

Saving Human Rights from Human Rights Law

*John Tasioulas**

ABSTRACT

This Article advances the thesis that international human rights law (IHRL) has strayed from its formative purpose. This purpose, as formulated by the Formative Aim Thesis (FAT), is to give expression and effect to an underlying morality of human rights, insofar as it is appropriate to do so, through the medium of individual legal rights ascribed to all human beings. This Article elaborates on two main ways in which IHRL has deviated from the FAT: (1) a tendency to ignore the vital distinction between human rights (which have associated obligations) and universal human interests or values more generally; and (2) an insufficiently critical promotion of both the legalisation and, more specifically, the judicialisation of human rights. This Article tentatively suggests that these internal deviations within IHRL may partly explain some of the external resistance IHRL has encountered, in the form of what is generally referred to as a “populist backlash.” One element in rescuing human rights today is saving them from the deformations they have undergone at the hands of IHRL.

* Yeoh Professor of Politics, Philosophy and Law, Dickson Poon School of Law and Director of the Yeoh Tiong Lay Centre for Politics, Philosophy and Law, King's College London. An early version of this article was delivered as a keynote lecture at the Human Rights Under Pressure Program at the Free University, Berlin on July 16, 2018. I am grateful to Helmut Aust for the invitation and for his helpful written comments. A subsequent version of this Article was delivered as the co-keynote lecture at the *Vanderbilt Journal of Transnational Law* Symposium on the Future of Human Rights Law, held at Vanderbilt University Law School on February 22, 2019 where I benefited from comments by James Gathii, Kathryn Sikkink, Gopal Sreenivasan, Lorna McGregor, Karima Bennoune, and Samuel Moyn. It also formed the subject of a seminar at the University of Frankfurt's "The Formation of Normative Orders" Exzellenzcluster on January 22, 2019 and Kadish Workshop in Law, Philosophy, and Political Theory at the University of California, Berkeley on April 12, 2019 where I benefited from the commentary of Ajay Ravichandran. For valuable comments on drafts at various stages I am grateful to Gerald Neuman, Katerina Linos, Yuval Shany, Colleen Murphy, Ingrid Wuerth, Guglielmo Verdirame, Rainer Forst, Jiewuh Song, Joshua Cohen, Jay Wallace, Scott Casleton, and numerous participants at the discussions in Berlin, Nashville, and Berkeley.

TABLE OF CONTENTS

| | | |
|------|---|------|
| I. | INTERNATIONAL HUMAN RIGHTS LAW: INTERNAL AND EXTERNAL PRESSURES | 1168 |
| II. | THE FORMATIVE AIM OF INTERNATIONAL HUMAN RIGHTS LAW: OR, NOT ESCHEWING THE FAT..... | 1173 |
| III. | CONFUSING HUMAN RIGHTS WITH INTERESTS AND VALUES | 1179 |
| IV. | LEGALISATION AND JUDICIALISATION | 1195 |
| V. | CONCLUSION..... | 1206 |

I. INTERNATIONAL HUMAN RIGHTS LAW: INTERNAL AND EXTERNAL PRESSURES

Human rights are always under pressure, a pressure that is exerted on at least two levels. The first level is that on which human rights are conceived as exacting moral standards: rights that ordinary moral reasoning, objectively albeit fallibly, discloses to us are possessed by all human beings simply in virtue of their humanity.¹ If one considers human rights as universal moral rights in this way, then they are constantly under pressure, both in relation to our understanding of them and our success in complying with them. The pressure stems from pervasive frailties that afflict the human condition—ignorance, lack of empathy and imagination, laziness and inertia, the impulse to dominate, illegitimate self-preference, scarce resources, and so on—that hinders humanity in grasping those standards or adhering to their demands in practice.

But that human rights are under pressure is also true on a second, and more topical, level if we focus on the imposing and complex structure of international human rights law (IHRL) that has been built up in the postwar era. It is this second sort of pressure—on the edifice on IHRL's norms and institutions—that is the focus of this Article. A major theme in the argument that follows is that relieving the pressure on IHRL, including pressures that are external in character, requires grasping its relation to human rights on the first level. This is because

1. I have argued in favour of this in John Tasioulas, *On the Nature of Human Rights*, in THE PHILOSOPHY OF HUMAN RIGHTS: CONTEMPORARY CONTROVERSIES 17, 17–59 (Gerhard Ernst et al. eds., 2012) [hereinafter *On the Nature of Human Rights*]. This view differs from the legalistic, Benthamite thesis that all rights owe their existence to their embodiment in law, but also from the family of “political” accounts of human rights, inspired by John Rawls’ *The Law of Peoples*. See JOHN RAWLS, THE LAW OF PEOPLES (Harv. Univ. Press 1999) (according to which it is an essential feature of human rights norms that they play a specific political role, such as setting benchmarks for political legitimacy or serving as triggers for international concern or intervention in the event of their gross violation).

the essential point of IHRL is to give expression and effect to an underlying morality of human rights, insofar as it is appropriate to do so, through the medium of individual legal rights ascribed to all human beings. This sums up what I have called the Formative Aim Thesis (FAT).² The tendency to stray from this governing rationale is liable to generate both internal and external pressures on IHRL.

The idea that IHRL is under severe pressure is a common refrain in recent years. Two important recent lectures are exemplary illustrations of this phenomenon. The first is “The Populist Challenge to Human Rights” delivered at the London School of Economics on December 1, 2016, by Professor Philip Alston of New York University, who is also the current United Nations (UN) Special Rapporteur on Extreme Poverty and Human Rights.³ The other lecture, “Is International Human Rights Law Under Threat?,” was delivered on July 26, 2017, as the British Institute of International and Comparative Law Annual Grotius Lecture by Prince Zeid Ra’ad Al Hussein, who at the time was the UN High Commissioner for Human Rights.⁴ These two lectures are chosen not only because they are illustrative of widely shared beliefs and anxieties among scholars and practitioners of IHRL, but also because the two authors are eminent figures in the human rights field. Their words, therefore, deserve serious consideration—and, of course, critical scrutiny.

In his lecture, Philip Alston addresses the challenge posed by “[t]he populist agenda that has made such dramatic inroads recently,” an agenda that “is often avowedly nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda.”⁵ Alston proceeds to warn, in dire terms, that as a result of populism, “the challenges the human rights movement now faces are fundamentally different from much of what has gone before.”⁶ In the constructive part of his lecture, Alston advances a number of proposals for responding to the populist challenge. These include: achieving more effective synergies between international and local human rights movements; giving economic and social rights equal prominence in human rights advocacy alongside civil and political rights; broadening the kinds of actors the human rights community engages with beyond states, so as to include, for example, corporations; making greater

2. I defend the FAT in John Tasioulas, *Exiting the Hall of Mirrors: Morality and Law in Human Rights*, in *POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS* 73, 73–89 (Tom Campbell & Kylie Bourne eds., Routledge 2018).

3. Philip Alston, *The Populist Challenge to Human Rights*, 9 *J. HUM. RTS. PRAC.* 1, 5 (2017).

4. Zeid Ra’ad Al Hussein, U.N. High Comm’r for Human Rights, Speech at the BIICL Annual Grotius Lecture: Is International Human Rights Law Under Threat? (July 26, 2017) (transcript available at the British Institute of International and Comparative Law).

5. Alston, *supra* note 3, at 2.

6. *Id.*

efforts to persuade sceptics of the soundness of human rights norms and institutions; and, in relation to human rights scholarship, he urges scholars to consider the “unintended consequences” of their scepticism about human rights law and institutions, such as its corrosive impact on the motivation of would-be human rights lawyers and activists.⁷

The lecture by Prince Zeid delves deeper, aiming to unearth the psychological origins of the populist backlash against human rights. He asks: “Why is international human rights law such an easy target? Why is it so misunderstood, so reviled by some, feared by others, spurned, attacked?”⁸ The answer he gives, in broad terms, is that unscrupulous politicians stoke and exploit fears among the citizenry—xenophobia, the fear of terrorism, and so on—to justify human rights violations, such as torture, arbitrary detention, and the curtailment of free speech, in order to secure and maintain their grip on power. Those who oppose human rights law are acting on the basis of unreasoning fear, whether by experiencing it themselves or promoting and exploiting it in others; by contrast, defenders of human rights law aspire to be guided by reason freed from the distortive influence of fear. In a truly striking passage, Zeid goes on to posit a difference in how the brains of those in the two opposed camps function:

The default condition of the human mind is, after all, fear. Primordial fear. That innermost instinctive mechanism protecting us from harm, from death. An emotion every extremist, skilled populists included, seeks to tap or stimulate The emotional mechanism in the mind of a human rights defender works rather differently. To do good in our lives, and not just to some, but to all; to defend the human rights of all — this requires a continuous investment of thought, where the natural prejudices lying deep within each of us must be watched out for and rejected every day of our lives. The default flow in the minds of humanity may be reptilian; but the internal battle to overcome it is profoundly human.⁹

This presents us with a dramatic image: one side trapped in, or exploiting, humanity’s reptilian inheritance, the other seeking to transcend it by ascending to a standpoint oriented to the good of all humanity.

For present purposes, nothing in this Article will contest anything said in these two lectures; indeed, many of Alston’s constructive proposals are highly plausible.¹⁰ Rather, this Article simply aims to

7. *Id.* at 13.

8. Al Hussein, *supra* note 4, at 1.

9. *Id.* This analysis chimes with some of the thoughts in Martha Nussbaum’s *The Monarchy of Fear*, which gives primordial fear a fundamental role in explaining how other emotions—such as retributive anger and exclusionary forms of disgust—can have a toxic effect on liberal democracy. See MARTHA C. NUSSBAUM, *THE MONARCHY OF FEAR: A PHILOSOPHER LOOKS AT OUR POLITICAL CRISIS* 17–62 (Simon & Schuster 2018).

10. For an insightful discussion of both internal and external pressures on international human rights law, see Gerald L. Neuman, *Human Rights, Treaties, and*

convey the shape of the problem they present as confronting IHRL—one that arises from external and morally disreputable sources—and to draw attention to a startling omission common to the diagnoses presented in both lectures. Neither author contemplates the possibility that some of the most serious pressures on IHRL are internally generated, arising from grave defects in the elaboration of human rights law and the self-understanding of its practitioners and scholars. In particular, they do not consider the extent to which IHRL has generated internal pressures by straying from its formative aim of giving substance and effect to a background morality of human rights. Had this possibility been in view, they might have gone on to consider to what extent these internal pressures are responsible for triggering or exacerbating some of the external pressures they identify. This latter move, however, would have required contemplating the possibility that the populist backlash that they decry is not accurately characterised in unremittingly negative terms as “xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda,” although no doubt such strands are present within it. Without wishing to pursue this point, it is a plausible hypothesis that such an exclusively negative portrayal of contemporary “populism” is an unrealistically Manichean template for interpreting political realities.¹¹

Now, it is admittedly true that Alston does occasionally refer to “shortcomings” within the human rights movement, but it quickly becomes apparent that for him these are overwhelmingly at the level of strategy and implementation, not fundamental principle and approach. There is no question, he believes, of “giving up on basic principles.”¹² To put it crudely, the impression conveyed is that the fundamentals of human rights law are in order, they just need better public relations to secure a wider consensus on them and more effective mechanisms to enhance levels of compliance.¹³ When he does broach

International Legitimacy, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER 51, 51–72 (Silja Voeneke et al. eds., Cambridge Univ. Press 2018).

11. The notion of “populism” is contested, both in regards to its meaning and its utility. Jan-Werner Müller has a pejorative definition, according to which populists falsely lay claim to being the exclusive representatives of the “real people.” Jan-Werner Müller, *How Can Populism be Defeated?*, in RETHINKING OPEN SOCIETY 196 (Michael Ignatieff et al. eds., Cent. European Univ. Press 2018); see also ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY 78 (2018) (identifying populism, in more neutral terms, with a thin, three-pronged ideology: (1) an attempt to make the popular will heard and acted on; (2) the call to defend the interests of the plain, ordinary people; (3) the desire to replace corrupt and distant elites). As an indication of the complexities of contemporary populism’s relation to human rights, consider the way in which “populist” politicians in Europe have sought to justify greater restrictions on immigration on the basis of protecting women’s and LGBT rights or ensuring the continuation of democracy and strong social welfare policies.

