when two ICs disagree on their interpretation of human rights: the ICs are related in a state of nature. Some hold that fear of fragmentation of international human rights may be overstated. Others welcome such fragmentation because it reduces the risk of human rights imperialism (Krisch, 2008, 66), or because it encourages critical reflexive function (McCrudden, 2014b; McCrudden, 2017). Several propose resolutions (Slaughter, 2003; Lavranos, 2008; Reinisch, 2008; Shany, 2003), and some are hopeful that it will yield a legal order where human rights norms acquire the requisite priority (Benvenisti, 2008, 4). International judges enjoy much discretion in their choice among these responses to fragmentation. It would seem that one valuable development of TIHR would be to offer standards and guides to help judges in different international legal regimes overcome the sorts of fragmentation we should be concerned about – to facilitate a normatively justifiably “conflict of laws” practice of how to regulate relations between these regimes with human rights norms in their proper place

d Expand modes of impact on compliance constituencies – and thus human rights

TIHR does note the role of international concern “to mobilize and support domestic actors in bringing pressure on governments for changes in law and policy” (37). However, the theory is skeptical about the prospects of social and cultural change: “...there may be little that any external agent can do to change the conduct of a government that resists adopting measures aimed at inducing comprehensive changes in conventional beliefs. For this reason, human rights doctrine may overreach in embracing an open-ended entitlement to social and cultural change.” (196). The prospects of such impact is crucial to determine whether there are effective mechanisms to protect against certain risks to the relevant interests – and hence whether there are corresponding human rights on this account (Hessler, 2013).

On this point TIHR’s caution would be diminished somewhat by expanding its scope to include the roles and impacts of regional human rights courts – as Beitz acknowledged (14). Space only permits brief summaries here. To understand the contributions of ICs requires closer attention to their interaction with various domestic ‘compliance constituencies’ (Dai, 2005, Alter, 2014). They include domestic judiciaries (Peters, 2009). For instance, in the Inter-American system they perform domestic ‘conventionality control’ (“Almonacid Arellano v. Chile”, 2006, Legg, 2012, Ch 5). Other important domestic actors are parliaments, opposition parties and civil society. These constituencies use the ICs jurisprudence and exploit possibilities to bring cases, mobilize, and hold political actors accountable. Thus many authors identify mechanisms whereby human rights conventions and their treaty bodies impact and how judicial and

political processes interact to change domestic practices (Simmons, 2009, Hillebrecht, 2014).

The impact of ICs is not limited to directly determine human rights violations, but also contribute other subsidiary tasks vis-à-vis states. They may strengthen the domestic rule of law and the domestic political deliberations to ensure domestic compliance with human rights. Thus they can support the domestic judiciary's independence and ability to review executives and legislatures. And the ECtHR's doctrine of a "margin of appreciation" arguably serves to nudge the domestic legislatures to more careful deliberation to avoid human rights violations – and might be valuable for other ICs (Follesdal, 2018; Follesdal, 2017).

One upshot is that when we expand TIHR to include ICs the range of effective mechanisms expand, to reduce the scepticism – and to expand the set of human rights.

e Human Rights obligations also to alleviate risks wrought by some non-state actors

To include ICs and their jurisprudence among the considered judgments of TIHR expands and develops the human rights practice of concern. This inclusion requires that we expand the range of agents who have human rights obligations beyond states – who are the only or primary duty bearers according to the current human rights conventions. Thus the state centric nature of TIHR recedes somewhat. The influential ICs arguably can create new benefits for individuals and their states – but also new risks, especially due to their extensive discretion. So states may create new risks against individuals' interests when they agree new treaties that establish ICs. Does it make sense according to the theory to regard triggers for mechanisms against such risks by certain non-state actors as human rights?

There are at least two reasons to support such an expansion. The rationale for human rights is to provide multi-level protection against standard, predictable risks within the system of sovereign states. So one implication is that we should be concerned about risks arising from bodies that states can use their sovereignty to establish or regulate – be it to address shared problems, to coordinate or assure each other, or to promote legitimate interests. Secondly, we find several examples of such usage of the term 'human rights' when we expand the scope of the practice. Several national constitutional courts, have insisted that the EU legislation must live up to human rights norms (e.g. Bundesverfassungsgericht, 1974). In its 'Kadi' judgement the CJEU challenged the United Nations Security Council' smart sanctions in the fight against terrorism, decision on the basis that it violated fundamental human rights of the EU ("Kadi," 2008). And the member states of the European Union have agreed that the EU shall accede to the European Convention on Human Rights (European Council, 2007, 6.2).

