RULE OF LAW AND INTERNATIONAL HUMAN RIGHTS

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Abstract

This article reviews the field of international human rights with particular attention to the way that the International Court of Justice, the International Criminal Court, the Human Rights Committee, and local domestic courts operate to resolve human rights cases. It first notes what internationally recognized human rights there are and the sources that give rise to them. It then explains how relativism enters human rights decision-making, especially at the domestic court level, in part because a common grounding for the human rights propounded was never adopted. Even at the level of the International Court of Justice, its failure to include an ethical modality in the way it interprets treaties generally, and human rights treaties, in particular,

can leave it floundering to present any consistent framework for its own human rights decision-making. The article then presents a philosophical theory to justify the human rights that are recognized, based on an objective criterion that can be developed to assist courts in deciding conflicts of rights cases. Especially with respect to state domestic courts, the International Court of Justice can serve as a model to be emulated were it to adopt this theoretical framework for future human rights decision-making.

I. INTRODUCTION

Rule of law is a principle under which all persons, institutions, and entities are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.[1] This is true whether the laws are domestic American laws, international laws, or the laws of foreign nations. This description, however, presupposes that courts will interpret international human rights principles consistently, where consistency means that judgments handed down by courts will share a closely similar view of a right's scope, content, and justification.[2] Of course, there will be factual differences between cases leading to different results, but the basic understanding of the substance of the rights should be generally the same. In the United States, when circuit courts disagree on a constitutional principle's scope or content, the Supreme Court will occasionally step in to clarify so that the understanding is consistent across the country.[3] But this is not what happens with international human rights law ("IHRL"). IHRL, especially customary international human rights law ("CIHRL"), leaves interpretations of its provisions predominantly to domestic courts, with international courts

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1 U.N. Secretary-General, Guidance Note of the Secretary General: UN Approach to Rule of Law Assistance (Apr. 2008), https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf [https://perma.cc/46KP-8C98].

2 Nils Engstad, *Consistency of the Case Law as a Prerequisite to Legal Certainty: European and National Perspectives* (Sept. 29, 2017), https://rm.coe.int/nils-engstad-president-of-the-council-of-europe-s-consultative-council/1680759572 [https://perma.cc/FAB3-Y6AD].

3 *Supreme Court Criteria*, GOLDSTEIN & RUSSELL, P.C., https://www.goldsteinrussell.com/pro-bono/supreme-court-criteria/ [https://perma.cc/P66S-VMRN] (last visited Jan. 12, 2022).

occasionally interpreting CIHRL.[4] This framework gives rise to differences over what laws get enforced and by whom. Even where domestic courts are deemed competent to enforce these provisions, there is no guarantee that their interpretations of the same rights will be similar.

Consequently, relativism in human rights adjudication becomes a problem, especially where local religious or cultural differences are likely to be present. Moreover, even when the International Court of Justice ("ICJ") decides a human rights case,[5] its methods for interpreting the international documents are limited to primarily four modalities: "textual, systematic (or contextual), purposive (or teleological), and historical."[6] This is similar to the first four of six interpretative modalities, identified by Professor Philip Bobbitt, of how the U.S. Supreme Court interprets the American Constitution—historical/originalist, textual, structural, prudential, doctrinal, and ethical.[7] Notice, however, that the last two modes of interpretation that the U.S. Supreme Court uses are not part of the ICJ's approach, although arguably some room should be made for an ethical interpretation.

The doctrinal modality is not used as an interpretative method by the ICJ, and it was not used by its predecessor, the Permanent Court of International Justice ("PCIJ"), because "the stare decisis rule has been excluded since 1922"; this is true even though the ICJ and the International Criminal Court ("ICC") often refer to their previous decisions.[8] More importantly, the absence of an established ethical modality at the international level leaves domestic courts to, without much guidance, essentially assign their own understandings of the norms they apply. This, in turn, allows for more occurrences of inconsistency and relativism to develop (as will be discussed below)

4 *See generally* Gábor Halmai, *Domestic Courts and International Human Rights: The Use of International Human Rights Law in Domestic Cases*, *in* SAGE HANDBOOK OF HUMAN RIGHTS 749–67 (A. Mihr & M. Gibney eds., 2014).

5 For purposes of this proposal, I am putting to the side any focus on regional conventions, such as the European Convention on Human Rights, as might be focused upon by the European Court of Human Rights, or the American Convention on Human Rights, as might be followed by the Inter-American Court of Human Rights, in order to focus primarily on the Universal Declaration of Human Rights ("UDHR") and subsequent United Nations ("U.N.") covenants.

6 Odile Ammann, *The Interpretative Methods of International Law: What They Are, and Why Use Them?*, *in* DOMESTIC COURTS & THE INTERPRETATION INTERNATIONAL LAW: METHODS AND REASONING BASED ON THE SWISS EXAMPLE 191, 195 (2020) (section references omitted).

7 PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

8 Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 1, 5 (2011).

between court decisions, especially where conflicts of rights are involved.[9]

In this article, I set out an ethical modality that international and domestic courts can logically adapt to avoid at least some inconsistencies. The modality is based on the work of American philosopher Alan Gewirth, whose justification for human rights can also be seen to provide a philosophical justification of those rights found in the Universal Declaration of Human Rights ("UDHR") and the subsequent International Covenant on Civil and Political Rights ("ICCPR") and International Covenant on Economic, Social and Cultural Rights ("ICESCR"). This article will also provide criteria for resolving conflicts of rights. The hope is that the ICJ, ICC, and Human Rights Committee ("HRC"), along with relevant domestic courts, will adopt this approach to ensure greater consistency in the application of international human rights norms across national boundaries going forward.

Part II identifies presently recognized international human rights and identifies their sources. Part III looks at the evolving importance of human rights in the development of international law, while at the same time noting how the limited jurisdiction of the ICJ, ICC, and HRC lead to much human rights protections being facilitated by domestic courts. Part IV describes the way that relativism operates to undermine development of a consistent framework for interpreting IHRL, both at the domestic level and at the level of the ICJ. Part V then explains how the current methods of interpretation used by the ICJ may also limit our understanding of the scope of human rights treaties and CIHRL. Part VI explicates a current philosophical theory of human rights that provides a universal justification for human rights, while also explaining their scope and contents. This will be followed in Part VII with a process that courts may use for resolving conflicts of rights to provide a more universal and consistent framework for their decisions, and which explains how domestic courts might be encouraged by the ICJ to adopt this process.

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9 One caveat must be noted. For purposes of the present discussion, reference to regional human rights documents and courts will occasionally be made without further engagement of their substance. This should not be understood to mean that the ideas expressed here do not have application in those contexts, only that those contexts will not be the focus of the discussion here.

II. WHAT ARE INTERNATIONAL HUMAN RIGHTS AND WHAT ARE THEIR SOURCES?

The International Bill of Human Rights ("IBHR")[10] is the umbrella term used to include the UDHR, the ICCPR and its two Optional Protocols, and the ICESCR.[11] These documents suggest that the rights engaged do not depend on their being granted by any state, although their protection will often depend on state authority.[12] Rather, human rights are just those rights humans possess *qua* human, "regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status."[13] A more plentiful philosophical explanation for why this might be true will be discussed in Part VI.

The UDHR was adopted by the United Nations ("U.N.") General Assembly in 1948; its thirty articles provide the principles and building blocks of current and future international human rights conventions.[14] The human rights identified are those said to be universal in that they apply to all humans regardless of whether they are enforced; they are also inalienable.[15] This is made explicit in Article 1 of the UDHR, which provides that "[a]ll human beings are born free and equal in dignity and rights,"[16] and in Article 2, which states, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[17]

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10 OFF. U.N. HIGH COMM'R HUM. RTS., FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS, https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf [https://perma.cc/EA27-G6UA] (last visited Jan. 10, 2022).

11 *What Are Human Rights?*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx [https://perma.cc/6SJ5-CYTG] (last visited Jan. 12, 2022).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948) [hereinafter Declaration].

17 *Id.* art. 2. The term "other status" means that "[t]here is no fine print, no hidden exemption clause, in any of our human rights treaties that might allow a State to guarantee full rights to some but withhold them from others purely on the basis of sexual orientation and gender identity." OFF. UN HIGH COMM'R HUM. RTS., FACT SHEET: INTERNATIONAL HUMAN RIGHTS LAW AND SEXUAL ORIENTATION AND GENDER IDENTITY (May 2015), https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf [https://perma.cc/JFD5-K8PR].

The thirty rights listed in the UDHR range from the most fundamental to those that need be present to make life worth living. They include the right to "life, liberty and the security of person,"[18] to not "be held in slavery or servitude,"[19] and to not "be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[20] They also include the rights "to recognition everywhere as a person before the law,"[21] "to equal protection of the law,"[22] "to [have available] an effective remedy by the competent national tribunals . . . ,"[23] to not "be subjected to arbitrary arrest, detention or exile,"[24] "to a fair and public hearing by an independent and impartial tribunal . . . of any criminal charge against [one],"[25] and to a presumption of innocence "until proved guilty . . . [with] all the guarantees necessary for [one's] defense."[26] There are also specific rights to not "be subjected to arbitrary interference with [one's] privacy, family, home or correspondence, [and to not suffer] attacks upon [one's] honour and reputation."[27] The UDHR makes clear that there exists the right to "freedom of movement and residence within the borders of each State,"[28] the right "to enjoy in other countries asylum from persecution,"[29] the "right to a nationality,"[30] and also the right of "[m]en and women of full age . . . to marry and to found a family."[31] Additionally, there are the rights "to own property . . . ,"[32] "to freedom of thought, conscience and religion,"[33] "to freedom of opinion and expression,"[34] and to "peaceful assembly and association."[35] Finally, there are the rights "to take part in the government of [one's] country . . . ,"[36] "to [have] social security

18 Declaration, *supra* note 16, art. 3.
19 *Id.* art. 4.
20 *Id.* art. 5.
21 *Id.* art. 6.
22 *Id.* art. 7.
23 *Id.* art. 8.
24 *Id.* art. 9.
25 *Id.* art. 10.
26 *Id.* art. 11.
27 *Id.* art. 12.
28 *Id.* art. 13.
29 *Id.* art. 14.
30 *Id.* art. 15.
31 *Id.* art. 16.
32 *Id.* art. 17.
33 *Id.* art. 18.
34 *Id.* art. 19.
35 *Id.* art. 20.
36 *Id.* art. 21.