12. Alston, *supra* note 3, at 2.

13. See *id.*

deeper criticisms, Alston refers to scepticism about the very idea of human rights as a moral ideal, human rights on what I have referred to as the first level.¹⁴ Specifically, he recounts a story about a famous international legal scholar who in a lecture dismissed human rights as an “illusion,” arguing that “there could not reasonably be universal rights to strive for; that there could be no way of proving or justifying any particular rights; and that most are heavily contingent and subjective.”¹⁵ This illusion, the famous scholar asserted, confronted would-be practitioners of IHRL with a yawning “abyss.”¹⁶ It is this kind of scepticism that Alston chastises academic critics of IHRL for engaging in; these critics fail in their responsibility to take seriously its “unintended consequences,” such as its demoralising effect on students and others committed to the cause of human rights.¹⁷

In other words, the only serious intellectual challenge to the human rights enterprise that Alston considers is that which trashes the very idea of a rationally grounded morality of human rights. But this kind of root-and-branch rejection of human rights morality can be left to one side, especially since it typically reflects a crude version of relativism that perhaps only narrowly escapes self-contradiction by lapsing into deep implausibility. This Article will proceed on the basis that there is a sound human rights morality that can be rationally justified even though our grasp of it, and compliance with it, is inevitably far from perfect. Even if one believes that societies that practice torture, slavery, or female genital mutilation are not only operating on different cultural norms, but are objectively mistaken about profound moral questions, this still leaves the question whether or not existing human rights law is seriously flawed. In other words, one can be sceptical about IHRL not because one is sceptical about the moral idea of human rights, but precisely because one believes in that idea, and additionally believes that the law has fallen out of tune with it in significant ways. Unfortunately, Alston skates over this possibility by assuming that the only serious intellectual or moral challenge to IHRL is one that repudiates the very idea of human rights morality, perhaps because he just assumes that IHRL is broadly in line with such a morality. But this assumption is eminently contestable.

Human rights laws and institutions, after all, are not themselves to be identified with sound human rights morality. They are not the deliverances of perfectly operating reason. To conceive of them in this way is a kind of idolatry, one that confuses man-made institutional means with objective ethical ends. Rather, they are fallible human creations, established by flawed human beings, relying on their inevitably limited reasoning powers against the countervailing

14. *See id.* at 13.

15. *Id.*

16. *See id.*

17. *See id.*

influence of nonrational factors, such as egoism and fear. So, between merely strategic criticisms of international human rights law, on the one hand, and a scepticism about the very idea of human rights morality, on the other, it is imperative to address deeper criticisms of the way in which human rights law is elaborated and understood by its practitioners and scholars. Otherwise, there is a risk of serious complacency: indulging in the wholesale disparagement of critics of IHRL while neglecting to inquire into whether IHRL itself is in good order.

This Article will explore the idea of saving human rights from the way in which they have been distorted by human rights law that has transgressed its proper bounds. Once that rescue operation has begun, human rights law might in turn be saved by bringing it into greater alignment with the human rights morality it is supposed to advance. This is, of course, a massive project that requires mobilising many different forms of expertise, ranging from philosophical expertise, to legal–doctrinal and social–scientific expertise. All that can be done here is to sketch a few lines of thought that might encourage others to lend a hand to this rescue mission.¹⁸

II. THE FORMATIVE AIM OF INTERNATIONAL HUMAN RIGHTS LAW: OR, NOT ESCHEWING THE FAT

In order to assess whether IHRL has been subverted from within, it is important to build up an understanding of the formative point of IHRL. In this regard, IHRL is no different from any other coherent department of law, each of which has its characteristic point that shapes its distinct identity as one department of law among others.

Some theorists, for example, argue that the point of contract law is to be understood as essentially that of recognising and upholding, by means of law, certain morally binding promises. The moral idea of a promise is the justifying point that lends coherence to this body of law.¹⁹ This, of course, does not mean that all promises should be legally enforceable—some may be too trivial to merit legal concern, hence the winnowing effect of the doctrine of consideration, while others may belong to a private domain that should be free of legal surveillance. Nor does it mean that only transactions that are properly classified under

18. As Jan-Werner Müller has stressed, “dealing with populism is not just a PR challenge; it is above all a question of policy content and a question about the adequacy of some of our political institutions.” Müller, *supra* note 11, at 202. Although I am somewhat skeptical about the general helpfulness of the notion of “populism” in explaining current widespread disaffection with existing international and national political orders, this article can be partly viewed as an attempt to give substance to Müller’s claim in the specific domain of human rights law and policy. *See generally id.*

19. For a version of this view, *see* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (2d ed., Oxford Univ. Press 2015).

the prelegal idea of promise should be recognised under contract law. There may be perfectly good reasons to extend the scope of contract, for instance by analogy, to other kinds of agreements. But it is to say that the idea of a promise is at the core of our understanding of a contract, and deviating excessively from this idea risks distorting contract doctrine, alienating it from its true purpose. Such distortion would occur, on this understanding, if contract doctrine were developed in line with an overarching justifying rationale, such as wealth maximisation.

The sort of analysis just hinted at for contract law can be replicated for other departments of law, such as criminal law. There, it could be argued, the formative aim turns on the idea of certain moral wrongs that there is a legitimate public interest in prohibiting, condemning, and punishing.²⁰ Accordingly, the criminal law tends to go astray, on this view, if it designates as crimes forms of conduct that do not fit the rubric of public wrongs of this kind. For example, when it proscribes conduct simply as a means of social control without regard to whether it is morally wrongful. Pursuing this line of thought, critics have plausibly argued that in recent decades both the United States and the United Kingdom have experienced rampant “overcriminalisation,” with legislators succumbing to the temptation to attach criminal sanctions to forms of behaviour that they perceive to be socially undesirable even if they are not clearly morally wrongful or do not in some other way fall within the class of public wrongs that is the criminal law’s proper concern.²¹

In previous writings, I have argued that a similar analysis can be carried out for IHRL.²² Specifically, I have defended the FAT, according to which the point of IHRL is that it is primarily concerned with giving effect to universal moral rights, insofar as it is appropriate for international law to do so, through the technique of assigning a uniform set of individual legal rights to all human beings. Now, the idea that the point of IHRL is given by a relationship with a background morality of human rights is a familiar one, but it has been disputed in recent years by prominent philosophers such as Martha C. Nussbaum, Charles R. Beitz, and Allen Buchanan.²³ They have sought to articulate the point of IHRL without invoking a background morality of universal rights, appealing instead to such notions as capabilities,

20. For a version of this view, see Sandra E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 CAN. J.L. & JURIS. 7, 8 (1998).

21. For a good example of such criticism, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 4–17 (Oxford Univ. Press 2008).

22. See Tasioulas, *supra* note 2.

23. See generally CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (Oxford Univ. Press 2011); ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* (Oxford Univ. Press 2017); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 273 (1997).

urgent interests, and norms enjoining a minimally decent standard of welfare and an egalitarianism of moral status. Elsewhere I have argued that such attempts fail, often collapsing back into some version of the FAT, especially when they are confronted with the question of the degree to which these other values need to be secured through IHRL.²⁴ In what follows, this Article shall simply take the correctness of the FAT as given.

It is important, however, to clarify two features of the FAT. First, it is not the profoundly mistaken view, which unfortunately is widely held, that IHRL is the only department of international law concerned with securing human rights morality, and that prior to IHRL's advent in the postwar era, international law did not concern itself with the protection of human rights.²⁵ On the contrary, many domains of international law, from humanitarian law to trade law, are vitally concerned with human rights. Indeed, if one were to ask which area of international law does most to safeguard human rights, the best answer may very well be the international law on the use of force and intervention, since war is probably the source of the gravest human rights catastrophes. Rather, the claim made by the FAT is that IHRL is concerned with human rights morality in a distinctive way: (a) giving effect to it is its *primary* aim, in that any other aims are appropriately subordinate or supplementary to this aim; and (b) it gives effect to it through a *specific legal technique* (i.e., by assigning individual legal rights to all human beings which impose corresponding obligations primarily on states).

The second misunderstanding to clear up is that the FAT does not assert that IHRL should simply mirror, in a simple-minded way, the background set of universal moral rights.²⁶ It does not require an isomorphism of human rights morality and law, such that the latter set of norms precisely match the former in terms of their normative content, as given by their associated duties and their bearers. Recall the proviso embedded in the FAT: IHRL should give effect to universal moral rights only *insofar as it is appropriate for international law to do so* by assigning universal legal rights to individuals. The proviso makes ample room for the fact that there are both principled and pragmatic constraints on giving effect to human rights morality through human rights law. Even if human rights morality requires a just distribution of domestic chores, for example, it is not the law's proper business to get involved with private matters of this kind. This is a principled constraint. Pragmatic constraints will arise when, even assuming that advancing a given human right is the law's business in principle, the adoption of legal means would be ineffective or even counterproductive.

24. See Tasioulas, *supra* note 2.

25. For an endorsement of this view, see BUCHANAN, *supra* note 23, at 121–30.

26. This so-called 'Mirroring View' is wrongly attributed to defenders of the FAT. *Id.* at 14–23. For a criticism of this interpretation, see Tasioulas, *supra* note 2.

In order to comply with these constraints, IHRL may justifiably diverge significantly in content from human rights morality, but the rationale for any such divergence will remain that of giving appropriate effect to the latter within these constraints. Sometimes IHRL will properly diverge by being narrower than human rights morality; sometimes it will diverge by being broader, e.g. when enshrining a right that promotes compliance with human rights morality, even though the content of that legal right does not correspond (even partially) with the content of a norm of human rights morality. I will come back to these considerations towards the end of the Article.

Although IHRL is subject to these constraints, it can nonetheless have significant value in enhancing compliance with human rights morality through a variety of means. First, it can offer a publicly accessible statement of the content of a given human right, one that can be discovered through formal legal reasoning rather than by means of more contestable moral reasoning. Among other things, this enables all the advantages of agreement on a set of human rights in spite of disagreement about the underlying normative case for acknowledging them as human rights. Second, insofar as there is disagreement about the proper interpretation of any given component of human rights morality, the law can help single out an authoritative interpretation that can coordinate expectations among actors with disparate views on the merits. Thirdly, human rights norms in morality may need to be rendered more determinate in specific ways in order to more effectively guide conduct. Lines need to be drawn, for example, regarding which forms of speech fall within the boundaries of the right to free speech and which (such as, perhaps, forms of hate speech) do not. Schemes for the allocation of obligations need to be settled upon in cases where a plurality of such schemes is, in principle, eligible. This requires a process of specification or *determinatio* that goes beyond the strict operations of reason, involving some kind of collective volitional act that chooses between rationally eligible alternative specifications of the content and allocation of the obligations associated with a given right.²⁷ Finally, a legal norm setting out a human right may also be backed up with one or more enforcement mechanisms, such as self-reporting by states bound by human rights, inquiries conducted by expert treaty bodies, formal criticism by other states or nonstate actors such as NGOs, judicial protection, economic sanctions, or military intervention.

The FAT is not only the most appealing account of the point of IHRL; it also has a strong foothold in the self-understanding of the postwar human rights culture. A striking illustration of this is the history of Article 27 of the Universal Declaration of Human Rights

27. On the idea of “*determinatio*,” see JOHN M. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 284–89 (2d ed., Oxford Univ. Press 2011).

which concerns, among other things, intellectual property rights.²⁸ Article 27 has the unique distinction of having generated a controversy, during the drafting stage, as to whether or not the rights it enumerates should have been included *at all*, as opposed to disputes about their precise formulation.²⁹ The nature of the disagreement pays eloquent tribute to the influence of the FAT. On the one hand, states from the common law tradition objected to the inclusion of intellectual property rights precisely because they did not see them as truly reflecting background moral rights, but rather as means of incentivising technological innovation so as to promote economic prosperity.³⁰ By contrast, states from the civil law tradition, which had long recognised the moral rights of authors, pressed for the inclusion of intellectual property rights.³¹ This is precisely the shape of debate one would expect among those who presuppose the truth of the FAT and therefore see IHRL as a vehicle for human rights morality.