When the human rights practice includes ICs, it appears that consistency as part of the reflective equilibrium method requires us to entertain the possibility that many other non-state actors should have international human rights obligations. Prime candidates are international organisations beyond the EU such as NATO and the UN and its bodies (Heupel and Zurn, 2017). Other bodies that are created by states, or that states use their sovereignty to allow or even regulate, also seem appropriate sources of relevant risks that may be constrained by international mechanisms. Examples include the treaties that facilitate economic globalization, for better and worse. Markets, market failures and externalities may all create new risks for individuals (Linarelli, et al., 2018). Furthermore, corporations may be relevant candidates for human rights obligations insofar as they can cause relevant harms when states fail to regulate them properly (Ruggie, 2011).

4 How does the theory help international judges interpret human rights and harmonize international law?

TIHR helps us understand and assess the tasks of ICs regarding human rights in a complex, interdependent multilevel legal and political order. But might TIHR also help ICs develop international human rights – as a sound theory should? Recall "the main questions a theory of human rights should illuminate - about their grounds, scope, and the manner in which valid claims of human rights should *guide action*." (51, my emphasis). ICs are in a position to both specify such human rights, and guide their application. Can the theory as specified provide guidance? An added benefit of TIHR would then be to serve as a constraint and guide for the judges discretion, to reduce the risk of domination by the ICs themselves.

IC judges are already engaged in a partial process of reflective equilibrium

In favour of this action-guiding role, we may claim that IC judges already engage in what we may recognise as a method of reflective equilibrium, albeit incomplete.

When the judges interpret and develop international law, they neither discover latent rules or make them up from scratch. They engage in processes reminiscent of reflective equilibrium, with important provisos. Thus former judge of the ICJ Rosalyn Higgins agreed with Hersch Lauterpacht who argued that when the judges interpret, they do not find rules but make choices “not between claims which are fully justified and claims which have no foundation at all but between claims which have varying degrees of legal merit” (Lauterpacht, 1958, 399; Higgins, 1976, 85;. Higgins, 1995, 3).

Neil MacCormick’s more detailed account of ‘rational reconstruction’ indicates several features of the method of reflective equilibrium:

In law ... the scholar or researcher is confronted by a vast body of material or of experimental or observational data. The materials and/or data may seem confused and disorderly, partly or potentially conflicting, gappy in places. As 'materials' or 'data', they already represent some kind of a more or less deliberate selection out of the totality of experience. The task of scholarship or science is then to take these selected items and put them back together, to reconstruct them in a way that makes them comprehensible because they are now shown as parts of a well ordered though complex whole. This requires explanatory principles establishing criteria of what counts as well ordered and rational ... Of course, it is an intellectual process, involving a new imagining and describing of the found order ... [T]here has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that do not fit and ought to be discarded or abandoned or at least revised. ...

In legal scholarship—in legal dogmatics, that is to say—rational reconstruction means the production of clear and systematic statements of legal doctrine, accounting for statute law and case law in terms of organizing principles, relating actual or hypothetical decisions both to their factual bases and to governing norms elaborated out of the authoritative materials. (MacCormick, 1990, 556)

One central characteristic that might appear to set the judges’ process of development of international law apart from the method of reflective equilibrium is that the starting points of legal materials – treaty texts, judgments, and their legal weight are not amendable to change in light of the theory.

The IC judges are indeed generally obliged to give primacy to the norms of the treaty that constitutes their IC. These norms are at the very least strongly held

considered judgments. This commitment reduces the risk that the judges will abuse their power. But it might also reduce the prospects for a harmonization of international law that accords human rights the proper weight. And these norms may appear to be beyond modification as a result of reflective equilibrium. However, even such norms may be modified: they are not immovable, they must be interpreted, and their weight and standing may be adjusted relative to other norms as parts of the interpretive practice of the courts. To illustrate: The European Court of Justice famously recognized a whole unwritten ‘Community Bill of Rights’ when adjudicating European Union law (“Internationale Handelsgesellschaft,” 1970, Witte, 1999).

One challenge to the process of reflective equilibrium as applied to the practice of human rights is the present ‘fragmented’ nature of international law: the various treaties have been agreed without sufficient attention to possible conflicts among their norms (Koskenniemi, 2006). The ICs are therefore arguably in a state of nature amongst themselves. Consider some tasks of IC judges where a theory of human rights such as TIHR arguably would be of particular help.

a Should a pro homine principle guide the harmonization of international law?