. . . ,"[37] "to work . . . ,"[38] to have time for "rest and leisure,"[39] "to a standard of living adequate for the health and well-being of [one]self and of [one's] family,"[40] "to education,"[41] to freely "participate in the cultural life of the community . . . ,"[42] and "to a social and international order in which the rights and freedoms . . . can be fully realized."[43]

The UDHR also notes that there are duties that everyone has to the community, including such limitations on rights and freedom "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . . ."[44] One does not have a "right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[45]

As demonstrated, the UDHR provides extensive and seemingly robust rights, which, depending on their interpretation, may afford a great deal of freedom and well-being to individuals across the globe. Still, how these rights are interpreted in legal contexts will often be a matter of local authority. This comes about because the language in the UDHR was thought to be aspirational at the time of its adoption, even though many of the rights have since been closely paraphrased in legally binding covenants, such as the ICCPR[46] and the ICESCR,[47] and several of its provisions have also become part of the CIHRL.[48]

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37 *Id.* art. 22.

38 *Id.* art. 23.

39 *Id.* art. 24.

40 *Id.* art. 25.

41 *Id.* art. 26.

42 *Id.* art. 27.

43 *Id.* art. 28.

44 *Id.* art. 29.

45 *Id.* art. 30.

46 International Covenant on Civil and Political Rights, art. 1, 2, Dec. 16, 1966, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR].

47 International Covenant on Economic, Social, and Cultural Rights, pmbl., Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

48 *See* Michelle Bachelet, U.N. High Comm'r for Hum. Rts., 70th Anniversary of the Universal Declaration of Human Rights (Dec. 6, 2018), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23983&LangID=E [https://perma.cc/6WBH-QUVM]; *see also* Ionel Zamfir, *The Universal Declaration of Human Rights and Its Relevance for the European Union,* PE 628.295, EURO. PARLIAMENTARY RSCH. SERV. (Nov. 2018), https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf [https://perma.cc/H7FU-5E4H]. It should be noted that an aspiration can become legally binding not only when made part of a binding agreement but also as customary international law by widespread state practice out of a sense of obligation (*opinio juris*), where there is not significant widespread rejection of the practice. *See*

As for the two Optional Protocols to the ICCPR, the first was added to further ensure individual protections by "enabl[ing] the Human Rights Committee set up in part IV of the Covenant . . . to receive and consider . . . communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant."[49] This is an important recognition that the rights that the ICCPR protects are individual rights, even if the individuals who can complain are only those who live in states that have signed onto this protocol. The Second Optional Protocol seeks to abolish the death penalty.[50]

An important difference between the ICCPR and the ICESCR concerns the availability of sufficient resources in less affluent countries to enable them to secure the positive rights that the ICESCR calls for. This is different from what would be needed to secure the negative rights protections under the ICCPR, which can be mostly satisfied by state noninterference with the freedoms that it sets out; whereas the ICESCR would require access to sufficient resources for states to provide the entitlements prescribed, like social security and health care. The ICESCR addresses this problem of insufficient resources by requiring less affluent and more prosperous states to join in collective arrangements for assistance and cooperation.[51] But, of course, exactly

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Customary International Law: Research Guides & Background Information, INT'L LEGAL RSCH. TUTORIAL, https://law.duke.edu/ilrt/cust_law_2.htm [https://perma.cc/TME5-YUD6] (last visited Jan. 12, 2022).

49 Optional Protocol to the International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 U.N.T.S. 171 (concerning individual communications).

50 *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, July 11, 1969, 1642 U.N.T.S. 414 (aiming at the abolition of the death penalty).

51 Here it is important to recognize that all states are not alike in the resources they will be able to bring to bear in meeting their international human rights obligations. The Kantian imperative that "ought implies can" is relevant to distinguish between states that have sufficient resources to meet ICESCR obligations from those that do not and will need help from more affluent states. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON A548/B576, at 540 (Paul Guyer & Allen W. Wood eds., trans., Cambridge University Press 1998) (1781). Thus, Article 2(1) of the ICESCR states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . .." ICESCR, *supra* note 47, art. 2(1). This clearly imposes an obligation on wealthier states to provide assistance, where necessary, to poorer states with fewer resources available to meet the Covenant's obligations. *See* Gorik Oams, *The Concept of 'Minimum Core Obligations': Guidance for International Obligations*, JAMES G. STEWART BLOG (May 28, 2018),

how any specific arrangement comes about, let alone how it will thereafter operate, is itself likely to be attenuated by other concerns, most notably the various political concerns of the respective parties.

Undeniably, almost all the provisions of the IBHR require interpretation, both regarding their meanings and requirements for parties concerned; and such interpretations are likely to be inconsistent when there is no overriding interpretative framework that can be appealed to. This will most assuredly be true in cases involving conflicts of rights where one human right gets offset against another. For then, in addition to the political concerns of the state actors operating in an international environment, reliance is likely to fall upon domestic courts to protect rights whose interpretations easily depend on differences gathered from local customs and religious practices. This article will attend to these issues in Parts IV through VI, but first it describes more fully the institutions for human rights adjudication that currently exist.

III. THE EVOLVING IMPORTANCE OF INTERNATIONALLY RECOGNIZED HUMAN RIGHTS AND THE ROLE OF INTERGOVERNMENTAL HUMAN RIGHTS INSTITUTIONS

Although IHRL is a more recent development on the international stage than some other areas of international law,[52] its rise in importance has been accompanied by a partial redeployment of rules of international law away from a past singular focus on state interactions

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http://jamesgstewart.com/the-concept-of-minimum-core-obligations-guidance-for-international-obligations/ [https://perma.cc/T2Z2-HMQB]. Additionally, Article 2(3) provides that: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." ICESCR, *supra* note 47, art. 2(3). This would suggest that there exists no duty for a developing state to provide economic rights to non-nationals. *See* VALENTIN JEUTNER, IRRESOLVABLE NORM CONFLICTS IN INTERNATIONAL LAW: THE CONCEPT OF A LEGAL DILEMMA 132 (2017).

52 It was not until 1948, soon after the founding of the U.N., that the General Assembly adopted the UDHR. *See* Declaration, *supra* note 16. Such a declaration had never been a part of the earlier League of Nations, whereas international humanitarian law ("IHL") has been evolving since August 22, 1864, "when the plenipotentiaries of 13 States had met, also in Geneva, and adopted the ten articles of the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field . . .." Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT'L L. 109, 123 (2015) (quoting 5 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977), at ¶ 4 at 8 (1978)).

toward a more comprehensive concern of individuals as bearers of human rights. While much of international law still does not directly concern human rights, it might be helpful to note similarities and differences where IHRL overlaps with a traditional international law area, *viz.*, international humanitarian law ("IHL").[53]

IHL regulates the behavior of parties involved in "an 'armed conflict' and requires humane treatment of civilians, prisoners, the wounded and sick."[54] It also "binds all parties to an armed conflict individually including members of State and non-State armed groups."[55] This is an important move beyond just focusing on state parties as sole actors. By contrast, IHRL "concerns the rights/entitlements individuals and groups can claim against governments."[56] Still, IHRL only binds state parties in their relations to individuals under their jurisdiction and control; it does not directly bind individuals.[57] With few exceptions where states have universal jurisdiction to operate,[58] individuals can only be bound if an IHRL treaty binds a state

53 Much of international law involves boundary disputes between states, as well as navigation on waterways. Still, new concerns about climate change, international terrorism, and economic effects on the global market are likely to bring into consideration human rights concerns. *See, e.g.*, *Understanding Human Rights and Climate Change*, OFF. U.N. HIGH COMM'R HUM. RTS. 13–25, https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf [https://perma.cc/D28L-J2TP] (last visited Jan. 10, 2022); Sital Dhillon, *Human Rights and Counter-Terrorism*, SHEFFIELD HALLAM UNIV. RSCH. ARCHIVE (SHURA) 7–9 (2016), http://shura.shu.ac.uk/14529/ [https://perma.cc/9AHS-TMUF]; RADHIKA BALAKRISHNAN, JAMES HEINTZ & DIANE ELSON, RETHINKING ECONOMIC POLICY FOR SOCIAL JUSTICE: THE RADICAL POTENTIAL OF HUMAN RIGHTS (2016).

54 DEMOCRATIC PROGRESS INST., LEGAL FACT SHEET: INTERNATIONAL HUMAN RIGHTS IN ARMED CONFLICTS (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocols Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977), https://www.democraticprogress.org/wp-content/uploads/2014/12/Legal-Factsheet-IHR-in-Conflict.pdf [https://perma.cc/9T8J-6GGE] (last visited Jan. 10, 2022).

55 *Id.*

56 *Id.*

57 *Id.* (citing ICCPR, *supra* note 46, art. 2(3).

58 "The principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.' The rationale behind it is based on the notion that 'certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim.' Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world." *The Scope and Application of the Principle of Universal Jurisdiction: Comments from Kenya,* U.N. Doc. A/64/452-RES 64/117,

party to criminally prosecute individuals who commit IHRL violations.[59] However, it should be noted that there is a growing trend in the international community toward expecting non-State actors to abide by international human rights norms "where they exercise some degree of control over a given population and community," and especially if they are themselves being controlled or directed by a state actor.[60] While IHRL applies in peacetime, it can also be applied in situations of armed conflict or belligerent occupation.[61] Indeed, it may even provide broader protections during times of conflict than IHL.[62]

I point out this difference less to focus on the overlap of the two areas of international law but more to stress the growing importance of IHRL in the development of international law generally. IHRL is part of a growing trend of national responsibility toward the protection of individual human rights, including international criminal responsibility of high ranking government officials, as will be set forth below.[63] Indeed, this trend is also now seen in the way recent commentators of international law have come to reconceptualize the historical development of international law from its early beginnings in the mid-seventeenth century as applying solely to nation states to where it is today. Professors Lori Damrosch and Sean D. Murphy, for example, state at the beginning of their well-recognized casebook on international law:

> Traditionally, international law was seen as the law of the international community of states, the basic units in the world

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https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf [https://perma.cc/NG4E-N8PC] (last visited Jan. 10, 2022) (citations omitted).

59 DEMOCRATIC PROGRESS INST., *supra* note 54 (citing European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, art. 13, Nov. 1950, E.T.S. 5; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]).

60 DEMOCRATIC PROGRESS INST., *supra* note 54, at 26–27.

61 *Id.* (citing Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J 131, 136, ¶ 106 (July 9)).

62 In terms of human rights applying to individuals during war: some are governed exclusively by IHL (for instance, the conduct of hostilities or the treatment of the wounded or sick); some exclusively by IHRL (for instance, the freedom of the press, the right to assembly, vote or strike); and others are covered by both (for instance, the prohibition on torture).
Id.

63 *See International Human Rights Law*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx [https://perma.cc/CE6H-ZA9U] (last visited Jan. 12, 2022).