If we construe the essential point of IHRL as that of subserving human rights morality through a specific institutional technique, as the FAT does, then we are well placed to resist recent arguments to the effect that human rights is “an elite discourse,” one that has little foothold in the “moral operating systems”—the day-to-day moral reasoning—of the vast majority of people across the globe.³² Pursuing this line of thought, Michael Ignatieff has recently argued that the moral thinking of most people revolves not around human rights but “ordinary virtues,” such as generosity, trustworthiness, resilience, and so on.³³ This is a hypothesis that may suggest an alarming divide between enlightened, human rights-loving elites ranged against the benighted, reptilian-brained mass of the populace. In fact, Ignatieff is sceptical about the moral powers of human rights discourse, setting greater store by the capacity of the ordinary virtues to challenge the oppressive and dehumanising forces at work in our globalising world.³⁴ But, in any case, Ignatieff’s entire setup thrives on the basis of the dubious equation of human rights with IHRL. It is hardly surprising that most people’s moral thinking does not draw heavily on a set of international legal norms geared primarily to the regulation of state conduct. It would be very peculiar were it otherwise. Human rights are

28. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27 (Dec. 10, 1948).

29. For a very helpful discussion, see generally Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121 (2009).

30. See *id.*

31. See *id.*

32. See MICHAEL IGNATIEFF, *THE ORDINARY VIRTUES: MORAL ORDER IN A DIVIDED WORLD* 24, 28 (Harv. Univ. Press 2017) (characterising human rights as “an ‘elite discourse’, the lingua franca of an influential but thinly spread stratum of educated, middle- and upper-middle-class intellectuals, university teachers, students, activists, journalists and bureaucrats.”).

33. *Id.* at 40, 150–54, 216–17.

34. See *id.* at 24, 200–23.

fundamentally moral norms, and the system of IHRL should be understood as subservient to them, in the manner outlined by the FAT. Interpreted as moral norms, human rights can be more readily found embedded in the “moral operating systems” of a striking number of people throughout the world irrespective of the place they occupy in any given social hierarchy.³⁵ Indeed, Ignatieff’s own investigations in moral ethnography revealed that all of the people he interviewed, no matter how humble their social status, believed they counted morally as individuals, that they have a “right to an equal voice,” that in virtue of their humanity they are not to be treated “like garbage.”³⁶ Even if they do not explicitly utter the expression “human rights” in making these assertions, it is not difficult to see that the thought that they are articulating may be accurately rendered in its terms, especially if they believe the forms of treatment they are demanding should be accorded to them simply in virtue of their status as human beings.

Once due credit is given to the thought that many people have an intuitive grasp of human rights morality—of moral rights possessed by all human beings simply in virtue of their humanity—it is no great stretch to suppose that their attitudes to IHRL are influenced, in broadly the manner suggested by FAT, by what they rightly or wrongly take to be the shape of that morality. Hence, for example, common expressions of suspicion or incredulity towards novel human rights, such as the rights to annual paid leave, internet access, or same-sex marriage. There is no need to take these doubts as manifesting a repudiation of the very idea of human rights, as opposed to scepticism that supposed rights of this kind deserve to be classed alongside paradigmatic human rights such as the rights against slavery and torture. If IHRL is commonly perceived to deviate excessively from the FAT, this may help explain some of the popular backlash encountered by the former. But leaving these sociological speculations aside, this Article turns now to the question posed at the beginning: Is there any reason to suppose that IHRL really does deviate in any significant way from the demands of the FAT?

Without in any way purporting to give an exhaustive accounting of the ways in which IHRL may have strayed from the FAT, the rest of this Article will highlight two important types of deviations that have in recent years subverted IHRL from within:

- (a) A failure adequately to recognise and follow through on the idea that IHRL is primarily concerned with giving effect to universal moral rights—which crucially have associated obligations—rather than either human interests generally or the full gamut of political values (Part III); and

35. *See id.* at 24, 28.

36. *Id.* at 198, 201. For a complete presentation of my skepticism about Ignatieff’s claims, see John Tasioulas, *Making Human Rights Ordinary Again: A Response to Ignatieff*, KING’S C. L.J. (2018).

- (b) The enthusiastic promotion of both the legalisation and, more specifically, the judicialisation of human rights, as if these institutional mechanisms were necessitated by a commitment to human rights, without due regard to the efficacy or legitimacy of pursuing these methods of institutionalising human rights (Part IV).

These two deviations are not exhaustive of the ways in which IHRL deviates from the FAT, nor does this Article purport to give anything approaching an exhaustive treatment of each of these points.³⁷

III. CONFUSING HUMAN RIGHTS WITH INTERESTS AND VALUES

According to the FAT, IHRL must be assessed in terms of the touchstone of a background morality of human rights. Teasing out the content of this background morality is the vital starting point in determining whether or not IHRL is aligned with its true purpose. What, then, is the content of the guiding idea of universal moral rights, moral rights possessed by all human beings simply in virtue of their humanity? This is, of course, an immense topic. This Article will focus on only one vital aspect: the fact that moral rights are associated with obligations, which are their normative content. In speaking about human rights, one is not simply appealing to a universal human interest, such as freedom from pain, or the interests in autonomy, knowledge, or friendship. Nor is one simply appealing to some other kind of deontic value, such as human dignity. Both universal human interests and human dignity are values that lie at the foundations of human rights; they are the underlying values that ground human rights claims. But they are not to be identified with human rights. Human rights only exist when the values of universal interests and human dignity are sufficient, in the case of all human beings, to justify obligations to treat each of them in certain ways.³⁸ That human rights involve counterpart obligations is significant in at least four ways.

37. Other important deviations include the tendency to associate a genuine commitment to human rights morality with a robust commitment to military intervention in the case of their extensive violation and with an uncompromising attitude to the punishment of individuals responsible for gross human rights violations. For helpful discussions of these areas of IHRL overreach, among others, see generally HURST HANNUM, *RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH* (Cambridge Univ. Press 2019), especially chapters 2 and 8. Hannum's analysis, however, is generally encumbered by the lack of a developed account of the principles determining what the formative aim of IHRL should be and, more specifically, by the lack of an appreciation of the significance of human rights morality in such an account.

38. For an elaboration of my account of the foundations of human rights morality, see John Tasioulas, *On the Foundations of Human Rights*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* (Rowan Cruft et al. eds., 2015).

First, obligations are categorical. Whether one is bound by them or not does not depend on one's attitudes or desires or projects. One is bound by them irrespective of how one happens to be motivated. A person cannot simply evade being subject to an obligation through the expedient of changing their profile of desires, goals, or preferences. Whether one has a reason to eat now or later is partly a function of one's desires. But that one has an obligation to provide food for one's dependent children obtains independently of one's desires or other subjective attitudes towards doing so.

Second, obligations are robustly resistant to being defeated by, or "traded off" against, other considerations, including other obligations. If we are simply talking about practical reasons to do or refrain from doing something, then reasons are habitually defeated by other reasons. One may have a reason to get out of bed early in the morning, but this could easily be defeated by countervailing reasons, such as the pleasantness of lingering a while longer in bed. But if one has promised to attend an early morning meeting that one can only do by getting up earlier than usual, then one has an obligation to do so, one that cannot be defeated by the reason to stay in bed because it would be pleasant. Of course, sometimes even obligations may be defeated, for example, in emergency cases, although there is an interesting question whether there is a class of moral obligations that are absolute in force, hence never subject to defeat. But, by their very nature, the instances where obligations are defeated will be exceptional. It is important, however, that we do not conflate the resistance of obligations to being defeated with the Dworkinian idea that rights are "trumps" against the common good.³⁹ This latter thesis embodies a conception of the common good—most likely, a utilitarian one—that does not incorporate human rights as part of its content, and construes rights as standardly liable to collide with the common good so construed.⁴⁰ Both assumptions involve grave distortions.

Third, the failure to comply with an obligation is wrongful. Someone who violates an obligation, without justification or excuse, is properly blameable by others and by himself (i.e., he has reason to feel guilty). Contrast failing to further another person's interests, or even acting in a way detrimental to their interests; doing either of those things is not necessarily wrongful. There is no wrong committed if a person fails to imperil their own life in order to save another's, unless there is a special relationship between the two. Equally, no wrong is committed if in a fair competition one drives another out of business or beats them for a coveted job.

39. See John Tasioulas & Effy Vayena, *The Place of Human Rights and the Common Good in Global Health Policy*, 37 THEORETICAL MED. & BIOETHICS 365, 366 (2016).

40. See *id.* at 375–80.

Finally, there are some obligations that are not associated with rights, for example, the “imperfect obligations” of charity and mercy.⁴¹ However, there is a subset of obligations that are *directed* in character, insofar as they are *owed to* a right holder. These rights-involving obligations (or, “perfect obligations”) have traditionally been thought to constitute the demands of *justice*. These demands *ceteris paribus* enjoy a certain priority over other ethical considerations, including moral obligations that have no associated right holder. The subset of these duties of justice that are owed to all human beings simply in virtue of their humanity is designated as *human rights*. It is a difficult question what explains the directedness of such rights-involving duties, but one plausible suggestion is that it arises from the nature of the justification of the relevant obligations.⁴² This justification is individualistic in nature, appealing to some interest or value inhering in the right holder, rather than in a collectivity. The exclusive origin of the perfect, rights-involving, obligation in some features (e.g. interests, dignity, etc.) possessed by the right holder explains why a violation of the obligation *wrongs* the latter in particular and provides a justified ground for feelings of *resentment*, not just blame.

The key premise to be extracted from this sketch is that if IHRL is to be faithful to its point, it must give proper expression and effect to universal moral rights that involve obligations in this sense, and not simply universal interests or values like human dignity. However, a persistent flaw of contemporary human rights discourse is the tendency to ignore the overarching demand that IHRL should be regulated by a background morality of human rights. One manifestation of this is the widespread anxiety about human rights inflation. This is not so much the vague concern that there are “too many” human rights, but rather the idea that there is a troubling corrosion of the idea of human rights because the distinction between a universal human interest and a universal moral right is too often overlooked by IHRL.⁴³ In other work, I have offered a general account of the foundations of human rights, which will only be sketched very roughly here. Human rights norms in morality are to be conceived as grounded in two basic kinds of concerns: human interests and human dignity.⁴⁴ Human dignity relates to the equal intrinsic value possessed by all human beings simply as members of the human species.⁴⁵ Universal human interests refer to the universal ingredients of human well-being. These are an irreducible plurality of values, such as accomplishment, friendship, knowledge, and play, which are objective, in that their value is not conditional on their being objects of desire or

41. Tasioulas, *supra* note 38, at 61–62.

42. *See id.*

43. *See generally* JAMES GRIFFIN, ON HUMAN RIGHTS (Oxford Univ. Press 2008).

44. *See* Tasioulas, *supra* note 38, at 50–56.

45. *Id.* at 53–56.

preference on the part of those for whom they are good.⁴⁶ Then there is the difficult matter of how one gets from these underlying values (universal interests and human dignity) to rights involving obligations. Three key considerations here are the following: (a) the putative obligation must be possible to comply with; (b) the obligation must not impose excessive burdens on duty bearers and others; and (c) the obligations associated with a given right must satisfy a holistic constraint of being generally consistent with other rights.⁴⁷ All three of these elements require complicated explication, but it is worth observing here that the reference to “burdens” in (b) is not simply to be explicated in terms of such factors as market price or psychological burdens due to immoral (e.g., homophobic or racist) commitments, since this would render the existence of human rights hostage to features of the world that involve moral flaws.⁴⁸ Unfortunately, much of contemporary IHRL discourse fails to heed these considerations, damaging its ability to realise its formative aim of giving effect to human rights morality.