As a first illustration of how TIHR might guide the IC judges, consider how they should rely on guiding principles of treaty interpretation and for harmonizing international law.

One supplementary means of interpreting several treaties is a principle of ‘Restrictive interpretation,’ – to minimize constraints on sovereignty. The principle ‘in dubio mitius’ is sometimes regarded as claiming the same, and sometimes to apply to exceptions – which must be interpreted so as to minimize them.

If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties. However, in applying this principle regard must be had to the fact that the assumption of obligations constitutes the primary purpose of the treaty, and that, in general, the parties must be presumed to have intended the treaty to be effective. (Jennings and Watts, 1992, 1278; cf Merkouris, 2017).

‘Pro homine’ or ‘pro persona’ is another principle of interpretation, much developed by the Inter-American Court of Human Rights, that treaties should be interpreted according to “the rule most favorable to the human being” (“Mapiripán Massacre v. Colombia,” 2005, 106; Rodiles, 2016).

These principles of interpretation can stand in some tension, since the function of human rights conventions is precisely to limit state sovereignty for the sake of individuals. The IACtHR has also applied the ‘pro homine’ principle to harmonize conflicting treaties, to the effect that such harmonization should be done “in the way which is most protective of human rights.” (Lixinski, 2010, 588). In effect, human rights norms, or the interests of human beings, should often be given priority over other treaties norms when they conflict. This would create several conflicts with ‘restrictive interpretation’ and in dubio mitius.

It is not clear that TIHR provides sufficient guidance - as currently developed - to assess whether ‘pro homine’ as a harmonizing principle is appropriate to make international law more justified as a whole.

b Policy challenges: how necessary and effective mechanisms of concern must human rights be?

Adding ICs entail that the theory should indicate more clearly what is required for a trigger for a mechanism of concern to be a human right, since international judges must often specify such human rights as a matter of international law. The effects of international mechanisms of concern are complex and conditional. They are often difficult to predict, especially among states with different traditions of rule of law, authoritarianism, etc.

Does TIHR require that the international expressions of concern triggered by a violation of a human right be *able* to improve a situation, or that it actually is likely to do so? Need the mechanism always be necessary and effective, or only for some states, in order to be human rights? - Or is the set of human rights more contingent on the nature of the states – sacrificing universality (112) for effectiveness?

Consider two examples. A despotic state might be quite robust against diplomatic pressure and mechanisms of international shaming concerning freedom of expression, or discrimination of women - such as expressions of concern by treaty bodies or judgments from a regional human rights IC. Do its inhabitants lack those human rights? This is at odds with current international human rights law, which maintains that states have obligations regardless of whether they can be enforced. Further elaboration of the theory may show how this implication might be avoided, for instance by recalling that the rules should be shaped in light of what we authorize other actors to do, and by expanding the range of actors. We have good reason to *not* have rules that differentiate between harsh despotic states and more responsive authoritarian or democratic states. It may be very difficult for IC judges to apply such distinctions to particular states, and it would create unfortunate incentives for rulers to become more despotic. The arguments must also consider the contribution of human rights treaties and their ICs on domestic actors ranging from civil society to judiciaries (196).

A second area for further development concerns how utopian and aspirational an institutional theory of human rights can be, while remaining grounded in existing institutions (Ratner, 2018a). Must mechanisms of concern be effective within the backdrop of *existing* institutions and cultures, for there to be a human right – or can it make sense to argue that there may be a human right *to and against* new institutions and agents (Hessler, 2013)? For instance, it would be helpful if a theory of human rights can frame arguments about whether corporations, UN bodies and ICs themselves should have certain human rights obligations, regardless of their current international legal status.

One way forward might be to explore the distinction Beitz draws between background political norms and international legal norms, where some human rights norms are as examples of the former. That perspective might guide decisions about how to formulate international human rights law.

c The problem of contribution under complex multilevel interdependence

An important challenge to protect individuals within our multilevel political and legal order is the problem of many hands. Risks are the result of the interplay of several ‘moving parts’ - several institutions that jointly cause harm. When interpreting human rights norms, which mechanisms of concern should an IC read into the treaties, for

which of the institutions that jointly put human interests at risk?