> political system from the Peace of Westphalia (1648) forward. At least from the mid-20th century, however, international law has increasingly dealt also with other entities, notably including the individual as bearer of human rights and as liable for the commission of international crimes.[64]

Given what has been described as the general framework in which the IBHR operates, it is worth asking more specifically how human rights are protected internationally. It has already been mentioned that most of the provisions of the IBHR are left to domestic courts to protect; still, it is worth discussing the more specific, albeit limited, roles of the ICJ, the ICC, and the HRC in protecting human rights.

A. The ICJ and IHRL

The ICJ, which is the successor to the PCIJ under the League of Nations, was established by statute when the U.N. was created on June 26, 1945.[65] The U.N. Charter stated that all members of the U.N. are *ipso facto* parties to the Statute of the International Court of Justice ("ICJ Statute").[66] The ICJ is composed of fifteen "independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices," of which "no two . . . may be nationals of the same state."[67] The ICJ's purposes are to settle inter-state disputes between state parties who may or may not be members of the U.N.,[68] and provide non-binding "advisory opinions on legal questions referred to it by the UN main organs and specialized agencies through its advisory proceedings."[69]

The ICJ's jurisdiction extends to "(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; [and] (d) the nature or extent of the reparation to be made

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64 LORI DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS, at xv (7th ed. 2019).

65 U.N. Charter art. 92.

66 *Id.* art. 93. *See also History*, INT'L CT. JUST., https://www.icj-cij.org/en/history [https://perma.cc/2JKY-SK7J] (last visited Jan. 21, 2022).

67 Statute of the International Court of Justice arts. 2, 3, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

68 U.N. Charter art. 35.

69 Gentian Zyberi, *Enforcing Human Rights Through the International Court of Justice: Between Idealism and Realism*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS INSTITUTIONS & ENFORCEMENT 3 (Apr. 1, 2018). *See also* ICJ Statute, *supra* note 67, art. 65.

for the breach of an international obligation."[70] In performance of its function, the ICJ applies:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations; [and]
>
> (d) . . . [those] judicial decisions [affecting the parties to the case] and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[71]

Together these provisions provide a basis for the settlement of disputes, especially between state parties who "declare that they recognize as compulsory ipso facto and without special agreement . . . the jurisdiction of the Court . . . ."[72]

Because these provisions limit the kind of cases the ICJ can hear to only those involving states, not individuals alleging human rights violations, the reality is that human rights issues will likely be raised in the ICJ only if a state party brings them forth. And since "human rights treaties generally have their own dispute settlement procedure, the situations in which the Court has dealt with human rights issues have arisen mainly in the context of general international law and non-human rights specific treaties or provisions, which nevertheless have raised such issues."[73] Nonetheless, the ICJ can render human rights decisions provided the issue is raised by a state party or is submitted to it by an organ or agency of the U.N. and falls within either a state practice or under a treaty provision, such as might be the case with the Convention on the Prevention and Punishment of the Crime of Genocide[74] and the International Convention on the Elimination of All Forms of Racial Discrimination,[75] with the latter "permitting referral

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70 ICJ Statute, *supra* note 67, art. 36(2).

71 *Id.* arts. 38(1), 59.

72 *Id.* art. 36(2).

73 *See* Sandy Ghandhi, *Human Rights and the International Court of Justice: The* Ahmadou Sadio Diallo *Case*, 11 HUM. RTS. L. REV. 527, 528 (2011).

74 Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, 78 U.N.T.S. 277.

75 International Convention on the Elimination of All Forms of Racial Discrimination art. 22, Mar. 7, 1966, 660 U.N.T.S. 195. *See also* Torture Convention, *supra* note 59.

to the Court after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure."[76] As a result of these limitations, the ICJ "is not a 'human rights' court," although it does provide an important, even if only occasional, forum for the resolution of human rights disputes.[77] One good example of this is found in the *Ahmadou Sadio Diallo* case.[78]

In *Ahmadou Sadio Diallo*, Guinea filed an application with the ICJ instituting proceedings against the Democratic Republic of the Congo ("DRC") alleging "serious violations of international law" after its national, Ahmadou Sadio Diallo, had been twice imprisoned, despoiled of his investments in two companies, and his property and bank accounts had been seized.[79] Mr. Diallo was also expelled from the DRC.[80] The ICJ acknowledged that Guinea had standing to bring the case on behalf of its national,[81] and that the DRC had violated Articles 9 and 13 of the ICCPR and Articles 6 and 12 of the African Charter of Human and Peoples Rights.[82] Since neither document contained a provision for the kind of remedy appropriate for Mr. Diallo's situation, the Court probed its own jurisprudence and that of other international courts and tribunals to determine what compensation may be awarded for lost income, material damage, and post-judgment interest.[83]

I point out this case mostly to stress that, although human rights violations are not a central focus of the ICJ, nor can individuals on their own bring an application before the ICJ, the ICJ nevertheless does provide an important forum for resolving human rights complaints where the issue is presented by a state party.

One other matter coming out of *Ahmadou Sadio Diallo* needs attention, as it points toward a possible future direction for the ICJ in the development of IHRL. The quote below is taken from the separate opinion of Judge Cançado Trindade. Because of its importance to our

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76 *See* Ghandhi, *supra* note 73, at 528 (citing Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russia Federation), Preliminary Objections, Judgment, 2011 I.C.J. 70 (Apr. 1)).

77 *Id. See also* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 597–98 (2nd ed. 2000).

78 Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), Judgment, 2010 I.C.J. 324 (Nov. 30).

79 *Id.* ¶ 1.

80 *Id.* ¶ 19.

81 *Id.* ¶ 6.

82 *Id.* ¶¶ 73, 80.

83 *Id.* ¶ 67.

discussion, I copy it in substantial part. Paying particular attention to paragraph 227, ask what changes would need to be made (if any) to the ICJ Statute and/or its operating procedures for the ICJ to hear intra-state, as opposed to inter-state, challenges, and how might those changes alter the ICJ's jurisdiction. How might an intra-state approach to human rights issues, affect the ICJ's influence on IHRL?

> 223. The subject of the rights, that the Court has found to have been breached by the Respondent State in the present case, is not the Applicant State: the subject of those rights is Mr. A. S. Diallo, an individual. The procedure for the vindication of the claim originally utilized (by the Applicant State) was that of diplomatic protection, but the substantive law applicable in the present case — as clarified after the Court's Judgment of 2007 on preliminary objections, in the course of the proceedings (written and oral phases) as to the merits — is the international law of human rights.
>
> 224. Whenever the Court diverted, in parts of the present Judgment, from the proper hermeneutics of human rights treaties, it incurred into inconsistencies . . .. Those deviations disclosed a somewhat crooked line of reasoning, which could and should have been avoided. Once the applicable law is identified and conformed, as in the present case, by human rights treaties, the Court is to interpret and apply them in pursuance of the general rule of interpretation of treaties . . ., bearing in mind their special nature.
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> 225. After all, human rights treaties do apply in the framework of intra-State relations (such as, in the present case, the relations between the DRC and Mr. A. S. Diallo). In properly interpreting and applying such treaties, the Court is thereby giving its contribution to the development of the aptitude of international law to regulate relations at intra-State, as well as inter-State, levels . . ..
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> . . . .
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> 227. The fact that the contentious procedure before the Court keeps on being exclusively an inter-State one — not by an intrinsic necessity, nor by a juridical impossibility of being of another form — does not mean that the reasoning of the Court ought to develop within an essentially and exclusively inter-State optics . . ..
>
> 228. The relations governed by contemporary international law, in distinct domains of regulation, transcend to a large extent the purely inter-State dimension (e.g., in the international protection of human rights, in the international

> protection of the environment, in international humanitarian law, in international refugee law, in the law of international institutions, among others), and the ICJ, called upon to pronounce upon those relations, is not bound to restrain itself to an anachronistic inter-State optics. The anachronism of its mechanism of operation ought not to, and cannot, condition its reasoning, so as to enable it to exert faithfully and fully its functions of principal judicial organ of the United Nations.[84]

B. The ICC and IHRL

The current ICC was created in 1998 when 120 nations adopted the Rome Statute of the International Criminal Court ("Rome Statute"), designed to "set up the highest legal standards, the equality of arms, the impartiality of the judicial process, and created a basis for the model of civil administration in the service of fair and equitable justice."[85] In furtherance of that aim, the ICC was created "to exercise its jurisdiction over persons for the most serious crimes of international concern . . . ."[86] Although not a military tribunal, the ICC was, in a sense, a continuation of what had begun with the Nuremburg Charter in 1945 to punish the major war criminals of the Axis Powers,[87] which was thereafter followed by the subsequent International Criminal Tribunal for the Former Yugoslavia[88] and the International Criminal Tribunal for Rwanda.[89]

Under the provisions of the Rome Statute, the ICC is the court of final resort that has limited jurisdiction to try individuals for "[t]he crime of genocide," "[c]rimes against humanity," "[w]ar crimes," and "[t]he crime of aggression,"[90] provided the crimes were committed

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84 Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), Judgment, 2010 I.C.J. 324, 729, ¶¶ 223–25, 227–28 (Nov. 30) (separate opinion by Trindade, J.).

85 *The ICC Rome Statute is 20,* INT'L CRIM. CT., https://www.icc-cpi.int/romestatute20 [https://perma.cc/PSQ2-R3KQ] (last visited Jan. 21, 2022).

86 Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 38544.

87 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter on the International Military Tribunal (Nuremburg Charter), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

88 Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993), as amended S.C. Res. 1877 (July 7, 2009).

89 U.N. INT'L RESIDUAL MECHANISM CRIM. TRIBUNALS, *The ICTR in Brief,* https://unictr.irmct.org/en/tribunal [https://perma.cc/KNB2-LBSE] (last visited Jan. 10, 2022).

90 Rome Statute of the International Criminal Court, *supra* note 86, art. 5(1).

"after entry into force of this statute," and only if the crimes committed occurred within the territory or by nationals of member states, or were referred to it by the U.N. Security Council, except in the instance where a non-member state accepts the jurisdiction of the ICC.[91] The ICC's jurisdiction is also limited to "the most serious crimes of concern to the international community as a whole" and, even then, only when "a State is unwilling or unable genuinely to carry out the investigation or prosecution."[92] This latter limitation follows the principle of complementarity recognized in international law.[93] Under the principle of complementarity, national courts have priority over the ICC to try cases because national courts may actually be in a better position than the ICC to protect human rights globally.[94]

Still, it is interesting to note that the crimes over which the ICC has jurisdiction are those that the U.N. International Law Commission has deemed to constitute peremptory norms (*jus cogens*) of customary international law[95] for which there is to be universal jurisdiction.[96] "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest."[97] And they are properly customary international law because they were established after "[a]cceptance and recognition by a very large majority of States" who believed them to be binding obligations of international

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91 *Id.* arts. 11, 12, 13.