This was strongly borne in on me in the course of working as consultant to the World Bank on a project on minimum core obligations and their relevance to the right to health in particular.⁴⁹ Taking the human right to health as a point of focus is especially illuminating, in this context, because it resonates with the plausible claims of human rights advocates, such as Alston,⁵⁰ that an effective response to the populist backlash against human rights must accord socioeconomic rights, in whose provision the general populace might more readily see itself as having a stake, equal visibility alongside more familiar civil and political rights, which are often (wrongly) conceived as predominantly of benefit to minority groups, criminals, refugees,

46. *Id.* at 50–53.

47. *Id.* at 56–63.

48. *Id.* at 60.

49. See JOHN TASIIOULAS, MINIMUM CORE OBLIGATIONS: HUMAN RIGHTS IN THE HERE AND NOW 1–3 (World Bank 2017), <https://openknowledge.worldbank.org/bitstream/handle/10986/29144/122563-WP-Tasioulas2-PUBLIC.pdf?sequence=1&isAllowed=y> [<https://perma.cc/P7EV-977D>] (archived Sept. 11, 2019) [hereinafter TASIIOULAS, MINIMUM CORE OBLIGATIONS]; JOHN TASIIOULAS, THE MINIMUM CORE OF THE HUMAN RIGHT TO HEALTH 1–2 (World Bank 2017), <https://openknowledge.worldbank.org/bitstream/handle/10986/29143/122561-WP-Tasioulas-PUBLIC.pdf?sequence=1&isAllowed=y> [<https://perma.cc/F5VL-CKYM>] (archived Sept. 11, 2019) [hereinafter TASIIOULAS, RIGHT TO HEALTH]; see also James G. Stewart, *New Symposium – John Tasioulas’ Minimum Core Obligations in Economic, Cultural and Social Rights*, JAMES G. STEWART BLOG (May 10, 2018), <http://jamesgstewart.com/new-symposium-john-tasioulas-minimum-core-obligations-in-economic-cultural-and-social-rights/> [<https://perma.cc/VXS4-J4XM>] (archived Aug. 31, 2019).

50. See Alston, *supra* note 3, at 9 (explaining that economic and social rights must be part of the fight for human rights).

terrorists, and others.⁵¹ The standard interpretation of the human right to health, however, is disfigured by two forms of bloating arising from the failure to heed the vital distinction between interests and rights.

The first form of bloating pertains to the normative scope of the human right to health (i.e., the subject matter of this right that individuates it as one distinct human right among other human rights). The human right to health is standardly treated as not only encompassing the provision of (certain kinds of) medical treatment, public health measures, and social determinants of health.⁵² It is also taken to include any right that bears on the interest in health, including, the right to education, to work, to political participation, the right not to be tortured or discriminated against, and so on.⁵³ This interpretation is doubly problematic—it renders the human right to health an unwieldy standard of assessment, since compliance with it involves compliance with a large schedule of other rights, and it undercuts the very enterprise of having an enumerated list of specific, largely nonoverlapping, rights since it turns out that one of these rights incorporates virtually all of the others. What underlies these difficulties is a failure adequately to distinguish the right to health from the interest in health. The former is one right among others; the latter is a universal interest that underlies many rights, among which is the right to health (the same is true of an interest like autonomy, which also lies at the basis of many human rights, hence cannot serve as the basis for individuating their normative scope).⁵⁴ The proper way of individuating distinct human rights is not simply by reference to the profile of interests they serve (since these will often be very similar in the case of quite different rights) but by reference to the subject matter

51. See TASIIOULAS, MINIMUM CORE OBLIGATIONS, *supra* note 49; TASIIOULAS, RIGHT TO HEALTH, *supra* note 49.

52. U.N. Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, ¶ 2, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR General Comment 14].

53. See *id.* at ¶ 3 (“The right to health is closely related to and dependent upon the realization of other human rights . . . including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.”). A leading global health law scholar has found this characterisation of the scope of the human right to health too limited, and has suggested the inclusion of “gender equality, employment, and social inclusion.” LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 257 (Harv. Univ. Press 2014). Meanwhile, a “Fact Sheet” jointly issued by the Office of the UN High Commissioner for Human Rights and the World Health Organization has, in similar terms, described the right to health as incorporating a range of other rights, including gender equality and freedom from torture and other cruel, inhuman, or degrading treatment of punishment. *The Right to Health: Fact Sheet No. 31*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS & WORLD HEALTH ORG. 3 (June 2008), <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> [https://perma.cc/A4QT-JNZB] (archived Sept. 17, 2019).

54. See Tasioulas & Vayena, *supra* note 39.

of the obligations associated with them.⁵⁵ In the case of the human right to health, these obligations are best interpreted as relating to medical treatment, public health measures, and social determinants of health.⁵⁶ On this view, therefore, torture, chronic unemployment, deprivation of basic education, and gender discrimination can all be human rights violations that have a severely negative impact on health without also thereby constituting violations of the human right to health. Nor is this tendency confined to economic, social, and cultural rights, as the Human Rights Committee's recent General Comment No.36 on the right to life amply illustrates.⁵⁷ The committee interprets this right very expansively, as including a right to enjoy a life with dignity (¶ 3), with the result that its content is extensively "informed by other human rights," including rights in the International Covenant on Economic, Social, and Cultural Rights (¶ 2).⁵⁸ However, the committee is less than forthcoming in articulating a principled basis for when the right to life incorporates the content of other human rights. It also does not adequately explain how the extensive overlaps with socioeconomic rights, such as the rights to health and housing, that it proposes are compatible with its claim that the right to life is nonderogable "even in situations of armed conflict and other public emergencies which threatens the life of the nation."⁵⁹ Again, the suspicion arises that the right to life is being individuated here by reference to the generalised interest in a "life with dignity," rather than by anything with the normative shape of a right.⁶⁰

The second way in which the human right to health is bloated relates to its content (i.e., the content of the obligations associated with it). This is so even if the scope of its normative content is restricted to obligations whose subject matter pertains to medical treatment, public health measures, and relevant social determinants of health. This content is standardly made to encompass elements that it is not remotely plausible to claim are owed to all because, in virtue of entrenched resource constraints, it is not possible, or it is unduly

55. *Id.* at 369–73.

56. *Id.*

57. See U.N. Human Rights Comm., *General Comment No. 36*, art. 6, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

58. See *id.* at ¶ 26. The extent of the overlap with socio-economic rights is significant. "The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence, pervasive traffic and industrial accidents, degradation of the environment, pervasive traffic and industrial accidents, deprivation of land, territories and resources of indigenous peoples, the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness."

59. *Id.* at ¶ 2.

60. *Id.* at ¶ 3.

burdensome, to impose them as obligations. Consider, again, the Economic, Social and Cultural Rights Committee's General Comment 14 on the human right to health,⁶¹ and focus on what it says about the special category of minimum core obligations. These are supposed to be obligations of immediate effect, unlike other obligations associated with socioeconomic rights they are not subject to progressive realisation over time, and also obligations that the General Comment interprets (wrongly, in my view) as nonderogable.⁶² The minimum core is interpreted as including elements, such as the adoption of "a national public health strategy and plan of action on the basis of epidemiological evidence" that, as leading commentators have pointed out, the richest and most advanced societies would struggle to meet.⁶³ In the judgment of John Tobin, author of a meticulous study of the right to health in international law,

the vision of the minimum core obligations of states under the right to health, as advanced by the ESC Committee, is disassociated from the capacity of states to realize this vision. It simply does not offer a principled, practical, or coherent rationale which is sufficiently sensitive to the context in which the right to health must be operationalized.⁶⁴

It is hardly surprising, in light of the kind of approach detailed above, that critics of the policy significance of the human right to health have dismissed it on the grounds that it represents "a claim on funds that has no natural limit, since any of us could get healthier with more care."⁶⁵ This criticism would hit its intended target if the expansive interpretation of human rights as interests were defensible in terms of the FAT, but it is not. Once the right is identified with the underlying interest which it serves, what is left is a supposed "right" that no longer has content with the shape and force of an obligation; it is to a large extent unfeasible; and it is readily and systematically overridden by competing considerations, given an environment of multiple competing claims on scarce resources.⁶⁶ In defiance of the FAT, it increasingly alienates IHRL from its normative roots in human rights morality, breeding scepticism about human rights law that may

61. CESCR General Comment 14, *supra* note 52.

62. *See id.*

63. *See id.*

64. JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* 240 (Oxford Univ. Press 2012).

65. William Easterly, *Human Rights are the Wrong Basis for Healthcare*, *FIN. TIMES*, Oct. 12, 2009, <http://www.ft.com/cms/s/0/89bbda2-b763-11de-9812-00144feab49a.html#axzz3ym5AIA9w> [<https://perma.cc/3WMJ-76HF>] (archived Sept. 11, 2019).

66. *See* TASIOLAS, *RIGHT TO HEALTH* *supra* note 49, at 8.

end up becoming, by a foreseeable if not justifiable process of blowback, scepticism about human rights morality itself.⁶⁷

A human rights doctrine that exemplifies the concerns expressed here is that of proportionality, a doctrine whose influence has expanded beyond its origins in German theology to German constitutional law and on to human rights legal thinking more generally, even if the United States has remained largely impervious to its otherwise extensive influence.⁶⁸ This doctrine involves a very expansive interpretation of human rights, such that they are equated with virtually any legally cognisable interest an individual may possess.⁶⁹ Having inflated the scope and content of human rights in this way, it then asks whether a measure that infringes this wide right might nonetheless be justified on a proportionality analysis that takes into account valid purposes served by the infringement.⁷⁰ This Article's discussion will be focused on the very first step of the proportionality analysis—the highly expansive interpretation of the content of human rights with which it starts.

Although proponents of the proportionality approach may use the words “obligation” or “duty,” proportionality exerts great pressure on the key idea that human rights are rights as opposed to interests or values.⁷¹ As the leading theoretical proponent of the doctrine, Robert Alexy, has recognised, on the proportionality view fundamental rights are “ubiquitous,” just because legally cognisable interests of individuals are ubiquitous.⁷² But the price of this ubiquity is a drastic

67. For a helpful discussion of the ways in which expansion in the content of IHRL can undermine their effectiveness, see Yuval Shany, *The Universality of Human Rights: Pragmatism Meets Idealism*, THE JACOB BLAUSTEIN INST. HUMAN RIGHTS LECTURE (July 21, 2018), <https://www.jbi-humanrights.org/BlausteinLecture2.Online.24July18.pdf> [<https://perma.cc/S5B8-RW6W>] (archived Aug. 31, 2019).

68. See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 *RATIO JURIS* 131, 132 (2003).

69. See *id.* at 135.

70. There are different formulations of the doctrine, but one that has achieved canonical status proceeds by (1) identifying a legitimate aim served by some measure; (2) asking whether the means adopted are effective in achieving that end; (3) whether they have the smallest negative impact on other rights and interests; and (4) asking whether, all things considered, the pursuit of the aim through these means is reasonable having regard not only to the harm done as a side-effect, but also to the harm that would ensue by not pursuing the aim at all (or through these or comparable means). There are various criticisms to be made of these elements, but my focus is on a prior step in proportionality analysis: the tendency to identify rights with interests and hence to be quick to identify all sorts of measures as interferences with rights that need to be vindicated via proportionality analysis. For a discussion of proportionality, see John M. Finnis, *Judicial Power: Past, Present and Future* 18–19 (Oxford Legal Studies, Research Paper No. 2/2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710880 [<https://perma.cc/H9JU-RRE4>] (archived Sept. 1, 2019).

71. See Alexy, *supra* note 68, at 133.

72. *Id.*

demotion in significance.⁷³ As Mattias Kumm, another of the leading defenders of proportionality, has written: “[A] rights-holder does not have very much in virtue of having a right An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified.”⁷⁴ What is lost here is the idea that human rights involve obligations, because obligations are not ubiquitous and of their nature generally resistant to being overridden by countervailing considerations.⁷⁵ In forthrightly setting out manifest implications of the proportionality doctrine, Alexy and Kumm inadvertently provide us with its *reductio ad absurdum*.