As an example, consider criticisms that the international trade and investment regimes constrain the policy space of poor governments so much that they cannot secure the economic and social human rights of inhabitants (Pogge, 2010, Linarelli, et al., 2018). Such descriptions rest on claims and counterfactuals open to empirical challenges and contestation (Howse and Teitel, 2010; Ratner, 2018b; Bonnitcha, Poulsen, & Waibel, 2017). Such issues notwithstanding, assuming for the sake of the argument that these impacts occur, what is to be done, by whom? Strategies may be to change individual treaties, or how they are to be interpreted (Salomon, 2008), or governments may be required to increase taxes to benefit the poor, or urged to agree a global tax on investments and trade ... (Ratner, 2018b.)

It would seem helpful if TIHR could indicate how to determine which of these alternatives ICs should pursue when they seek to develop the treaties. International judges are highly skilled in international law and legal methods, but these decisions appears to require quite different expertise concerning likely implementation or success, and the impact on third parties or the long term systemic effects (Alvarez, 2016, 528-9).

This would appear to be a very similar problem to that identified in *The Idea of Human Rights* for ‘naturalistic’ theories:

these naturalistic views are not sufficiently robust to illuminate what we might call the problem of contribution.... The selection of agents from among those in a position to act which have responsibilities to do so (65)

In response, TIHR already underscores the need to take a range of empirical factors into account (140-41). While international judges are not trained in these matters, TIHR may point to the importance of providing them with relevant information during the proceedings – including from experts and representatives of third parties likely to be influenced by the interpretations and decisions of the international judges.

5 Conclusions

Charles Beitz’ *The Idea of Human Rights* is a valuable contribution to international normative political theory, both for the theory presented and for the research agenda it provokes. The present reflections have sought to carry further the attempts of that book “to bring more coherence, fitness for purpose, and capacity to account for pre-reflective judgments of which we feel confident.” (7)

The Idea of Human Rights delineates the practice of human rights to include international human rights treaties that are “open to interpretation and revision within the practice.” The jurisprudence of international courts and tribunals are central interpreters of this practice, and must therefore be regarded as part of the practice. To include these institutions and their judgments and interpretations have several implications for the theory. ICs affect not only the rules, but also the multifarious impacts of human rights rules wrought not only by state authorities but also by non-state actors within and outside the state. The role of human rights is not only to trigger corrective action, but also indirectly, to support and strengthen other actors. Indeed, when effective, ICs help delineate the scope of sovereignty that states have – and thus what they and the system of sovereign states are.

As currently developed *The Idea of Human Rights* leaves several tasks unanswered, given that a theory of human rights should be action guiding – presumably also how international judges should develop the practice of human rights. This expanded account of the practice of human rights also prompts us to consider how

human rights may reduce the new risks created by ICs themselves, as well as those of other international actors. Other important concerns are how international judges may best use international human rights to harmonize international law, how to determine which human rights individuals have against which actors under new circumstances, and how to allocate human rights obligations within our complex, interdependent multilevel legal order. These issues are important, and complex. They cannot be left completely to international judges – and not completely to *The Idea of Human Rights*.

References

- Almonacid Arellano v. Chile (IACtHR 2006).
- Alter, K. (2014). *The New Terrain of International Law: International Courts in International Politics* Princeton New Jersey: Princeton University Press.
- Alvarez, J. (2016). 'Beware: boundary crossing-' - A critical appraisal of Public Law approaches to international investment law'. *Journal of world investment and trade*, 17, pp. 171-228.
- Beitz, C. R. (1975). Justice and international relations. *Philosophy and Public Affairs*, 4(4), pp. 360-389.
- Beitz, C. R. (1979). *Political theory and international relations* Princeton: Princeton University Press.
- Beitz, C. R. (2009). *The Idea of Human Rights* Oxford: Oxford University Press.
- Benvenisti, E. (2008). The Conception of International Law as a Legal System. *German Yearbook of International Law*, 50
- Bonnitcha, J., Poulsen, L., & Waibel, M. (2017). *The Political Economy of the Investment Treaty Regime* Oxford: Oxford University Press.
- Buchanan, A. (2013). *The heart of human rights* Oxford: Oxford University Press.
- Bundesverfassungsgericht. (1974). Solange I: Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel. *BVerfGE* 37, 271
- European Convention for the Protection of Human Rights and Fundamental Freedoms; ECHR (1950), as amended by Protocols Nos. 11 and 14. Entry into force 3 September 1953.
- Crawford, J. (2005). *The creation of states in international law* Oxford: Oxford University Press
- Crawford, J. (2012). Sovereignty as a legal value. In J. Crawford & M. Koskeniemi (Eds.), *The Cambridge Companion to International Law* (pp. 117-134). Cambridge: Cambridge University Press.
- Dai, X. (2005). Why comply? The domestic constituency mechanism. *International Organization*, 59(2), pp. 363-398.
- Daniels, N. (2003). Reflective Equilibrium. Retrieved Date from <http://plato.stanford.edu/archives/sum2003/entries/reflective-equilibrium/>.
- Dzehtsiarou, K. (2015). *European Consensus and the Legitimacy of the Strasbourg Court* Cambridge Cambridge University Press.
- European Council. (2007). Treaty on European Union (Lisbon Treaty). *Official Journal of the European Union*, 50(2007/C 306/01) Retrieved from <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>
- Follesdal, A. (1991). *The significance of state borders for international distributive justice* Harvard University: UMI No. 9211679.
- Follesdal, A. (2009). Why the European Court on Human Rights might be Democratically Legitimate – A Modest Defense. *Nordic Journal of Human*