92 *Id.* arts. 5(1), 17(1)(b).

93 *See Q&A: The International Criminal Court and the United States,* HUM. RTS. WATCH (Sept. 2, 2020, 12:00 AM), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states [https://perma.cc/D3TF-XNN8]. Here it is important to note that the ICC has limited jurisdiction to investigate serious crimes, especially when involving a non-member country like the United States.

94 Marta Bo, *Crimes Against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity*, OPINIO JURIS (Dec. 23, 2019), http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/ [https://perma.cc/49S7-8F4Q].

95 *See* Report of the International Law Commission on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 146–47, https://legal.un.org/ilc/reports/2019/english/chp5.pdf [https://perma.cc/7HSM-8UTD] (last visited Jan. 10, 2022) [hereinafter Report of the International Law Commission]. *See also* RESTATEMENT (THIRD) FOREIGN REL. L. § 702 cmt. n (AM. LAW INST. 1987).

96 *See Factsheet: Universal Jurisdiction*, CTR. CONST. RTS., https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-universal-jurisdiction [https://perma.cc/WK5T-G3Y4] (last modified Sept. 8, 2021).

97 Report of the International Law Commission, *supra* note 95, at 145 (Conclusion 17).

law—"acceptance and recognition by all States is not required."[98] Evidence for the existence of such norms might include "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference."[99] Also relevant as a subsidiary means for determining peremptory norms are "[d]ecisions of international courts and tribunals, in particular of the [ICJ],"[100] as well as "[t]he works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations."[101] The list of peremptory norms is non-exclusive; it is open to future additions by the same process in which the current list of norms has come about.[102]

This is all very similar and consistent with what is said in the Preamble of the Rome Statute regarding the subject-matter jurisdiction of the ICC. It also provides additional support for the Rome Statute's claim that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[103] Other comments also offered by the International Law Commission note that no state may adopt a treaty provision,[104] other obligation,[105] or take any reservation to a provision in a treaty that would operate as an exemption to a *jus cogens* norm;[106] nor may another customary rule of international law come into existence or stay in existence if it violates a *jus cogens* norm.[107] In short, a *jus cogens* or peremptory norm "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[108] There are limitations, however, even when states see themselves bound to open their domestic courts

98 *Id.* at 143 (Conclusion 7(2)).
99 *Id.* at 143 (Conclusion 8(2)).
100 *Id.* at 143 (Conclusion 9(1)).
101 *Id.* at 143 (Conclusion 9(2)).
102 *See id.* at 146 (Conclusion 23).
103 Rome Statute of the International Criminal Court, *supra* note 86, pmbl.
104 Report of the International Law Commission, *supra* note 95, at 144 (Conclusion 11).
105 *Id.* at 145 (Conclusion 15).
106 *Id.* at 144 (Conclusion 13).
107 *Id.* at 145 (Conclusion 14).
108 *Id.* at 142 (Conclusion 2).

to the prosecution of a *jus cogens* violation,[109] if, for example, the claim is brought against another state as opposed to an individual, the ICJ has ruled state immunity may still apply.[110]

C. The U.N. Human Rights Committee

Article 28 of the ICCPR established a Human Rights Committee ("HRC") of eighteen members "of high moral character and recognized competence in the field of human rights," but not "more than one national of the same state."[111] Before taking up the duties of the HRC, each member must "make a solemn declaration in open committee that he will perform his functions impartially and conscientiously."[112] The HRC shall review reports submitted by the state parties to the ICCPR "on measures they have adopted which give effect to the rights recognized,"[113] as well as use its good offices toward friendly solutions on matters referred to it,[114] after "all available domestic remedies have been invoked and exhausted"[115] or, "with the prior consent of the State Parties concerned, appoint an ad hoc, Conciliation Commission."[116]

A somewhat similar committee was originally created by Articles 16, 17, and 21 of the ICESCR to receive periodic reports of state party compliance and to make recommendations to the General Assembly as needed; that Committee is now the Committee on Economic, Social and Cultural Rights ("CESCR"), following the failures of two previous monitoring bodies.[117] By contrast with the CESCR, the HRC allows so-called "shadow reports" from non-governmental organizations ("NGOs") and accepts complaints from individual persons under

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109 *The* Pinochet *Case: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity*, AMNESTY INT'L (Jan. 1999), https://www.amnesty.org/en/wp-content/uploads/2021/06/eur450011999en.pdf [https://perma.cc/M6H6-3JBS].

110 Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99 (Feb. 3).

111 ICCPR, *supra* note 46, arts. 28(1)–(2), 31.

112 Declaration, *supra* note 16, art 38.

113 ICCPR, *supra* note 46, art. 40.

114 *Id.* art. 41(e).

115 *Id.* art. 41(c).

116 *Id.* art. 42(1)(a).

117 ICESCR, *supra* note 47, arts. 16, 17, 21. *See also International Covenant on Economic, Social, and Cultural Rights,* WIKIPEDIA, https://en.wikipedia.org/wiki/International_Covenant_on_Economic,_Social_and_Cultural_Rights [https://perma.cc/N79L-JUF2] (last modified Nov. 24, 2021).

the jurisdiction of those states who have accepted the First Protocol to the ICCPR.[118] As can be seen from the limited powers conferred to these committees under the ICCPR and the ICESCR, these committees are limited in what they can actually do to prevent human rights violations. Still, the HRC is a U.N. expert body capable of greater impartiality in the solutions it proposes than "the more high-profile UN Human Rights Council, or its predecessor, the UN Commission on Human Rights," which were "*UN political bodies:* composed of states, established by a UN General Assembly resolution and the UN Charter . . ." to discuss human rights issues around the globe.[119] These latter two bodies have been criticized by various states' parties as not always being appropriately impartial.[120]

D. Domestic Courts

It is important to note that much of IHRL relies on the willingness of nation states' domestic courts to afford not only *jus cogens* protections but the whole ambit of IBHR. "[IHRL] lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights."[121] "Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties."[122] This may give rise, especially with regard to *jus cogens* violations—where universal jurisdiction is present—to individuals bringing IHRL complaints under the CIHRL. However, not all nation states may choose to enforce *jus cogens* or the CIHRL in their domestic courts. And even those that do may first require the presence of a domestic rule that allows the case to go forward.

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118 Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 49, art. 1.

119 *United Nations Human Rights Committee,* WIKIPEDIA, https://en.wikipedia.org/wiki/United_Nations_Human_Rights_Committee [https://perma.cc/HH9V-583P] (last modified Jan. 2, 2022).

120 *United Nations Human Rights Council,* HUM. RTS. WATCH, https://www.hrw.org/topic/united-nations/human-rights-council [https://perma.cc/3PUB-TAY3] (last visited Jan. 12, 2022).

121 *International Human Rights Law*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx [https://perma.cc/BY3M-NNP6] (last visited Jan. 12, 2022).

122 *Id.*

> In *The Paquete Habana*, the U.S. Supreme Court held that,[123] [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[124]

This broad statement of international law being part of U.S. law nevertheless allows for some very important exceptions. For example, the United States Circuit Court of Appeals for the District of Columbia has held that customary international law may be superseded by a later-in-time statute.[125] On the other hand, because Congress enacted the Alien Tort Statute ("ATS"),[126] non-US citizens can sue a foreign national or legal person for violation(s) of customary international norms wherever the violation may have occurred,[127] but only if they can show the basis for their claim to be a well-defined norm of customary international law. When the ICCPR was ratified, the U.S. Senate added a number of declarations, understandings, and reservations, including the declaration that the treaty does not create a private cause of action.[128] Consequently, if ICCPR rights are going to be enforced in a U.S. court, it must be because they are part of the customary

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123 *See, e.g.*, Andrew Johnson, *How Universal is Universal Jurisdiction?*, AM. U.J. GENDER, SOC. POL'Y & L. BLOG (2019), http://www.jgspl.org/how-universal-is-universal-jurisdiction/ [https://perma.cc/J63D-SKPV] (last visited Jan. 19, 2022) (discussing universal jurisdiction as applied in French and German courts and noting that for "[IHL] and gross human rights abuses[,] . . . [s]ome European states have turned to exercising universal jurisdiction to hold Syrian officials accountable") (citations omitted).

124 The Paquete Habana, 175 U.S. 677, 700 (1900).

125 *See* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

126 28 U.S.C. § 1350 (1948).

127 *See Alien Tort Statute*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/alien_tort_statute [https://perma.cc/LQ42-GLHF] (last visited Jan. 21, 2022).

128 *See* 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992).

international law which the United States recognizes.[129] In other words, had the ATS not been enacted, it is unclear whether U.S. domestic courts would be enforcing international human rights at all.[130]

For example, in *Sosa v. Alvarez-Machain*,[131] following his acquittal for complicity in the murder of a U.S. Drug Enforcement Authority agent and his subsequent capture and detention in Mexico, Alvarez-Machain brought a suit under the ATS against one of his Mexican abductors for the tort of false arrest, which he claimed was in violation of the law of nations.[132] Alvarez-Machain claimed that under the ATS, the district court had jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations,"[133] and that his detention was an "arbitrary arrest" in violation of both the UDHR and the ICCPR.[134]

The U.S. Supreme Court held that Alvarez-Machain's "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support creation of a federal remedy."[135] Noting that the Restatement (Third) of Foreign Relations Law of the United States "says in its discussion of CIHRL that a 'state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention,'" the Court, per Justice Souter, went on to add that "[a]ny credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive

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129 COMM. ON FOREIGN RELATIONS, U.S. SENATE REPORT ON RATIFICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102–23 (2d Sess. 1992), *as reprinted in United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 658 (1992). *See generally* Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility, Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1 (2005).

130 I am distinguishing here international human rights from the American Bill of Rights and the Fourteenth Amendment of the Constitution. Granted, the IBHR may have originally drawn inspiration from these American documents. U.S. DEP'T OF STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 30. Still, the enforcement in American courts of those rights provisions is because they are part of American constitutional law. *See also* Ash, *supra* note 129.

131 *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

132 *Id.* at 698.

133 *Id.* at 698–99 (citing 28 U.S.C. § 1350).

134 *Id.* at 734.

135 *Id.* at 738.

authority."[136] Finding no such factual basis in the present case, the Court denied Alvarez-Machain's ATS claim notwithstanding that language in the UDHR and the ICCPR could be interpreted to provide a contrary result. Still, the Court left open the possibility that a future case might turn out differently, presumably where there would be a fuller justification for the custom in question, noting that "nothing Congress had done is a reason for us to shut the door to the law of nations entirely."[137] This case illustrates how local rules domestic courts are obliged to follow can affect not only whether they can hear a case of CIHRL, but also how they need go about interpreting the norms that are in dispute.[138]

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136 *Id.* at 737 (citing RESTATEMENT (THIRD) FOREIGN REL. L. § 702 (AM. L. INST. 1987)).