To elaborate somewhat on this last point, it is important to distinguish three real or apparent conflict scenarios that need to be accommodated by human rights morality, and a human rights law that is properly responsive to it. The first scenario is that in which a given human right *appears* to be in conflict with another consideration, including perhaps another human right, but this appearance is false. One reason why there is no conflict may be that the supposed conflicting consideration falls within the scope of an exception built into the specification of the relevant human right’s associated obligations. It is an open question, of course, whether there are any human rights that identify wrongs that are not subject to exceptions. The obligations associated with the human right not to be tortured are often interpreted in this way.⁷⁶ The criminal who has been justly sentenced to a term of imprisonment for having committed murder should be treated as falling within an exception to the right to liberty. His right to liberty is not in conflict with the demands of retributive justice which justify the imprisonment.⁷⁷ Instead, the obligation associated with his right to liberty is subject to certain exceptions, and one of them is an exception catering for loss of liberty based on the infliction of a just punishment.⁷⁸ Such a criminal’s *interest* in liberty is

73. See *id.* at 134 (citing JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 1, 256 (William Rehg trans., Cambridge Polity 1996)).

74. Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY* 139 (George Pavlakos ed., Hart Publishing 2007).

75. See *id.*

76. As a matter of law, Article 7 of the International Covenant on Civil and Political Rights, which prohibits governments subjecting anyone “to torture or to cruel, inhuman or degrading treatment or punishment,” is standardly interpreted as exceptionless. See International Covenant on Civil and Political Rights, March 1976, 99 U.N.T.S. 171.

77. See GRIFFIN, *supra* note 43, at 57–82. This is the leading contemporary on philosophical discussion of human rights, but it manifests a tendency to identify human rights with our interest in personhood, downplaying the vital role of obligations in specifying the content of human rights. This, I have argued, has unfortunate consequences for Griffin’s account of the grounding of human rights and their role in practical conflicts. John Tasioulas, *Taking Rights out of Human Rights*, 120 *ETHICS* 647, 672–78 (2010).

78. See Tasioulas, *supra* note 77, at 673–78.

undeniably set back in virtue of the just sentence imposed upon him—that setback to interests is, after all, a crucial part of the point of punishing him—but his *right* to liberty is unaffected.⁷⁹ This is something that cannot easily be said on the proportionality analysis, which tends to reduce the right to liberty to the criminal's interest in liberty, and therefore is compelled to regard the just sentence as an infringement—a justified violation—of that right.⁸⁰

Justified violations, or infringements, of a right represent the second kind of conflict scenario. They involve cases where the obligation associated with a right is engaged but its normative force is overridden or at least counterbalanced by another consideration, whether a human right or some other value.⁸¹ Again, it is an open question whether an obligation associated with a given right is defeasible in this way or, instead, possesses absolute force and therefore is never open to being justifiably overridden.⁸² Almost by definition, the occurrence of cases of infringement will tend to be rare, arising in emergency situations rather than the ordinary course of life.⁸³ Reverting to the human right to liberty, an example of an infringement of a human right would be a situation in which, in order to avert a massive terrorist attack, a large number of people have to be locked in a building for a whole day in order to prevent the launch of that attack by a terrorist reasonably suspected to be hiding in that building.⁸⁴ Here the rights to liberty of the innocents in the building have been violated, but justifiably so. That they have been violated, in contrast with the case of the criminal sentenced to a just punishment, is shown by the fact that they, unlike him, deserve an apology and perhaps even compensation for the permissible violation of their rights. The obligations to apologise and to compensate are what have been termed “remainders” of the initial obligation not to interfere with their liberty. Moreover, they, unlike the criminal, have good reason to seek to evade the restriction of their liberty, if they could do so in such a way as to not unduly risk imperiling the measures taken to foil the terrorist attack.

Finally, the third scenario is that in which is a genuine conflict between the human right and the other practical consideration, but there is no justification for overriding the obligation associated with the right. Failure to comply with the right in such a case is a straightforward violation of the human right. The only ameliorating factors here may be considerations that tend to excuse the rights violator, such as the fact that they were provoked or acted in ignorance,

79. *See id.*

80. *See* GRIFFIN, *supra* note 43; Tasioulas, *supra* note 77.

81. *See* Tasioulas, *supra* note 77.

82. *See id.*

83. *See id.*

84. *See id.* at 673.

or that justify extending merciful treatment to them, such as the fact that they have repented of their wrongdoing.

An aspect of the poverty of the proportionality analysis is that, in conflating rights with interests in its very first step, it fails to accommodate this threefold scheme in the right way, being too ready to find conflicts where there are none and, as a result, massively inflating the category of infringements.⁸⁵ But this is inconsistent with the fact that the normative content of rights is given by their associated obligations and that it belongs to the very idea of such an obligation that it is robustly (if not absolutely) resistant to being overridden.⁸⁶ Or, as T.M. Scanlon has put it, “interests are balanced, rights are re-defined.”⁸⁷ In other words, while interests, considered purely as interests, pervasively come into conflict among themselves and with other considerations and have to be traded off against each other in ordinary practical deliberation, rights have as their content obligations, and serious thinking about the latter has to focus on specifying their content in such a way that they are generally resistant to being overridden, which may indeed involve redefining those obligations over time.⁸⁸

It is not difficult to see how continual gnawing away at the connection between IHRL and human rights morality can lead to general disaffection with the former. One way is through people coming to feel that the FAT, which they believe ought to regulate the development of IHRL, is not being complied with by the latter. Such a possibility is not farfetched if, as suggested above, elements of human rights morality figure strongly in the moral consciousness of ordinary people, together with the common-sensical belief that the point of IHRL is to give appropriate expression and effect to this morality.⁸⁹ But a more indirect path to discontent makes less ambitious assumptions about implicit moral knowledge. For, even if ordinary people are persuaded that the basic interests discussed above are their rights, it is inevitable that the aspirational and insatiable character of

85. Interestingly, Article 19(2) of the German Basic Law protects the “essence” of a basic right from being qualified. See GRUNDGESETZ [GG] [BASIC LAW] art. 19(2) (Ger.). But this expedient of identifying a non-derogable core leaves out the central case, in which the obligation is robustly, but not absolutely, resistant to trade-off.

86. See FRANCISCO URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* (Cambridge Univ. Press 2017); Guglielmo Verdirame, *Rescuing Human Rights From Proportionality*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS*, *supra* note 38; Finnis, *supra* note 70.

87. T.M. Scanlon, *A Framework for Thinking about Freedom of Speech, and Some of its Applications 5* (Oct. 26, 2018) (unpublished manuscript) (on file with the University of California, Berkeley School of Law).

88. For reasons of the kind sketched above, I have been encouraged by, and learnt from, the following recent works on proportionality: Finnis, *supra* note 70; URBINA, *supra* note 86; Verdirame, *supra* note 86 (criticizing proportionality as a subversion of human rights morality).

89. See Tasioulas, *supra* note 2, at 14.

such demands will lead those interests to go systematically underfulfilled. This, after all, is the clear message of the proportionality analysis in conceding that “a rights-holder does not have very much in virtue of having a right.”⁹⁰ It can be anticipated that those who have had their hopes raised about lavish entitlements to health care, education, or work opportunities will be liable to fall victim to intense frustration when these entitlements are not remotely satisfied, followed by anger and eventually cynicism about the whole enterprise of IHRL, and perhaps even about human rights morality itself.⁹¹

Various lines of response on the part of those who are sympathetic to the tendency to identify rights with interests can, of course, be anticipated. Consider here two broad responses that concede the substance of the critique that the Article has been elaborating. The first kind of response, which is broadly technocratic in character, can be put in the mouths of the friends of the proportionality doctrine. Accepting the categorical difference between universal interests and human rights morality, they might nonetheless defend proportionality as a useful judicial heuristic device or decision procedure. This would be to contend that, although it does not closely reflect the logic of human rights proper, nonetheless proportionality is the procedure best calculated to secure superior human rights outcomes overall in judicial adjudication, thereby meeting the demands of the FAT. Much here will depend upon whether the vaunted advantages really are in the offing, something regarding which it is possible to be doubtful, especially when it comes to the limits of judicial expertise in the domain of socioeconomic policy within which so-called welfare rights must operate. But even if these doubts could be assuaged, there would still be a problem of legitimacy confronting the proposal to confer such broad-ranging discretion upon judges in human rights adjudication.⁹²

The second response, call it the vanguard response, might be attributed especially to human rights activists operating beyond the strict confines of legal adjudication. The response is that the distinction between interests and rights is correct as a matter of strict moral logic,

90. Robert Alexy, *Political Liberalism and the Structure of Rights*, in *LAW, RIGHTS AND DISCLOSURE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY* 139 (George Pavlakos ed., Hart Publishing 2007).

91. For a powerful expression of this sort of theme, see Onora O’Neill, *The Dark Side of Human Rights*, 81 INT’L AFF. 427, 429–33 (2005). However, O’Neill imposes a more stringent demand that not only must there be obligations associated with human rights in morality, but that these obligations must be allocable by pure moral reasoning, without any kind of institutional fiat. This leads her to reject the bona fides of socioeconomic rights as moral human rights, since the allocation of the positive obligations associated with them typically does demand some institutional mechanism. I have argued against this overly austere view. See John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?* 75, 80–82 (Thomas Pogge ed., Oxford Univ. Press 2007).

92. See *infra* Part IV.

but neglects the advantages of treating human rights as important human interests when it comes to fashioning and deploying a politically effective rhetoric. Only such an ambitious, aspirational rhetoric, the response goes, will galvanise ordinary people to further the interests of their fellow citizens and others; only such a rhetoric will set a high enough bar against which to judge official action, given the inveterate tendency of governments to fall short of the objectives they have been set. This response too is to be judged empirically on whether it achieves its advertised payoffs, rather than breeding cynicism about human rights law as embodying practically meaningless utopian ideals that give with one hand only to take with the other. But, beyond this outcome-oriented concern, there is also an inherent strain in advancing the human rights cause by means of literally overblown claims that deviate from the actual truth about human rights. After all, the strategy advocated for involves misleading people about their human rights in order to achieve a supposedly improved human rights outcome.

If, as this Article has urged, IHRL is disciplined in line with the FAT, then we have to jettison—happily, rather than with regret—the idea that IHRL is a blueprint for utopia. We have to give up the idea that IHRL is a means for pursuing all of the moral and political ideals we properly recognise. Instead, IHRL is primarily aimed at advancing human rights morality through a distinctive legal technique. But human rights morality does not exhaust the whole of morality, nor even everything that is most important in morality. In addition to universal moral rights, there are moral rights that we possess not simply in virtue of our humanity, but in virtue of our membership of particular communities, call them citizenship or membership rights.⁹³ These rights form a natural template for thinking about legally enshrined constitutional rights within a given polity.⁹⁴ There are also moral rights possessed by groups, such as the right to national self-determination, and also rights held by animals. In addition to these rights, morality includes obligations that are not associated with rights, such as obligations of charity or mercy, which have an important place in practical deliberation despite not being claimable by any of their beneficiaries as a matter of right. Finally, it includes supererogatory ideals—such as ideals of excellence, heroism, or love—that there is good reason to pursue but which are not obligatory.⁹⁵ It in no way undermines the distinctive significance of human rights to observe that they do not exhaust the whole field of moral concern; on

93. See DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE (Oxford Univ. Press 2007) (providing a helpful exploration of the idea of citizenship rights).

94. See *id.*

95. See *id.* at 14–15.

the contrary, it is essential to registering that distinctive significance.⁹⁶

Fortified with this antiutopian insight, one is better equipped to defend a reformed IHRL against leading critics from both the right and the left of the political spectrum. These are influential critics who in no way fit Alston's and Zeid's characterisation of the populist opponents of human rights as nationalists, xenophobes, and misogynists.⁹⁷ One double-barreled line of objection from the right can be found in Eric Posner's book, *The Twilight of Human Rights Law*.⁹⁸ Posner's first objection takes its rise from the tendency of IHRL to proliferate rights and uncontrollably expand their content.⁹⁹ This tendency, Posner argues, deprives IHRL of its ability effectively to guide the conduct of states or, therefore, to provide a determinate yardstick for subjecting state policy to critical evaluation.¹⁰⁰ Putting a somewhat cynical spin on this phenomenon, he observes that since human rights demands are numerous and impossible to comply with immediately as a complete set, a state can always plausibly claim to postpone compliance with any given right (or a given obligation associated with a right) in order to comply with another right (or its associated obligation).¹⁰¹ But, even if this has some strength against the current expansionist tendencies of IHRL, the proper answer is to bring such law into line with the FAT, and to develop certain doctrines more fully, such as those of progressive realisation and minimum core obligations, which offer guidance with respect to the prioritisation of human rights demands in the face of resource scarcity.¹⁰² Posner's second line of objection is that, to the extent that IHRL does provide guidance when it comes to matters of development, development economics is a far superior source of guidance than IHRL:

If the goal is to help people in poor countries, and limited funds are available, then those funds should be used in ways that do the most good, not to compel the

96. This has been a persistent theme in the important work of Onora O'Neill. For example, see JUSTICE ACROSS BOUNDARIES: WHOSE OBLIGATIONS? (Cambridge Univ. Press 2016).