- Rights*, 27(2), pp. 289-303. Retrieved from <http://www.jus.uio.no/smr/forskning/publikasjoner/ntmr/utgaver/2009/2/docs/njhr0209.pdf>
- Follesdal, A. (2017). Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights? *International Journal of Constitutional Law*, 15(2), pp. 359-371. doi:10.1093/icon/mox019 Retrieved from <http://www.follesdal.net/ms/Follesdal-2017-interam-margin.pdf>
- Follesdal, A. (2018). Appreciating the Margin of Appreciation. In A. Etinson (Ed.), *Human Rights: Moral or Political?* (pp. 269-294). Oxford: Oxford University Press.
- Griffin, J. (2009). *On Human Rights* Oxford: Oxford University Press.
- Hart, H. L. A. (1961). *The concept of law* Oxford: Clarendon Press.
- Hessler, K. (2013). Hard Cases: Philosophy, Public Health, and Women's Human Rights. *Journal of Value Inquiry*, 47, pp. 375-390.
- Heupel, M., & Zurn, M. (Eds.). (2017). *Protecting the individual from international authority: Human rights in international organizations*. Cambridge: Cambridge University Press.
- Higgins, R. (1976). Integrations of Authority and Control: Trends in the Literature of International Law and Relations. In B. Weston & M. Reisman (Eds.), *Towards World Order and Human Dignity*
- Higgins, R. (1995). *Problems and process: International law and how we use it* Oxford: Oxford University Press.
- Hillebrecht, C. (2014). The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change. *European Journal of International Law*, 20(4), pp. 1100-1123. doi:10.1177/1354066113508591
- Howse, R., & Teitel, R. (2010). Global Justice, Poverty and the International Economic Order. In S. Besson & J. Tasioulas (Eds.), *The Philosophy of International Law* (pp. 437-449). Oxford: Oxford University Press.
- Internationale Handelsgesellschaft (ECJ 1970).
- Jennings, R., & Watts, A. (1992). *Oppenheim's International Law Vol 1 parts 2-4* (9 ed.): Longman.
- Kadi and Al Barakaat International Foundation v Council and Commission, No. C-402/05:461 (ECJ Grand Chamber 2008).
- Koskenniemi, M. (2006). Fragmentation of International Law *International Law Commission, Study Group on Fragmentation*.
- Krisch, N. (2008). The open architecture of European Human Rights Law. *The Modern Law Review*, pp. 183-216.
- Lauterpacht, H. (1958). *The Development of International Law by the International Court* Stevens & Sons.
- Lavranos, N. (2008). The Solange-Method as a Tool for Regulating Competing Jurisdictions among International Courts and Tribunals. *Loyola Law School Los Angeles International and Comparative Law Review*, p 275.
- Legg, A. (2012). *The Margin of Appreciation in International Human Rights Law: Deference and proportionality* Oxford: Oxford University Press.