137 *Id.* at 731.

138 A particularly interesting example of how customary international norms and U.S. domestic law might interface is suggested but not fully resolved in the *Sosa* case. Because of what the Supreme Court said in *Sosa*, the ICCPR is not directly enforceable in U.S. courts unless there exists a separate congressional authorization under which ICCPR complaints can be heard in domestic courts. Even when taken separately, the norms of the ICCPR, many of which now constitute customary international law, might not give rise to a claim in federal court absent a statute like the ATS authorizing the federal courts to hear these cases. *See generally* Cedric M. J. Ryngaert & Duco W. Hora Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, 65 NETH. INT'L L. REV. 1 (2018). Part of the problem is created by the Supreme Court's 1938 decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which "denied the existence of any federal 'general' common law." *Sosa*, 542 U.S. at 726. And although the Court has seen fit at times "to create federal common law rules in interstitial areas of particular federal interest" including "judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Id.* (citations omitted). Consequently, U.S. courts remain reluctant to adopt any set of new federal common law norms absent a congressional mandate. And even where there exists a federal statute, like the ATS, which provides for a federal court to hear a case alleging a violation of customary international norm, there may still be an insufficient factual basis, as the *Sosa* Court determined.

When the ATS was originally adopted by the First Congress, as part of the Judiciary Act of 1789, it was not intended to be "stillborn" but is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (citing *Sosa*, 542 U.S. at 724). The original customary international norms that the First Congress most likely had in mind were "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724–25. Still, the fact that those norms may have been what the Congress had in mind when they enacted the ATS may not restrict a court from considering other customary international norms that may now be present. As Justice Souter noted, we have no reason to believe from any development over the last two centuries that "Congress has . . . limited civil common law power by another statute." *Id.* at 725. "Accordingly, we think courts

IV. HOW RELATIVISM OPERATES TO UNDERMINE DEVELOPMENT OF A CONSISTENT INTERPRETATION OF IHRL

It is telling to note a comment by philosopher Allen Buchanan regarding how the IBHR came about. He wrote, "that the [UDHR] and the various human rights treaties that followed it wisely avoided a justification for the norms they asserted";[139] and that "it was possible to agree on a list of human rights only on condition that almost nothing was said about how they are grounded."[140] Buchanan's statement suggests a disconnect between the labels many in the world identify to reference human rights and the statuses or actions they will protect, and this suggests that the determination of what to protect may actually restrict what the labels represent.[141] This has given rise to claims of cultural relativism in the way that the IBHR is applied, especially when applied by domestic courts. For instance, when local norms, often based on culture and religion, affect the way the provisions of the UDHR, the ICCPR, and the ICESCR are likely to be interpreted by individual nation states, the domestic courts in those states are likely to afford the local cultural interpretation to the IBHR's provision.[142] It is also seen when governments sign onto human rights treaties with particular reservations, often to preserve cultural norms and patterns that would otherwise be at odds with the objects and purposes of the treaties.[143]

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should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.*

139 Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 96 (Samantha Besson & John Tasioulas eds., 2010).

140 *Id.*

141 *See* Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870 (1985) ("In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.").

142 *See, e.g.*, Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 MINN. J.L. & INEQ. 367, 367–68 (1989).

143 *See* Sarah Hélaoui, Cultural Relativism and Reservations to Human Rights Treaties: The Legal Effect of the Saudi Reservation to the CEDAW [The Convention on the Elimination of All Forms of Discrimination Against Women] (Fall 2004) (M.A. Thesis, Lund University) ("In light of general principles of international law,

Buchanan goes on to note that,

> [i]n the end, whether such a justification becomes available will depend not only upon the further development of the moral foundations of the idea of human rights—a task which until recently most contemporary moral and political philosophers, like most international legal theorists have avoided—but also upon improvements in the global public deliberative processes that occur within the complex array of institutions within which human rights norms are articulated, contested, and revised over time.[144]

The global public deliberative process Buchanan refers to perhaps begins when domestic courts render human rights decisions that appear inconsistent with what intergovernmental organizations and some NGOs believe to be correct. It has been argued that the:

> So-called 'sensitivities' and relativist arguments invoking culture do not absolve States from their human rights obligations, the Special Rapporteur in the field of cultural rights told the Third Committee (Social, Humanitarian and Cultural) today, as delegates sparred with experts over country-specific mandates for situations in Myanmar and the Democratic People's Republic of Korea.
>
> Seeking to dispel misconceptions about cultural diversity, Special Rapporteur Karima Bennoune emphasized the destructive impacts of cultural relativism — which uses culture to take away rights rather than amplify them. The presence of relativist arguments in United Nations resolutions is reprehensible. 'Sensitivities' cannot justify the criminalization of sexual orientation or gender identity or racial discrimination, for instance.
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> . . . .
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> In a similar vein, Fernand de Varennes, Special Rapporteur on minority issues, said statelessness is neither accidental nor neutral because it involves discrimination against minorities.

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the legal effects of incompatible reservations must take into account the intent of the reserving State. In the case of Saudi Arabia, the strong traditionalist Islamic identity speaks against an intent to be bound by CEDAW without the reservation and the *de lege lata* effects must accordingly be the invalidation of the treaty ratification. Assumingly, most States that enter reservations incompatible with the object and purpose of a treaty will regard them as inseparable from the intent to be bound by the treaty. In particular, it can be concluded with relative certainty that reservations formulated as a result of strong cultural (religious) relativist arguments, which falls outside the margin of appreciation afforded to sovereign states, are unlikely to be separable from the reserving State's intent to be bound by the treaty.").

144 Buchanan, *supra* note 139, at 96.

> 'Just as was the case for the Jewish minority in Germany before the Second World War, minorities too often continue to find themselves 'unworthy' of citizenship, with consequent obstacles in accessing basic public services, even including in some cases education,' he said. More must be done to ensure respect for stateless people, especially in addressing arbitrary requirements for citizenship.[145]

While such debates do not promise to lead to a complete solution to the relativist issue, they may give rise to at least partial solutions based on the force of the rights presented.

Professor Jack Donnelly, for example, has argued that the most important human rights are identified in Articles 1 through 11 of the UDHR.[146] He wrote, "[r]ights to life, liberty, and security of the person; the guarantee of legal personality; and protections against slavery, arbitrary arrest, detention, or exile, and inhuman or degrading treatment" are "basic requirements of human dignity, and are stated in sufficiently general terms, that any morally defensible contemporary form of social organization must recognize them."[147] Other "[c]ivil rights, such as freedom of conscience, speech and association," Donnelly suggests, are open to adjustment to fit more strongly traditional communities, where "a positive evaluation of relatively autonomous individuals" may not be presupposed.[148] Still, other rights, such as the "right of free and full consent of intending spouses" while "subordinate to the basic right to marry and found a family," was of recent enough origin that Donnelly thinks it may not be offended by some customs such as bride price.[149]

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145 Press Release, United Nations General Assembly, Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates, U.N. Press Release GA/SHC/4241 (Oct. 23, 2018).

146 Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 417 (1984).

147 *Id.*

148 *Id.*

149 *Id.* at 418 (citing Declaration, *supra* note 16, art. 16(2)). Bride price is money, property, or other form of wealth paid by a groom or his family to the woman or the family of the woman he will be married to or is just about to marry. Bride price can be compared to dowry, which is paid to the groom, or used by the bride to help establish the new household . . .. The tradition of giving bride price is practised in many Asian countries, the Middle East, parts of Africa and in some Pacific Island societies, notably those in Melanesia. *Bride Price,* WIKIPEDIA, https://en.wikipedia.org/wiki/Bride_price [https://perma.cc/2U84-WGLL] (last modified Jan. 5, 2022). The point of raising it here is to show that human rights norms will often be interpreted, especially by domestic courts, to comply with local cultural traditions.

While Donnelly's approach offers reasons for why some rights may be less subject to the influence of cultural relativism than others, it really doesn't close the gap on the effect of cultural relativism. Indeed, it leaves open exactly how far cultural norms can offset human rights, arguably even basic human rights. For example, under Donnelly's position, the right to marry another person of the same sex would not be guaranteed, even though he admits that Article 16(1) of the UDHR recognizes "the basic right to marry and found a family."[150] But even on what he would treat as the most important human rights, like the right to life, it is unclear how this would flesh out with consensual acts of homosexual behavior, which in some countries can lead to death. For example, in Saudi Arabia, individuals who are homosexual will often incur "[f]ines, floggings, beatings, torture, vigilante attacks, prison time up to life, chemical castrations, death, whippings, and deportation for first time offenders. People convicted twice face automatic execution. Islamic Sharia law is applied."[151]

There is a stronger case to be made for limiting reservations on international human rights treaties than what Donnelly offers. Under Article 19 of the Vienna Convention of the Law of Treaties,

> [a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[152]

For our purposes, we focus on Article 19(c). Scholars have asked: "[i]s the object and purpose of a treaty a subjective or objective criterion?"[153] This has raised an interesting debate among some scholars of international law. Especially in the context of multilateral human rights treaties, it is correct to say that,

> [m]ost scholars agree that the 'object and purpose' of a treaty is an objective criterion, which exists independently of attitudes of States. Likewise, they agree that it lies within the competence of the State parties to determine the

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150 Declaration, *supra* note 16, art. 16(1).

151 *LGBT Rights in Saudi Arabia*, WIKIPEDIA, https://en.wikipedia.org/wiki/LGBT_rights_in_Saudi_Arabia [https://perma.cc/J7LA-ENFL] (last modified Jan. 8, 2022).

152 Vienna Convention of the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331.

153 Hélaoui, *supra* note 143, at 30.

> compatibility of a reservation in relation to this object and purpose, thus giving the objectivity a sense of subjectivity.[154]

Does the latter limitation in effect undermine what these scholars initially claimed was an objective standard? Obviously, the approach suggested here may raise questions in any given context concerning the good faith of the parties and whether the reserving party should be bound only with those (other parties) who have accepted the reservation.[155] But even with that said, the approach affords opportunity for rational engagement over the object and purpose of the treaty that cannot simply be ignored by claiming to follow a different cultural or religious point of view.