97. Alston, *supra* note 3; Al Hussein, *supra* note 4.

98. See generally ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (Oxford Univ. Press 2014).

99. See *id.* at 32–38.

100. See *id.*

101. Compare POSNER, *supra* note 98, at 92–93 (“The dilemma for human rights enforcers is that they cannot demand that states comply with all rights perfectly, but if they do not, then they have no basis for criticizing a country’s decision to allocate more resources to satisfy one rather than another.”), with HANNUM, *supra* note 37, at 57–58 (arguing that the proliferation and expansion of human rights claims often reflects an attempt by governments hostile or indifferent to human rights “drown” the project of IHRL by overburdening it). For a more moderate version of this objection, see Neuman, *supra* note 10, at 51.

102. See POSNER, *supra* note 98, at 92–93.

country to submit to an abstract formulation of human rights that Westerners imagine are right for everyone in the world.¹⁰³

Crudely put, if our goal is to maximise utility in a less developed country, mosquito nets are generally superior to lawsuits.¹⁰⁴ But notice that Posner simply appears to assume that maximising utility (“do the most good”), and its customary proxy, economic growth, is the ultimate objective of development policy.¹⁰⁵ Whether or not one believes that there is a requirement to maximise utility—whether or not one is a utilitarian of some sort—according to the FAT this is decidedly not the aim of IHRL. Human rights law should secure human rights even if, as is often the case, doing so fails to maximise aggregate utility (e.g., because it rules out forms of surveillance or interrogation that would maximise general welfare but violate the right to privacy or the right not to be tortured). Human rights are a vital component of an account of sustainable development, but scarcely the whole of it.¹⁰⁶ If one is clearer about the important, but circumscribed, objective of IHRL, such critics can be put on the back foot. The yardstick they employ to measure the performance of IHRL can be challenged, and this will force critics like Posner to articulate and defend their own normative assumptions, something that they typically avoid doing (often on the unhelpful grounds that they are not advancing “philosophical” theses).¹⁰⁷ Unfortunately, international human rights lawyers have not been in a good position to do this because they have tended to embrace the idea that IHRL is about the promotion of interests generally, collapsing the human rights system into what Posner calls “an undifferentiated welfarism,” thereby gifting him precisely the opening his scepticism needs to question the efficacy of IHRL.¹⁰⁸

Something similar goes for critics from the left. Writers like Samuel Moyn, for example, have explicitly attributed to IHRL the aim of constructing utopia—the last utopia, in the words of his well-known book—a replacement for the postwar collapse of socialist and communist ideals.¹⁰⁹ They go on to point out that IHRL has come

103. *See id.* at 146.

104. *See id.* at 146–47.

105. *See id.* at 145–48.

106. U.N. High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development 9 (May 30, 2013), <https://sustainabledevelopment.un.org/content/documents/8932013-05%20-%20HLP%20Report%20-%20A%20New%20Global%20Partnership.pdf> [<https://perma.cc/HTU9-R29T>] (archived Sept. 13, 2019).

107. *See generally* POSNER, *supra* note 98.

108. *Id.* at 94 (“The more human rights there are, and thus the greater the variety of human interests that are protected, the more that the human rights system collapses into an undifferentiated welfarism in which all interests must be taken seriously for the sake of the public good.”).

109. *See* SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 4–5, 211 (Harv. Univ. Press 2010); *see also* Samuel Moyn, *Human Rights in Heaven*, in *HUMAN*

drastically short of building utopia on earth, in part because human rights do not give us enough of the values we cherish.¹¹⁰ In particular, IHRL has not done enough to address the massive economic inequalities that have arisen in the very same period—the heyday of economic “neoliberalism”—during which the human rights ideology has been ascendant.¹¹¹ Now, it seems there are many things that one could say in reply to Moyn. One is that he has not adequately specified what kind of egalitarianism he has in mind, let alone defended it against objections. This requires hard normative work, as the philosophical literature on equality readily attests. Another is that he underestimates the potential of human rights to constrain permissible material inequality, perhaps because he focuses excessively on how IHRL is understood or implemented, rather than on what it actually requires or ought to require. It is worth asking: How much truly worrying inequality would persist if an IHRL properly in line with the FAT were fully realised throughout the globe? This question, which goes to the core of his criticism, is one that is not taken seriously enough by Moyn. But the third point to stress here is that the utopian interpretation of IHRL should be rejected—there should be no truck with the idea that IHRL is supposed to be the primary conduit for realising all of our most important human values. So, even if leftist critics like Moyn can articulate a compelling egalitarian ideal, the question will remain whether that ideal is the proper business of IHRL. It may, instead, be one of a number of eligible conceptions of social justice, none of which has a compelling claim in the abstract to the realised through IHRL. It cannot be assumed that any such egalitarian ideal is the proper business of IHRL on the illusory basis that everything of great value reduces to human rights.

Both criticisms from the stylised left and right political standpoints could be parried if IHRL were properly responsive to the important but limited objective described by the FAT. As an anecdotal matter, however, it is worth registering that whereas criticisms to the effect that IHRL is overly ambitious are often regarded by insiders as heretical, criticisms along the lines that it is not aiming high enough usually receive a much more sympathetic hearing. This is not only because it is those nominally associated politically with “the right” who are prone to make criticisms of the former kind. This asymmetry in response also reflects the misguided totalising ambitions of many of those in the human rights movement, hence their reluctance to accept that not everything of great value is a matter of human rights or to be

RIGHTS: MORAL OR POLITICAL? (Adam Etinson ed., Oxford Univ. Press 2018); John Tasioulas, *Philosophizing the Real World of Human Rights: A Reply to Samuel Moyn*, in HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 109.

110. *See id.*

111. *See* SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 176–220 (Harv. Univ. Press 2018) [hereinafter MOYN, NOT ENOUGH]

pursued through IHRL. It is this totalising ambition, the dream of formulating a “secular ethic” for a globalising world couched exclusively in the language of human rights, that needs to be discarded as a prelude to a proper understanding of both human rights morality and IHRL.

IV. LEGALISATION AND JUDICIALISATION

Let us turn now to the second way it was previously foreshadowed that contemporary IHRL strays from the FAT: through the unjustified legalisation or judicialisation of human rights morality. We begin with legalization before turning to judicialization. Prominent philosophers have argued that it belongs to the very nature of human rights that they are oriented towards legalisation, in that affirming the existence of a norm of human rights morality carries the implication that there is at least a *pro tanto* case for its legal enactment: whether as law generally (Joseph Raz), as constitutional law (Jürgen Habermas), or as part of IHRL (Allen Buchanan).¹¹² By contrast, I have argued, following the lead of Amartya Sen,¹¹³ that it is better to resist the idea that there is a conceptual nexus between human rights morality and human rights law of any of these kinds.¹¹⁴ On this view, preparedness to legalise human rights norms is an important indication that one takes them seriously.¹¹⁵ Recall however that, according to the FAT, there are both principled and pragmatic constraints bearing on the question of whether some component of human rights morality should be enshrined in, or given effect through, IHRL.¹¹⁶ One pragmatic constraint relates to whether IHRL will actually work to bring about increased compliance with human rights morality or whether it will be, instead, neutral or even counterproductive in its effect or in some way excessively damaging to other values.¹¹⁷ So, to provide a helpful focus for this discussion, consider the question of whether joining a

112. These are the views, respectively, of Joseph Raz, Jürgen Habermas, and Allen Buchanan. See generally JOSEPH RAZ, *Human Rights Without Foundations*, in THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., Oxford Univ. Press 2010); JÜRGEN HABERMAS, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, in THE CRISIS OF THE EUROPEAN UNION: A RESPONSE 71 (Ciaran Cronin trans., Polity 2012); BUCHANAN, *supra* note 23, at 3.

113. See Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2918–19 (2006); Tasioulas, *On the Nature of Human Rights*, *supra* note 1, at 23–24.

114. See Tasioulas, *On the Nature of Human Rights*, *supra* note 1, at 23–24.

115. So, for example, an astute but sympathetic critic of IHRL, like Hurst Hannum, still conceives of human rights norms as essentially legal norms. See HANNUM, *supra* note 37, at 19. But even human rights lawyers who do not follow him in this, and acknowledge a background morality of human rights, are strongly prone to take the desirability of legalising such rights as an article of faith.

116. Tasioulas, *supra* note 2.

117. *Id.*

multilateral human rights treaty regime enhances compliance with human rights morality by member states.

Empirical investigations into this question suggest an interesting conundrum. On the one hand, the strongest evidence for a positive effect of treaty membership relates only to a subset of states.¹¹⁸ These do not include established liberal democracies or autocratic regimes—the best and worst performers with regard to human rights compliance, one might plausibly suppose—but rather the group of states that are moderately democratic or transitioning towards democracy after a period of turmoil, such as a civil war.¹¹⁹ This was the finding of Beth Simmons's groundbreaking book *Mobilizing for Human Rights*.¹²⁰ We need not be detained here by questions about the mechanisms through which this improvement in performance is achieved; suffice to say that Simmons and others strongly emphasise the impact of treaties on domestic politics and litigation rather than on the workings of external, “white knight” interventions by other states or international organisations.¹²¹ This priority of domestic politics explains the significance of a state's possessing a quasi-democratic character in channelling the influence of IHRL into its policy and conduct.¹²²

However, in addition to this positive effect, there is also evidence of backsliding—of deterioration in compliance with human rights relative to what it was or might have been domestically for a given state—when high-performing states, especially democratic states that are highly integrated into the international legal order, join human rights treaties.¹²³ In an original and richly suggestive article, Andrew Guzman and Katerina Linos set out some cases of backsliding, including how membership of the European Convention on Human Rights has impacted negatively on the rights of criminal defendants and gay people in the United Kingdom and entitlements of welfare claimants in Sweden.¹²⁴ Guzman and Linos claim that the existence of backsliding explains various human rights-related phenomena.¹²⁵ These include the reluctance of high-performing states to join human rights treaties and the emergence of regional human rights regimes (since such regimes will typically involve less gaping discrepancies in human rights performance among participating states than

118. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 1, 151 (Cambridge Univ. Press 2009).

119. *Id.*

120. *Id.* A somewhat different way of identifying the states that are most benefited is formulated by Guzman and Linos. They are those states who are close to, but below, the relevant international legal human rights norm. See Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 CALIF. L. REV. 603, 646–47 (2014).

121. See SIMMONS, *supra* note 118, at 126 (“The real politics of change is likely to occur at the domestic level.”); see also Guzman & Linos, *supra* note 120.

122. See SIMMONS, *supra* note 118, at 151.

123. Guzman & Linos, *supra* note 120, at 605.

124. *Id.* at 615–23.