- Liao, S. M., & Etinson, A. (2012). Political and Naturalistic Conceptions of Human Rights: A False Polemic? *Journal of Moral Philosophy*, 9(3), pp. 327-352
- Linarelli, J., Salomon, M., & Sornarajah, M. (2018). *The Misery of International Law: Confrontations with injustice in the global economy* Oxford: Oxford University Press.
- Lixinski, L. (2010). Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law. *European Journal of International Law*, 21(3), pp. 585-604.
- Locke, J. (1690 (1963)). *Two treatises of government* New York: New American Library, Mentor.
- MacCormick, N. (1990). Reconstruction after Deconstruction: A Response to CLS. *Oxford journal of legal studies*, 10
- Macklem, P. (2015). *The Sovereignty of Human Rights* Oxford: Oxford University Press.
- Maliks, R., & Karlsson, J. S. (Eds.). (2017). *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice*. Cambridge: Cambridge University Press.
- Mapiripán Massacre v. Colombia (IACtHR 2005).
- McCrudden, C. (2014a). Human Rights: Law, politics and philosophy. https://www.wzb.eu/sites/default/files/u32/chr_mccrudden_human_rights_law_politics_and_philosophy.pdf
- McCrudden, C. (2014b). The pluralism of human rights adjudication. In L. Lazarus, C. McCrudden & N. Bowles (Eds.), *Reasoning rights: comparative judicial engagement*. Oxford: Hart.
- McCrudden, C. (2017). Is the Principal Function of International Human Rights Law to Address the Pathologies of International Law? A Comment on Patrick Macklem's the Sovereignty of Human Rights. *University of Toronto Law Journal*, (?)
- Merkouris, P. (2017). In Dubio Mitius. In J. Klingler, Y. Parkhomenko & C. Salonidis (Eds.), *Between the Lines of the Vienna Convention: Canons of Construction and Other Interpretive Principles in Public International Law: a Practitioners' Handbook*: Kluwer.
- Peters, A. (2009). Humanity as the Alpha and Omega of Sovereignty, . *European Journal of International Law*, 20, p 513.
- Pogge, T. (2010). The Role of International Law in Reproducing Massive Poverty. In S. Besson & J. Tasioulas (Eds.), *The Philosophy of International Law* (pp. 417-436). Oxford: Oxford University Press.
- Ratner, S. (2015). *The thin justice of international law: a moral reckoning of the law of nations* Oxford: Oxford University Press.
- Ratner, S. (2018a). International law and political philosophy: Uncovering new linkages. *Philosophy Compass*, 14(2), p e12564. doi:10.1111/phc3.12564
- Ratner, S. (2018b). Survey Article: Global investment rules as a site for moral inquiry. *Journal of Political Philosophy*
- Rawls, J. (1971). *A theory of justice* Cambridge, Mass.: Harvard University Press.
- Rawls, J. (1993). Law of Peoples. In S. Shute & S. Hurley (Eds.), *On Human Rights: the Oxford Amnesty Lectures 1993* (pp. 175-216). New York: Basic

Books.

- Rawls, J. (1999). *The law of peoples* Cambridge, Mass.: Harvard University Press.
- Raz, J. (2010a). Human rights in the emerging world order. *Transnational legal theory*, 1, pp. 31-47.
- Raz, J. (2010b). Human Rights without Foundations. In S. Besson & J. Tasioulas (Eds.), *The Philosophy of International Law* (pp. 321-338). Oxford: Oxford University Press.
- Reinisch, A. (2008). International Courts and Tribunals, Multiple Jurisdiction *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press.
- Rodiles, A. (2016). The law and politics of the Pro Persona Principle in Latin America. In H. P. Aust & G. Nolte (Eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (pp. 153-174). Oxford: Oxford University Press.
- Ruggie, J. (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. *Annex to A/HRC/17/31, Endorsed by the Human Rights Council Resolution 17/4 of 16 June 2011* Retrieved from https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf
- Salomon, M. (2008). *Global responsibility for human rights: World poverty and the development of international law* Oxford: Oxford University Press.
- Scheinin, M. (Ed.). (2019). *Human rights norms in 'other' international courts*. Cambridge: Cambridge University Press.
- Shany, Y. (2003). *The competing jurisdictions of international courts and tribunals* New York: Oxford University Press.
- Simmons, B. (2009). *Mobilizing for Human Rights* New York: Cambridge University Press.
- Slaughter, A.-M. (2003). A global community of courts. *Harvard International Law Journal*, 44, p 191.
- Tasioulas, J. (2012). On the nature of human rights. In G. Ernst & J.-C. Heilinger (Eds.), *The philosophy of human rights: Contemporary Controversies* (pp. 17-61). Berlin: de Gruyter.
- Tasioulas, J. (2013). Human rights, legitimacy and international law. *American Journal of Jurisprudence*, 58(1), pp. 1-25.
- von Bogdandy, A., & Venzke, I. (2014). *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* Oxford: Oxford University Press.
- Weiler, J. H. H. (1999). *The constitution of Europe* Cambridge: Cambridge University Press.
- Witte, B. d. (1999). The Past and Future Role of the European Court of Justice in the Protection of Human Rights. In P. Alston, M. Bustelo & J. Heenan (Eds.), *The EU and human rights* (pp. 859-898). Oxford: Oxford University Press.