Here it is helpful to note what the HRC said in a general comment about the role of reservations regarding the ICCPR. First, as many civil and political rights are being addressed by the ICCPR, the "object and purpose" must be "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[156] Second, reservations that offend peremptory norms (*jus cogens*) must be found to "not be compatible with the object and purpose of the Covenant."[157] Examples of such incompatibility would be "denying peoples the right to determine their own political status and to pursue their economic, social and cultural development."[158] Indeed, as for "reservations to the non-derogable provisions of the Covenant," those provisions "may not be suspended, even in times of national emergency."[159] States must thus make provisions to provide "remedies for human rights violations,"[160] even in such emergency contexts, including making "change[s] in national law to ensure compliance with Covenant obligations."[161] Additional

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154 *Id.*

155 *See* Vienna Convention of the Law of Treaties, *supra* note 152, art. 31(1). *See also* Richard W. Edwards Jr., *Reservations to Treaties*, 10 MICHIGAN J. INT'L L. 394–401 (1989).

156 Human Rights Committee, General Comment 24(52), U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 7 (1994).

157 *Id.* ¶ 8.

158 *Id.* ¶ 9.

159 *Id.* ¶ 10.

160 *Id.* ¶ 11.

161 *Id.* ¶ 12.

HRC concerns are expressed regarding reservations to the First and Second Protocols.[162]

With regard to the Vienna Convention, the HRC disavows "[t]he principle of inter-State reciprocity," noting that human rights treaties "are not a web of inter-State exchanges of mutual obligations," but an "endowment of individuals with rights."[163] This latter point suggests that the obligations states owe individuals which should flow from a human rights treaty cannot be limited, even when reservations are shared, if the reservations themselves would undermine the object or purpose of the treaty. Lastly, for human rights compliance to be properly determined, reservations, to the extent they are appropriate, must "not be general, but must refer to a particular provision of the Covenant and include in precise terms its scope in relation thereto."[164] These comments put forth by the HRC should be helpful to those parties seeking to present their case to the HRC as to what can be expected as a likely outcome of a treaty reservation. Beyond that, although the HRC's comments do not bind the ICJ, the ICJ acknowledges "it should ascribe 'great weight' to the interpretation adopted by this independent body that was established [by the ICCPR] specifically to supervise the application of the treaty."[165]

Nevertheless, even taking account of the ICJ's willingness to give deference to the HRC's interpretation, there remains a serious disconnect with the ICJ when considering its approach to interpreting CIHRL versus treaties. Remember, reliance on CIHRL may take hold when provisions of the IBHR are thought to bind states who were not signatories to either the ICCPR or ICESCR because the provisions of these documents have since become generally followed by most states as binding. The difficulty I speak of arises because of the ICJ's almost exclusive focus "on State practice and *opinio juris*" when evaluating customary international human rights norms. If the norms were seen to piggyback on how the original treaty provision itself would be interpreted, assuming the original treaty interpretation was clear, it may provide a basis upon which to avoid customary international human rights norms from becoming too easily subject to determinations that

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162 Human Rights Committee, *supra* note 156.

163 *Id.* ¶¶ 16, 17.

164 *Id.* ¶ 19.

165 Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 664, ¶ 66 (Nov. 30). *Cf.* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Judgment, 2021 I.C.J. 32, ¶ 101 (Feb. 4).

are relative to local and cultural norms.[166] Exactly how this could be avoided is examined in further detail below.

V. HOW TREATY INTERPRETATION RELATES TO INTERPRETING CIHRL AND WHERE LIMITATIONS MIGHT LIE

Here we might begin by noting how the ICJ interprets treaties in general. Primarily, the ICJ follows one of four methods of treaty interpretation: textual, systematic (or contextual), purposive (or teleological), and historical.[167] Together these categories represent the ways in which the ICJ interprets treaties, including human rights treaties. And because CIHRL comes about only when a state adopts a particular norm to follow that likely originated from a human rights treaty, understanding how treaties are interpreted should aide understanding how the ICJ interprets customary international human rights norms as well.[168]

The textual method attempts to interpret the language of a treaty literally in terms of the plain meaning of the words.[169] Its goal is to limit the "discretion of decision-makers" when texts are "easily identifiable and accessible."[170] Even when this form of interpretation is the focus, however, there remain concerns related to context or to a prior interpretation not based solely on the written words of a document.[171] Additionally, the ICJ has ruled that "treaties should be interpreted and applied within the framework of the legal system prevailing at the time of the interpretation, rather than at the time of the drafting or adoption of the text."[172] This suggests that understanding the language of

166 *See* Ammann, *supra* note 6, at 195–96.

167 *Id.* at 195.

168 Modalities are what allows an interpretation of a form of expression, like a treaty or a human rights norm, to be characterized as true. *See* BOBBITT, *supra* note 7, at 11. Different kinds of interpretations involve different modalities. For example, "a *logical* modality may be attributed to a proposition, '*p*,' by saying that it is logically necessary or contingent or logically impossible, that '*p.*'" *Id.* An "*epistemic"* modality is employed "[t]o say that it is known or unknown or known that it is not true that '*p*[.]'" *Id.* "[A] *moral* or *deontic"* modality signals that *p* "is obligatory, permissible or forbidden," and with a "[a] *temporal* modality" affirms that that *p* "is now or will be . . .." *Id.* Beyond these examples, modalities operate here to characterize certain interpretations of a treaty or human rights norm as true, as they did for Bobbitt in explaining various forms of American constitutional interpretation as true.

169 *See* Ammann, *supra* note 6, at 197–98.

170 *Id.*

171 *See id.* at 198–99.

172 *Interpretation of Human Rights Treaties,* ICELANDIC HUM. RTS. CTR., https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-

human rights treaties, for example, should be in "context and in light of its object and purpose," as understood today, rather than as it might have been understood at the time when the treaty was drafted.[173]

The systematic (or contextual) approach represents a kind of "inner linkage which connects all legal institutes and legal rules so as to form one unitary whole."[174] It refers to the fact that "[c]ontext is regularly mentioned by States and their courts when they interpret treaties."[175] Scholars emphasize "the interpretative context," and "States likewise mention context when ascertaining custom, though less frequently than in treaty interpretation."[176] Indeed, since customary international law focuses on state practice, "context excludes the acts of one State that have not been endorsed by a sufficient number of other States."[177] It does include, but only as a supplementary means of interpretation, the "preparatory work of the [underlying] treaty and the circumstances of its conclusion"; these "teleological considerations" are included because "the nature of an object cannot be defined without considering its purpose (and *vis versa*)."[178]

A purposive or teleological interpretation thus allows a court to give effect to the goal that the treaty was intended to achieve and arguably along with that a purpose to any customary rule that may result.[179] It is a common approach used by international courts to interpret treaties.[180] It may be recalled from our earlier discussion that the HRC focused on the "object and purpose" of the ICCPR in deciding whether a reservation should be allowed. It is also not uncommon to find the European Court of Human Rights and the Inter-American

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rights-treaties [https://perma.cc/NE6X-9N9D] (last visited Jan. 12, 2022). As a general set of standards, the rules for treaty interpretation, regardless of treaty type, are set out in Articles 32 and 33 of the Vienna Convention. *See* Vienna Convention on the Law of Treaties, *supra* note 152, arts. 32–33.

173 *Interpretation of Human Rights Treaties, supra* note 172 (citing Vienna Convention on the Law of Treaties, *supra* note 152, art. 31).

174 Ammann, *supra* note 6, at 202 (citing FRIEDRICH KARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS [System of the Modern Roman Law] 214 (1840)).

175 *Id.* at 204.

176 *Id.* at 205.

177 *Id.* at 206.

178 *Interpretation of Human Rights Treaties, supra* note 172 (citing Vienna Convention on the Law of Treaties, *supra* note 152, art. 32). *See also* Ammann, *supra* note 6, at 209–10.

179 Ammann, *supra* note 6, at 209.

180 *Id.* at 210–11.

Court of Human Rights to adopt a teleological approach to treaty interpretation.[181]

Finally, it is worth noting that historical interpretation is used in international law "to confirm a specific interpretation (a), or to avoid manifestly absurd or ambiguous results (b)."[182] This approach, while potentially helpful in the interpretation of treaties, may be less helpful in determining customary international norms, which are "not enacted through an institutionalized deliberative process like treaties," but will involve the practices of a number of states.[183] However, states do rely on historical information to "identify State practice and *opinio juris*."[184]

The categories of textual and historical interpretation used by the ICJ may seem familiar with the textual and historical modes Bobbitt identifies in describing the six modalities of constitutional interpretation used by the U.S. Supreme Court.[185] But here it is important to remember that the kinds of debates concerning original intent that occur in the American constitutional context—such as debates between expectation originalism and semantic originalism—are not likely to occur when the ICJ interprets a treaty since, as already noted, treaties are usually interpreted without consideration of the intent of the drafters.

On the other hand, the systematic and purposive approaches discussed above may be more aligned with the structural and prudential modes used in American constitutional interpretation to explain Court decisions that deviate from the constitutional text and its background history. An example that Bobbitt uses to explain this is when Minnesota granted relief from foreclosure to Midwest farmers during the depression era. He wrote:

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181 *Id.* at 211.

182 *Id.* at 214.

183 *Id.* at 215.

184 *Id.* at 216.

185 *See* BOBBITT, *supra* note 7, at 12. The constitutional modalities that the U.S. Supreme Court has used to characterize "legal propositions . . . as true from a constitutional point of view" are:

historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from the moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule). *Id.* at 12–13.

> the Minnesota legislature passed a statute providing that anyone who was unable to pay a mortgage could be granted a moratorium from foreclosure. On its face such a statute not only appeared to realize the fears of the framers [of the Constitution] that state legislators would compromise the credit market by enacting debtor relief statutes, but also plainly to violate the Contracts Clause that was the textual outcome of such concerns. Moreover, the structure of the national economic union strongly counseled against permitting states to protect their constituents by exploding a national recovery program that depended on restoring confidence to banking operations. Nevertheless[,] the Supreme Court upheld the statute, observing that: 'An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community.'[186]

In this case, the Court's use of a prudential modality during an economic emergency allowed it to uphold the Minnesota legislature's decision to put a freeze on foreclosures by calling upon a "reserved power of the State [implicit in the Tenth Amendment] to protect the vital interests of the community."[187]

This is not dissimilar from what the ICJ stated in its 1951 Advisory Opinion on Reservations to the Crime of Genocide. In that case, the Court stated:

> [I]n a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[188]

In other words, any reservation that would deviate from the object and purpose of the treaty was not acceptable. The clear takeaway was to distinguish human rights treaties from other treaties since their "object and purpose" differs from traditional multilateral treaties "concluded

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186 *Id.* at 16–17 (citing Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 444 (1934)); U.S. CONST. art I, § 10.