125. *Id.* at 610.

international regimes, thereby diminishing the threat of backsliding).¹²⁶ They additionally contend that these effects occur beyond the treaty context, for example, in relation to customary international law and “soft law” norms, since such norms can also shape the views of some domestic political agents and enhance their influence at the expense of others.¹²⁷ This means that the phenomenon of backsliding cannot be localised to situations in which there is state consent to the international norms in question, as in the multilateral treaty scenario.¹²⁸

Now, the overall phenomenon that potentially emerges here is what has been aptly termed a “race to the middle.”¹²⁹ As some poorer-performing states are lifted upwards by a human rights treaty, high-performing states are dragged down.¹³⁰ More importantly, the two phenomena of uplift and backsliding are intimately related.¹³¹ On the one hand, the very same democratic or quasi-democratic domestic mechanisms that lead to human rights improvements in the case of poorer-performing states can also lead to deteriorations in performance in the case of higher-performing states.¹³² On the other hand, one cannot simply respond to this situation by excluding high-performing states from such treaty regimes, since the beneficial effect of such regimes on poorer-performing states appears to be significantly dependent on the participation of the former.¹³³

This is a troubling scenario derived from empirical investigation into how human rights treaty regimes actually work, one that calls into question the complacent assumption that human rights laws have an exclusively positive effect on human rights compliance across the board. In the remainder of this discussion, it will simply be assumed that this “race to the middle” exists, recognising that whether it does is a matter of controversy that needs to be settled through the deployment of skills beyond those of the professional philosopher. One observation worth making, however, is that Guzman and Linos are not immune to the tendency to identify human rights with underlying interests that was criticised in the previous section.¹³⁴ This arguably leads them to exaggerate the incidence and extent of backsliding insofar as they are prepared to find that it has occurred whenever there

126. *Id.*

127. *Id.* at 640.

128. *See id.* at 641.

129. *See* RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 1, 75–76 (Oxford Univ. Press 2013).

130. *See id.*

131. *See* Guzman & Linos, *supra* note 120, at 638.

132. *See id.* at 637–38.

133. *See id.* at 647–48.

134. The conflation of rights and interests is suggested at various points in their article, for example, in their talk of “infinite provision of the right.” *Id.* at 626; *see also id.* at 648, 653 (noting the “greatest improvements to human welfare” and proposing that maximal specifications of human rights in law will eliminate backsliding).

is a reduction in the fulfilment of interests, even without properly addressing the question whether this reduction breaches any moral or legal obligation generated by those interests.¹³⁵ However, such concerns shall be left aside and it will be simply assumed that backsliding is a real possibility in order to raise two questions about it.

The first is: What can be done to mitigate, or even eliminate, the risk of human rights backsliding by higher-performing states? Here there is an interesting proposal by Guzman and Linos that opposes the general drift of my argument in the earlier parts of this Article.¹³⁶ They claim that one way to eliminate the risk of human rights backsliding is by having human rights standards in treaties that are “maximal”—standards that are very hard or impossible to meet even by high-performing states:

A demanding norm—perhaps even one that exceeds every country’s existing practice—reduces the associated backsliding costs because it reduces the number of states for which the international norm is less demanding than their *ex ante* domestic policy. In the most extreme cases, such as the CEDAW requirement that states take “all appropriate measures . . . to modify the social and cultural patterns of conduct of men and women,” the number of such countries may be reduced to zero, which eliminates the risk of backsliding completely.¹³⁷

However, they concede that this solution would come at a cost, since maximal standards would diminish the extent to which poor performers can be influenced to improve their compliance with human rights, given that such influence will only operate on states that do not fall too far short of the relevant international norm.¹³⁸

But the idea that employing “maximal” standards in treaties eliminates the risk of backsliding seems very questionable. First of all, if a standard is so maximal that it is virtually impossible for high-performing states ever to meet—like General Comment 14’s ambitious “minimum core obligations” associated with the human right to health, which we encountered previously—then it is unlikely to embody the demands of human rights morality. Human rights morality imposes a set of obligations that it is feasible, in general, for states to meet.¹³⁹ Meeting those obligations is a moral demand, not a mere aspiration; failure to meet them is a wrong, not an inevitable disappointment. Maximal standards, by contrast, seem more like aspirations. To this concern, the reply may come: Why worry if the ‘maximal’ standard goes far beyond the content of the relevant norm of human rights morality? Will it not be the case that by striving to meet that maximal standard states are unlikely to do worse in human rights terms than they were

135. *See id.* at 626, 648, 653.

136. *Id.* at 614 (observing that many international human rights standards are set at moderate levels and arguing that unreachable standards could eliminate backsliding).

137. *Id.* at 614, 653.

138. *See id.* at 652.

139. *See* CESCR General Comment 14, *supra* note 52.

doing before joining the treaty? But there are two main reasons why this hypothesis is misguided.

First, in seeking to advance human rights by means of a maximal, aspirational norm, one creates a conflict in human rights consciousness. Human rights are supposed to be moral demands that are feasible and that it is morally wrong to violate; maximal standards will include many elements that are neither of these things. The risk is that casting human rights law in aspirational terms discredits the very idea of human rights, promoting a sense of disenchantment and cynicism, or at least laxity, that is detrimental to our commitment to the morality of human rights and, indirectly, to our compliance with it.¹⁴⁰ Second, and more importantly, a maximal human rights norm will presumably encompass some elements that are genuinely human rights demands and some that are not. But given that the maximal norm cannot be realistically fully complied with, a state must inevitably choose which of its components to meet and which to leave unmet. The risk is great that a state will choose to fulfil a merely aspirational component of the norm at the expense of a component that genuinely reflects a human right. This might occur not only within the components of a single maximal norm, but also between different maximal norms, such as the rights to health and to education. So, for example, faced with resource limitations, a state might choose to provide cosmetic surgery—an aspirational component—at the expense of adequate provision of secondary education—a rights-based component. It would then be complying with human rights law but backsliding in terms of human rights morality.

Let us turn now to the second question prompted by the phenomenon of backsliding. Assume that backsliding by high-performing states as a result of joining a human rights treaty cannot be eliminated. This is a reason, *pro tanto*, for such states not to join these treaties. On the other hand, there remains the fact that a treaty regime would have a positive effect on poor-performing states. Assume that this positive effect is partly conditional on high-performing states also joining the treaty regime. Now, the question that arises here is whether it is acceptable for a government to join a treaty regime, reasonably anticipating that it will lead to backsliding domestically, but justifying its decision on the basis of the human rights benefits to citizens of other states?¹⁴¹ The question is not fanciful—it is precisely the way in which some defend the United Kingdom's membership of the European Convention on Human Rights. They claim that

140. For a perceptive discussion of the problems that arise when a large and chronically persistent gap opens up between the content of international human rights law and actual state practice, see Shany, *supra* note 67, at 8–12.

141. Of course, if Guzman and Linos are right, this worry will extend beyond treaty norms to customary law and soft law which can have a backsliding effect on a state even if it has not consented to them. Guzman & Linos, *supra* note 120, at 640–41. But I leave this issue to one side.

membership results in an overall inferior human rights jurisprudence domestically than nonmembership, but that this detriment is offset by the gains in human rights compliance in other states' parties. In order to answer this question, a principled basis is needed for weighing the human rights of our own citizens against those of citizens of other countries.

One line of thought is that a state should give *absolute priority* to the human rights of its own citizens. No gains in the human rights of foreigners should be achieved at the expense of human rights losses at home. When it comes to human rights, it is "fellow citizens first." But this answer has its difficulties, especially in light of the fact that the obligations associated with human rights vary greatly in importance notwithstanding that they all arise from moral rights possessed by all human beings simply in virtue of their humanity. If membership of a human rights treaty will bring a significant reduction in the torture and degrading treatment of prisoners in foreign lands, does the fact that it might have some negative effects domestically at the margins of the right to free speech really preclude joining the treaty?

At the other extreme, one might argue that when it comes to human rights, the human rights of all should count equally; if human rights are at stake, we should treat people entirely *sub specie humanitatis*. No priority whatsoever should be accorded to our fellow citizens simply in virtue of the fact that they are fellow citizens. A state would therefore be justified, perhaps required, to join a human rights treaty if it had a net positive effect on human rights compliance by states parties, even if this came at the cost of serious backsliding at home. Like the absolute priority view, however, this *no priority* view is strong medicine. It is perhaps most plausible if the set of human rights were highly constrained, limited to such rights as the right not to be tortured or enslaved. But on a more expansive reading of human rights, it seems very hard to sustain against the thought that states have a special responsibility for their own citizens, which requires them to accord extra weight to their rights, even if not absolute weight. Presumably, the thought that states have a special responsibility to advance the rights and welfare of their own citizens lies at the core of much of the populist revolt against forms of economic globalisation that—very arguably—have helped raise the living standards of some of the very poorest people on earth, but at the expense of job losses in wealthier countries.

So, the middle ground proposal is that states should give a weighted but not absolute priority to the fulfilment of their own citizens' human rights. The difficulty, of course, is in specifying the added weight and justifying it. The justification, presumably, would be sought in the special value of membership of a political community and, in consequence, the special responsibility that governments have to the members of their community. That special value is a function, broadly, of the intrinsic and instrumental value of membership of a

community. Moreover, this value partly encompasses human rights concerns. The rights to a nationality and to democratic participation are partly grounded in the intrinsic value to individuals of community membership. Equally, it can be argued that one form of political community—the state—is the most effective instrument for the realisation of human rights in the world today. Hence, the extra weighting accorded to fellow citizens' rights would not merely reflect the force of communitarian, non-human rights values.

My strong inclination is to accept a version of the weighted priority view. However, I do not claim to have provided an answer to the challenge arising from the asymmetric distributional effects across states of human rights treaties. Nor has our discussion broached procedural responses to this challenge, such as the role that democratic endorsement can play in justifying a choice among some version of the three broad answers sketched. But once it is seen that human rights law has to be assessed by reference to a background human rights morality, and its implications for such a morality cannot be assumed always to be positive, it is precisely such difficult questions with which we will need to wrestle. Unfortunately, there is little evidence that advocates of the legalisation of human rights morality have done so, leaving them open to objections along the lines that human rights treaties unjustifiably sacrifice the rights and interests of domestic constituencies.

Let us turn now from legalisation to judicialisation. That human rights norms are given effect through some legal system or other is one thing (legalisation), that these norms may be upheld through judicial procedures of some sort (judicialisation) is another.¹⁴² Again, for many a serious commitment to human rights morality involves a commitment not only to the legalisation of its norms but also their effective justiciability. It is a powerful theme in contemporary human rights theory and practice that rights, especially human rights, are the special province of the courts.¹⁴³ On a crude, but influential, version of this account attributable to Ronald Dworkin, legislatures deal with matters of policy, which aims to maximise the fulfilment of the interests or preferences of citizens, while courts are forums of principle in which rights that set a limit to the pursuit of the general welfare are identified, interpreted, and applied to the specific circumstances of a case.¹⁴⁴ But this attempt to solder certain categories of values to corresponding types of institutions (legislature/welfare, courts/rights) is misguided, as is the idea that rights essentially protect minorities

142. See, e.g., RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* 1, 58 (Harv. Univ. Press 1985).

143. See *id.* at 33–72.

144. See *id.*

from majorities.¹⁴⁵ This is partly for the reason, broached earlier in this Article, that the idea that rights stand in a dichotomous and generally antagonistic relationship to the general welfare or the common good is a profound error. But another strain in this crude picture, which is the assumption that giving adequate effect to rights entails rendering them justiciable, is worth exploring here. The matter is complicated by the fact that there are different kinds of justiciability, but this Article will focus on the relatively strong form according to which a right is justiciable if its possessor is empowered to seek their entitlements under the right in question to be granted to them by means of a judicial decision upholding that right.¹⁴⁶

There is much to be learned, in this connection, from the way in which the Constitutional Court of South Africa has engaged with socioeconomic rights, including minimum core obligations associated with various such rights enshrined in the constitution. As argued elsewhere, what can be found in the South African jurisprudence is a combination of three elements: (a) a rejection of any justiciable claim to be immediately furnished with the content of one's socioeconomic rights, including that covered by minimum core obligations; (b) an acknowledgement that the doctrine of minimum core may nonetheless be relevant to the all-things-considered test of reasonableness in realising the relevant rights; and (c) a general failure by the Constitutional Court of South Africa *explicitly* to articulate, or even rely upon, specific minimum core obligations in reaching its decisions.¹⁴⁷ Notwithstanding (c), however, it is plausible that the minimum core doctrine is implicit in some of the decisions—especially those that involve fulfilment of the right to health insofar as it addresses *urgent needs*, as well as various forms of *unjustified exclusions*.¹⁴⁸

This interpretation of the relevant South African jurisprudence contradicts those commentators who argue that the Constitutional Court has adopted a test of reasonableness in regard to the fulfilment of socioeconomic rights in preference to the idea of minimum core obligations. Quite apart from posing a false opposition between minimum core obligations and the test of reasonableness, these latter interpretations seem to be in thrall to the mistaken idea that properly affirming the existence of a human right entails rendering it justiciable

145. See GRÉGOIRE WEBBER ET AL., *LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION* 1–14 (Cambridge Univ. Press 2018) (skewering nicely some prevailing myths of this kind); see also Finnis, *supra* note 70.