187 *Blaisdell*, 290 U.S. at 444. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. 10. Recall, the Contract Clause in Article I states: "No State shall . . . pass any . . . law impairing the obligation of contracts . . .." U.S. CONST. art. I, § 10.

188 Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28), *cited in Interpretation of Human Rights Treaties, supra* note 172.

to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States."[189] In the case of human rights treaties, "[t]heir object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states."[190] Thus, they could not be deviated from if the nature of the reservation would not conform to the "object and purpose" of the treaty. In short, the treaty obligations would stand notwithstanding the usual procedure for how treaty obligations can be reserved.

Another area where there is a deviation from the American situation—which may be more relevant to avoiding relativism in human rights decisions—is the absence of the two additional modalities that Bobbitt identifies as part of American constitutional interpretation: the doctrinal and the ethical. With respect to the doctrinal, as was pointed out earlier, given the frequency that the ICJ and the ICC refer to their own previous decisions, the fact that those decisions may not be considered binding as a matter of stare decisis does not suggest they have no significant role to play.[191] Indeed, the ICJ's statement in the *Diallo* case that "it should ascribe great weight to the interpretation adopted by [the HRC]" makes plain its obligation to at least consider human rights decisions rendered in other international forums. If so, the specific lack of stare decisis at the level of the ICJ may afford the ICJ greater flexibility than would result were it bound by a particular precedent of its own court; but only if the other interpretative modes used will be sufficient to guarantee human rights decisions and do not follow a sliding scale down into cultural relativism. This leaves then only the ethical modality as the other outsider that the ICJ should consider when interpreting norms of customary international law and treaties.

Here, it is important to say clearly how the ethical modality operates in American constitutional interpretation to see if it might have any application to international law. In the American constitutional system, we think of the Supreme Court as being obliged "to police the boundary between private rights and public power since rights are mainly inferred in the U.S. Constitution from the limits on [governmental] power (ethical)."[192] This is how Bobbitt can draw out rights from the American ethos as expressed by the Constitution.

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189 *Interpretation of Human Rights Treaties*, *supra* note 172.

190 *Id.*

191 Guillaume, *supra* note 8.

192 BOBBITT, *supra* note 7, at 27. *See id.* at 21 (citing a number of U.S. Supreme Court cases that struck down state laws including where "a state attempted to bar

Professor Tushnet takes a somewhat different approach. He characterizes ethical interpretation as requiring courts "to distinguish between fundamental, basic, or human rights on the one hand, and nonfundamental, less basic rights on the other."[193] This requires courts "to distinguish between fundamental and other rights" by either adopting the claims of a particular ethical system or by being able to reflect "the moral consensus of society."[194] But even if the moral consensus somehow could be reflected, Bobbitt questions, and Tushnet does not answer, how either of these approaches could fit a constitutional requirement or even "how the Constitution requires a moral argument."[195]

Tushnet invokes "a community's commitment as the basis for judicial review" by "relying on 'common values' widely shared in the society at the time of decision," that would allow courts to "invalidate statutes because they are inconsistent with an enduring consensus about fundamental values, as reflected in the language of the Constitution, decided cases, and our society's cultural heritage."[196] But, as Bobbitt notes, this would only work if the values can "link up with some legal commitment in the Constitution."[197] Put another way, the elements of the ethos would need to be "derived from the ethical choices manifest in the American Constitution."[198] For example, "because the Constitution rigorously and carefully puts certain matters beyond the reach of the powers allocated [to Congress] in Article I, ethical arguments can infer individual and group autonomy over these subjects."[199] But even then would the resulting "ethical" judgment be truly ethical or just prudential? Bobbitt challenges Tushnet's view that the legal process can be justified by making sure that the legal process produces morally acceptable outcomes.[200] Instead, Bobbitt counters: "[w]hen the legal process is justified on the grounds that it produces

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schools from teaching foreign languages"; where "a state passed a compulsory education act requiring every school-age child to attend public school"; where "a local zoning ordinance was applied to prohibit a grandmother from living with her grandchildren"; and where "a man allegedly suffering from delusions (but concededly harmless) was confined to a mental hospital for almost twenty-five years without treatment.") (citations omitted).

193 *Id.* at 135 (quoting MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 110–11 (1988)).

194 *Id.* at 136.

195 *Id.*

196 *Id.* at 137 (citing TUSHNET, *supra* note 193, at 139–41).

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.* at 138 (citing TUSHNET, *supra* note 193, at 110–11).

morally acceptable outcomes it is being judged on a prudential basis, and all other forms are merely sham."[201] But might Bobbitt's concern here be too focused on the outcomes being acceptable as opposed to why they should be acceptable?

I take the exchange between Bobbitt and Tushnet to question whether an ethical modality needs to do more than merely capture the existing beliefs of the culture and society if it is not to succumb to Bobbitt's prudential criticism. But this also suggests that the kind of moral modality needed should be less question-begging so as not merely to be just a replacement for a different set of cultural norms. For purposes here, in setting out a framework for interpreting IHRL, a few adjustments need to be made.

To begin with, since the IBHR already exists, spelling out the rights humans have, the inference we would want to work from would be in reverse of the inference drawn by Bobbitt, from a constitution that presently restricts government actions, to one that explains why those restrictions should be thought necessary. This is more obvious in cases where the government is a signatory to a human rights treaty. But it should also apply to CIHRL where there is a clear grounding for the existence of certain rights, either as a matter of state practice and *opinio juris* or, as will be argued below, because a moral justification for these human rights would demand it. The ground for reversing the inference is that all the rights proclaimed in the IBHR are claim rights, which are meant to impose duties upon a respondent.[202] Once the inference is reversed, however, because the rights are already present, international, and domestic courts should be able to mark out various duties on state actors. These duties should not just be based on the language of the original source documents (i.e., human rights treaties), but should also bring into the assessment a court's judgment as to which interpretation provides the best constructive interpretation of the treaty or state practice to the given situation.[203] Such an

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201 *Id.*

202 In WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 3d ed. 1964), Hohfeld states the clue "we find, in ordinary legal discourse, toward limiting the word" "right" is the notion that a correlative "duty" attaches; "for it is certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative." *Id.* at 38.

203 Ronald Dworkin argues "that creative interpretation is not controversial but *constructive*," focusing on "purpose not cause." RONALD DWORKIN, LAW'S EMPIRE 52 (1986). He goes on to say: "[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." *Id.* Surely there is no reason to

interpretation would have to be objective to avoid any claim of relativism, and it must be of such a compelling nature to be able to call the attention of the international community to its plausibility. Still, this should be possible provided the theoretical framework that the court starts from is itself objective in a severely rational way.

Finding the best constructive interpretation of a community's legal practice is especially necessary to resolve conflicts of rights, which might occur in the application of a treaty but more likely will show itself in the area of CIHRL. Louis Henkin claims that "[h]uman rights . . . belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development."[204] But is that true or is Henkin's view overly idealistic?[205] On its own the view expressed would need considerable support if it is going to be able to achieve the kind of universality necessary to resolve the human rights conflicts it is likely to encounter.

Consider, for example, the 2002 "regulations issued by the National Population and Family Planning Commission of China, which prohibit ultrasound scans to determine the sex of a fetus, and authorize monetary and non-monetary punishments for sex-selection abortions."[206] Abortion regulations often create problems when juxtaposed against other cultural norms. Sometimes the conflict is between those who believe the fetus has a right to life and those who support a woman's right to choose.[207] There are two recent American examples, although they are not specifically directed toward defining the personhood status of the unborn. One example is seen with a Mississippi law, currently pending before the U.S. Supreme Court, which may replace the current viability standard—around twenty-four weeks after conception—with a standard that would reduce that timetable to fifteen weeks, after which an abortion would generally no longer be

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believe that a rational discourse over the interpretation of a human rights treaty or custom could not be evaluated by the same criterion, especially if there exists a philosophical theory available that does what Buchanan said had not been previously done when the Declaration and Covenants were adopted, namely, justify the scheme of rights proclaimed.

204 Xiaobing Xu & George Wilson, *On Conflict of Human Rights*, 5 PIERCE L. REV. 54 (2006) (citing LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, HUMAN RIGHTS 3 (1999)).

205 *Id.*

206 *Id.* at 31.

207 *Id. See also* Krissi Danielsson, *What is Fetal Viability?*, VERYWELL FAM. (Apr. 20, 2021), https://www.verywellfamily.com/premature-birth-and-viability-2371529 [https://perma.cc/E4LU-R47P].

allowed.[208] A similar law has already been adopted in Texas, limiting abortions after only six weeks, and which is being challenged as unconstitutional.[209] In China, there is the further concern of avoiding sex discrimination if the choice is based on the expected sex of the offspring.[210] There is also a problem created by Article 1 of the Population and Family Planning Law of China, which limits the number of children a family can have "to maintain harmony between population and socio-economic development as well as to realize sustainable development."[211] Each of these different "justifications" challenge the woman's right to make a choice and so each would need to be worked out in a way that would be consistent between societies if human rights are to continue to be presumably universal and not culturally relative.

Other conflicts arise when a government imposes a quarantine on certain groups of people to prevent the further spread of an epidemic or pandemic disease, as with the 2002 Severe Acute Respiratory Syndrome ("SARS") or the 2020–22 novel coronavirus SARS-CoV2 ("COVID-19").[212] A conflict of rights also occurs when different states or different regions in the same state make euthanasia illegal,[213] or restrict the rights or impose different duties on women, as in Islamic countries.[214] Conflicts of rights can also arise when states refuse to allow or recognize same-sex marriages or make adult consensual

208 *See* Adam Liptak, *Supreme Court to Hear Abortion Case Challenging Roe v. Wade*, N.Y. TIMES (Dec. 1, 2021), https://www.nytimes.com/2021/05/17/us/politics/supreme-court-to-hear-abortion-case-challenging-roe-v-wade.html [https://perma.cc/M9UK-JRYU].

209 Eleanor Klibanoff, *Supreme Court Again Declines to Intervene in Challenge to Texas Abortion Law*, THE TEX. TRIB. (Jan. 20, 2022), https://www.texastribune.org/2022/01/20/supreme-court-texas-abortion-law-challenge/ [https://perma.cc/4BRV-BCAR]; Edgar Sandoval & Dave Montgomery, *Near-Complete Ban on Abortion is Signed into Law in Texas*, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/05/19/us/texas-abortion-law.html [https://perma.cc/C2K2-DTMJ].

210 Xu & Wilson, *supra* note 204, at 31–32.

211 *Id.* at 35–36. *See also* City Planning Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Apr. 1, 1990), 1987-1989 P.R.C. LAWS 349 (China), http://www.china.org.cn/environment/2007-08/20/content_1034354.htm [https://perma.cc/VYK5-KZX5].