146. For a helpful discussion addressing some of the complexities of whether human rights morality should be justiciable in constitutional courts, see Frank I. Michelman, *Human Rights and Constitutional Rights*, in *HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER*, *supra* note 10, at 73–96.

147. TASIIOULAS, *RIGHT TO HEALTH*, *supra* note 49, at 18.

148. *Id.*

in the strong sense of justiciability described above.¹⁴⁹ In reality, there are many practical and principled considerations that stand in the way of that simplistic inference.¹⁵⁰ A key passage that helps show why this is so can be found in the Constitutional Court's judgment in *Minister of Health v. Treatment Action Campaign (No. 2)*:

It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards . . . should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demand on the public purse Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.¹⁵¹

Elaborating somewhat on this instructive passage, at least four significant limitations on the idea of strong justiciability in relation to human rights claims can be identified, especially those invoking socioeconomic rights such as the human right to health. In outlining these limitations, it will be assumed that part and parcel of any such justiciability will be a large role for courts in determining the content of abstract and open-ended human rights provisions. To begin with, there are constraints on judicial expertise, itself formed by legal education, experience of legal practice and of judging, when it comes to specifying the content of human rights and the best means for securing that content. The process of specification would not only require an adequate grasp of the interests in play, but also of the costs that would be incurred in fulfilling those interests by means of an obligation of a particular shape, including the appropriateness of distributing those costs in various ways across the different members of society, and in addition a grasp of the best policies for implementing those obligations. Of course, the issue of cost arises with respect to all human rights, whether they belong to the category of civil and political rights or else

149. See Emma J. Broster, *Litigating the Right to Health Care in South Africa*, in *LITIGATING THE RIGHT TO HEALTH IN AFRICA* 116 (Ebenezer Durojaye ed., 2016); POSNER, *supra* note 98, at 87–88.

150. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 28 ¶ 37–38 (S. Afr.).

151. See *id.*; *cf. id.* at ¶ 55–69 (holding that the government policy of restricting the use of nevirapine, an antiretroviral drug used to combat mother-to-child transmission of HIV, to research and training sites, unreasonably excluded individuals in the case of which such treatment was medically indicated); *id.* at ¶ 125 (requiring the government to revise its policy on access to nevirapine, but stressing that this did not mean that “everyone can immediately claim access to such treatment, although the ideal . . . is to achieve that goal.”).

to economic, social, and cultural rights.¹⁵² Nonetheless, it poses an especially acute problem for rights of the latter kind, both because of the relative lack of a long-standing judicial tradition of engaging with such rights in most jurisdictions, but also because the process for determining whether the benefit to the right holder justifies incurring the costs of a given obligation is generally a more complex one in their case. Of course, it is not the mere existence of these constraints that is at issue here, but whether they bear more heavily on judges than legislators. This is, at least, a matter to be determined case by case, depending on an assessment of the capabilities of the various governmental organs in different jurisdictions, rather than one in which there is a blanket presumption in favour of superior judicial competence.

A second limitation on the making human rights strongly justiciable, independent of the first, must also be recognised. Even if courts are just as good, or even better, than legislatures in specifying the content of human rights and the institutional means for their realisation, enabling litigants to claim their entitlements under those rights in court may be counterproductive so far as overall compliance with human rights is concerned.¹⁵³ A dramatic illustration of this is the experience of certain Latin American jurisdictions, such as Brazil and Colombia, in which there are strongly justiciable constitutional rights to health.¹⁵⁴ Rather than straightforwardly enhancing the fulfilment of this right, justiciability has sometimes had the opposite effect due to contextual economic and social factors bearing on people's access to legal justice.¹⁵⁵ Wealthier individuals are better placed to exercise their human rights entitlements, insofar as they are better informed and more able to bear the costs of litigation, than less well-off individuals.¹⁵⁶ The upshot, given an overall static or nonexpanding health budget, is that more scarce resources are used to benefit better-off people at the expense of the poor than would otherwise be the case, irrespective of the comparative weight of the human rights considerations in play.

152. For example, see STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (Norton Press 2013).

153. See generally TASIOLAS, *RIGHT TO HEALTH*, *supra* note 49.

154. See *id.* at 19–21.

155. See, e.g., Octavio L.M. Ferraz, *Health Inequalities, Rights and Courts: The Social Impact of the "Judicialization" of Health" in Brazil*, in *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* (Alicia E. Yamin et al. eds., 2011) (regarding Brazil); David Landau, *The Reality of Social Rights Enforcement*, 53 *HARV. INT'L L.J.* 189 (2012) (regarding Colombia); Akritas Kaidatzis, *Socio-Economic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015-2018* 26 (June 6, 2019) (unpublished manuscript) (on file with the Oñati Institute for the Sociology of Law) (discussing of the potentially negative impact of judicialization on social rights in the context of a country subject to austerity measures).

156. See Landau, *supra* note 155, at 199–200; Kaidatzis, *supra* note 155.

A third limitation arises out of the essentially law-creating function countenanced by the strong judicial role in relation to human rights. One problem is that, in conflict with the rule of law, this undermines the ability of courts credibly to present themselves as fundamentally law-applying bodies within an overall constitutional structure that includes a legislature. Courts will be robbed of their legitimacy insofar as they come to assume the role of retrospective law-makers, or are widely perceived to have done so. It is no answer to say this problem is obviated so long as courts can be trusted to arrive at correct specifications of the content of human rights. This is because it is highly unlikely that there is a single correct specification of a workable human rights standard in each case, which means that inevitably a choice will need to be made to adopt one formulation of the human right from a range of eligible options. Of course, there are ways to mitigate this problem, such as according such judicial decisions only prospective effect. But still a fourth problem would remain: that such law-making is not democratic in character, a factor that strongly bears on law's legitimacy. Again, much here will depend on the details of the particular scheme of justiciability that is in question, and in particular whether judicial determinations of human rights can be overturned or amended by democratically elected bodies or by democratic referendums. But even leaving aside the compromised legitimacy of law that is not subject to robust democratic accountability, there is still the more diffuse point that the vitality of the human rights ethos in a democratic society will be sapped by human rights matters being systematically decided in court proceedings rather than through ordinary democratic political contestation. This not only risks fuelling the "populist" charge that human rights are the playthings of "elites," who deploy them as trump cards in order to short-circuit the democratic process whenever it suits their interests to do so, it also has a further consequence. By reducing the vast majority of citizens primarily to spectators of, rather than active participants in, the politics of human rights, it also risks undercutting their general awareness of human rights matters, the strength of their commitment to such rights, and their willingness and ability to engage with them at the requisite level of sophistication. This last point resonates with what Mona Younis has identified as the greatest flaw of the contemporary human rights movement—the overprivileging of expert technical expertise and the concomitant failure to engage a mobilised citizenry:

By neglecting citizen engagement, the human rights movement has failed not only to secure all rights but has put the civil and political rights already secured at risk, including in the North. Indeed, our gravest error has arguably been to imagine that we could achieve rights-respecting governments without a mobilized citizenry. We disregarded the need for movements in our efforts,

despite our knowledge of the essential role of social movements in all significant social and political transformations.¹⁵⁷

Naturally, the four types of concerns enumerated above apply with even greater force to regional or international courts. Their very supranational character distances them from domestic jurisdictions in ways that exacerbate the problems of competence, effectiveness, rule of law, and democratic legitimacy and ethos.¹⁵⁸

V. CONCLUSION

Proceeding from an account of the formative point of IHRL, as specified by the FAT, this Article has sought to identify challenges confronting this body of law that do not arise from sources external to it, but rather from failures on the part of its scholars and practitioners to ensure proper responsiveness to this formative point. Very tentatively, it has also been suggested that some of the external frustrations with IHRL—those often ascribed to a “populist backlash”—may themselves be partly explicable as responses to these internal failures. The internal problems identified are located on two broad levels: the first—the conflation of rights and interests—arises at the level of the overarching normative point of IHRL; the second—the uncritical enthusiasm for legalisation and judicialisation—relates to the institutional embodiment of human rights norms. Unavoidably,

157. Mona Younis, *Back to the Future: Returning to Human Rights*, OPEN GLOB. RIGHTS (Nov. 1, 2018), <https://www.openglobalrights.org/Back-to-the-Future-returning-to-human-rights/> [<https://perma.cc/3ULU-NBM8>] (archived Aug. 30, 2019). Younis’ emphasis on popular social movements, as opposed to elite agendas, in driving progressive social change echoes a theme developed at length in Elizabeth Anderson, *Social Movements, Experiments in Living, and Moral Progress: Case Studies from Britain’s Abolition of Slavery*, UNIV. OF KANSAS (Feb. 11, 2014), https://kuscholarworks.ku.edu/bitstream/handle/1808/14787/Anderson_Social_Movements.pdf?sequence=1&isAllowed=y [<https://perma.cc/V3PB-VQM9>] (archived Aug. 30, 2019). In addition to the failure to engage a mobilized citizenry, Younis’ insightful commentary identifies the privileging of civil and political rights over socio-economic rights, and the related privileging of Western human rights accomplishments over those outside the West, as the three major failures of the contemporary (Western) human rights movement.

158. Perhaps the most grandiose manifestation of the tendency to judicialization is the proposal by human rights experts, supported by the governments of Switzerland, Austria, and Norway, to establish a World Court of Human Rights that would be “competent to decide in a final and binding manner on any complaints brought by individuals, groups or legal entities alleging a violation of any human right found in an international human rights treaty binding on the duty-bearer.” Panel on Human Dignity, *Protecting Dignity: An Agenda for Human Rights*, GENEVA ACAD. INT’L HUMANITARIAN L. & HUM. RTS. 36 (2011), <https://web.sonoma.edu/users/s/shawth/Panel%20Human%20Dignity> [<https://perma.cc/LC2V-QD4Z>] (archived Aug. 30, 2019). For incisive criticism, see Philip Alston, *Against a World Court for Human Rights*, 28 ETHICS & INT’L AFF. 197, 199 (2014).

this Article has been highly selective in the illustrations given of these problems; unavoidably, also, this Article has had to pass over other varieties of deviation from the FAT that doubtless arise at both of these levels. Beyond that, some of the most significant deviations from the FAT occur at a third level—those concerned with appropriate responses to violations of IHRL. In this connection, consider especially the tendency of IHRL to be recruited both in campaigns to expand the legal grounds for military intervention and to restrict or to eliminate the scope of immunity to criminal prosecution for human rights violations. Both of these developments are erosions of state sovereignty partly caused by the increasing dominance in recent years of IHRL within the international legal order.¹⁵⁹ As a result, it is also not difficult to interpret both developments as triggering a backlash on the part of those anxious to resist any such erosion. But pursuing such speculations is a task for another day. Harking back to the outward-looking diagnoses of the challenges confronting IHRL of Alston and Zeid from which we began, this Article has hopefully given some substance to the thought that human rights also need to be saved from many of their avowed friends, and not just from their sworn enemies. The starting point for this rescue operation is the recognition that human rights are first and foremost moral standards and that IHRL's formative aim is to give those standards appropriate legal expression and effect.

159. For a compelling exploration of some of the ways in which the increasing dominance of IHRL has put pressure on key concepts and norms of general international law and encumbered its pursuit of international peace and cooperation, see Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 331, 346 (2017). This article is impressively sensitive both to the concerns that motivate the FAT and to the fact that IHRL is, in principle, only one among various mechanisms, legal and non-legal, for realizing human rights morality. For some powerful skepticism about the tendency for anti-impunity to dominate the agenda of IHRL, see *generally* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle et al. eds., Cambridge Univ. Press 2016).