212 Xu & Wilson, *supra* note 204, at 32. *See also US Entry Suspensions Due to Covid-19*, TUFTS INT'L CTR., https://icenter.tufts.edu/immigration/covid-19/coronavirus-travel-suspensions/ [https://perma.cc/Z5NV-DNR7] (last updated Oct. 26, 2021).

213 Xu & Wilson, *supra* note 204, at 33.

214 *Id.*

homosexual acts or advocacy for gay rights a crime.[215] Such conflicts of rights frequently involve restrictions on individual freedom in the name of preserving religious traditions.[216] But other conflicts, more related to individual well-being, might include restrictions that limit the availability of abortions, even to protect the health of the mother,[217] make unavailable medical or other facilities to serve transgendered people, or restrict persons seeking asylum in other countries to avoid gang or paramilitary-related threats in their home country.[218] Property rights may also be involved if, for example, the owner of stored grain during a famine or the patent holder of a life-saving drug during a pandemic can restrict availability to only those who can pay his price.[219] And what about nations that refuse to answer the call to end racial discrimination or to boycott those nations' sports teams, for example, that do discriminate?[220]

A related concern asks if there are normative values not involving human rights because they serve the betterment of society that can override a human right. For example, restraining freedom of the press during America's two Gulf wars in the name of protecting national security[221] or the concern with respect to China's limiting family size to realize sustainable development. There is also the problem that—while the domestic laws of many countries, the ICCPR, and the International Covenant on the Elimination of All Forms of Racial Discrimination might prohibit advocacy of all forms of national, religious or

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215 *See, e.g.*, Claire Felter & Danielle Renwick, *Same-Sex Marriages: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (June 23, 2020), https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons [https://perma.cc/5C9G-YD8G] (last updated June 28, 2021, 12:28 PM).

216 *See id.*

217 *See, e.g.*, Rachel B. Vogelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Oct. 28, 2019), https://www.cfr.org/article/abortion-law-global-comparisons [https://perma.cc/SRQ6-GW5E]; Neela Ghoshal, *Rights in Transition: Making Legal Transition for Transgender People a Global Priority*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2016/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north-0# [https://perma.cc/A9UP-XHWF] (last visited Jan. 21, 2022).

218 *See, e.g.*, Joshua D. Safer, Eli Coleman, Jamie Feldman, Robert Garofalo, Wylie Hembree, Asa Radix & Jae Sevelius, *Barriers to Health Care for Transgender Individuals*, DEP'T HEALTH & HUM. SERVICES (Apr. 1, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4802845/ [https://perma.cc/6872-PP86]; *Asylum and the Right of Refugees,* INT'L JUST. RES. CTR., https://ijrcenter.org/refugee-law/ [https://perma.cc/6HZL-SDT8] (last visited Jan. 21, 2022).

219 Xu & Wilson, *supra* note 204, at 34.

220 *See id.* at 34–35.

221 *Id.* at 35.

racial hatred—in the United States such remarks are constitutionally protected by the First Amendment.[222] In France, schools may prohibit all forms of religious dress, but in Britain the Court of Appeals has upheld wearing Muslim gowns.[223] Can such arguable non-human rights values properly be used to offset an individual or group's rights to free expression and religious practice? Or must the so-called "non-human rights values" be recharacterized as involving other human rights? These are particularly problematic questions that beg for a resolution. A major problem in dealing with cases involving "non-human rights values" is to find a common denominator for resolving these and the more obvious conflicts of human rights.[224] As the IHR system is currently set up, some conflicts—such as the "right of everyone to form trade unions and join the trade union of his choice" under Article 8(a) of the ICESCR—might have a limitation built into the treaty that, "[n]o restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in *the interests of national security or public order* or for the protection of the rights and freedoms of others . . . ."[225]

Still, other approaches might claim one right to be superior to the other in a particular case or to seek a compromise as with time, place, and manner restrictions on freedom of speech.[226] But how is it that "non-human rights values" could override human rights values unless

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222 *Id.* at 50–51.

223 *Id.* at 51.

224 *See id.* at 36 ("[I]t is a point of controversy whether other non-right values [than those recognized in an international convention] may constrain human rights.").

225 *Id.* (citing ICESCR, *supra* note 47, art. 8(a)) (emphasis added). Other examples of limitations cited include Article 4(1) of the ICCPR, which provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. ICCPR, *supra* note 46, art. 4(1). Additionally, ICCPR Article 4(2) goes on to list a variety of rights and freedoms that remain non-derogable, even in times of public emergency, such as the rights to life, freedom from torture, cruel, inhuman, or degrading punishment, freedom from slavery and servitude, or guilt, except as found by law, the right to always be recognized as a person before the law, as well as the freedoms of thought, conscience, and religion. *Id.* art. 4(2). These are the *jus cogens* rights discussed in Part III, *supra*.

226 *See id.* at 40–41. In Section 6, I will discuss more fully resolving conflicts of rights and when a state's interest might be sufficiently compelling to override application of a particular right without removing it entirely from consideration.

they are recharacterized as themselves involving human rights and, if so, to what degree are they to be valued against other human rights? Each of these separate examples and the questions they pose, if they are to be resolved without begging any questions, requires a justification that does not presuppose the very value it affirms if relativism is to be avoided. Absent such a justification, it is highly likely that conflict of rights resolutions will be marked by a relativism based on local values, cultures, and religious traditions.

VI. JUSTIFYING INTERNATIONAL HUMAN RIGHTS

So far in this article, we have looked at the major sources of IHRL, the rights that are recognized, the institutions that exist to protect these rights, and the obstacles (both jurisdictional and interpretative) that stand in the way of institutional attempts to protect human rights. In this section, I offer a philosophical framework to offset at least some of the interpretative challenges that institutions confront in their ascription of human rights. That framework is based on the writings of Professor Alan Gewirth, who laid out a full-fledged justification for human rights grounded in voluntary purposive human action. The connection to the law will be the way the framework can be set alongside IHRL to provide the needed ethical modality for interpreting international human rights and resolving conflicts that occur.

According to Gewirth, previous attempts to ground human rights have each failed because of their inability to provide a non-question begging justification for the rights they propound.[227] For example, consider Thomas Jefferson's famous statement in the American Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."[228] That statement represents an intuition that Jefferson seems to suggest would be shared by all of mankind, but was it really shared by all humans? Jefferson himself owned slaves and, in

227 *See* Alan Gewirth, *The Basis and Content of Human Rights*, *in* NOMOS XXIII: HUMAN RIGHTS 119 (J. Roland Pennock & John W. Chapman eds., 1981), *reprinted in* ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 42–43 (1982).

228 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For a more general expansive account of the issues to be discussed, see generally ALAN GEWIRTH, REASON AND MORALITY (1978).

reality, most of the rights propounded in the Declaration would have applied only to white, property-owning, male colonists of his day.[229]

An alternative approach might hold that rights are attached to practices or institutional rules that bring them about, such as promising.[230] Here too, however, we run into a need to first establish that the institution giving rise to the rights is not itself morally wrong like slavery and apartheid.[231] A third approach would be to try to ground the rights in interests.[232] But why should the presence of an interest necessarily legitimate any rights claim that might arise? Why would it not give rise to too many rights claims to be useful?[233] One may have an interest in winning the lottery, but does that mean that the individual has a right to win? A fourth approach would be to say that people have "rights because they have intrinsic worth or dignity or are ends in themselves or children of God."[234] But this would just beg the question of whether people have intrinsic worth.[235]

Finally, there is philosophy professor John Rawls' answer that "if persons were to choose a constitutional structure for their society from behind a veil of ignorance of all their particular qualities, they would provide that each person must have the same basic rights."[236] While this may be true as a matter of self-interest, since this approach is only able to achieve its egalitarian result by assuming each person not to know upfront their particular qualities, it appears circular when thought of as a justification for equal human rights.[237]

Having thus brushed aside the most familiar approaches to justifying human rights, Gewirth sought the basis for human rights in a feature common to all moral judgments, namely, that the persons addressed are voluntary purposive human agents.[238] "For all moral judgments, including rights claims, consist directly or indirectly in precepts about how persons ought to act to one another."[239] But if this is

229 *See* GEWIRTH, *supra* note 227, at 44. *See also Natural Rights and the Declaration of Independence*, CONST. RTS. FOUND., https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html [https://perma.cc/7WUS-M32N] (last visited Jan. 20, 2022).

230 GEWIRTH, *supra* note 227, at 44.

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *See id.*

236 *Id.* at 44.

237 *Id.*

238 *Id.* at 45.

239 *Id.* at 46.

the case then moral judgments presuppose that the persons addressed are capable of acting voluntarily, at least within a limited range, and also purposively, toward fulfilling some end or purpose of their own. The term used to identify such persons is "agent," meaning voluntary purposive actor. The bridge between what agents do and the rights claims each agent impliedly makes by acting is then established by what Gewirth calls "a dialectically necessary method." Using this method, "it is possible and indeed logically necessary to infer, from the fact that certain objects[, namely, freedom and well-being] are the proximate necessary conditions of human action, that all rational agents logically must hold or claim, [on pain of contradiction,] that they have rights to such objects."[240] The method operates from within the internal conative standpoint of the agent so to infer "a statement not about a person's rights, but about their claiming to have them."[241] Gewirth believes that this should be enough to establish a universal moral principle that must be accepted by "every rational human agent on his own behalf."[242] The actual argument works as described below.

"I do X for purpose E."[243] This is a statement uttered or implied when an agent from his or her own point of view chooses to act.[244] It is neutral on its face in that it is not based on any preexisting established value.[245] Still, from this statement, it can be inferred from within the agent's own point of view that "E is good," meaning that the agent regards her purpose as providing a reason or presents a pro-attitude to act.[246] It does not imply that the agent believes her action to be morally good or not good.[247] Next, it can be inferred that the agent claims, "[m]y freedom and well-being are necessary goods."[248] This inference follows from the fact that the agent in acting will need a certain amount of voluntariness or freedom if she is to perform the action and well-being to be able to do the action.[249] Put another way, if the agent values doing X for purpose E, she must similarly value her freedom and well-being as necessary features to her being able to act. Finally, but still

240 *Id.*

241 *See id.*

242 *Id.*

243 GEWIRTH, *supra* note 228, at 43, 49. Here I am relying on the more full-fledged account Gewirth set out in *Reason and Morality*.

244 *Id.* at 42.

245 *See id.* at 43.

246 *Id.* at 44, 49.

247 *Id.* at 49.

248 GEWIRTH, *supra* note 227, at 50.

249 *See* GEWIRTH, *supra* note 228, at 52, 53–54.

from within the point of view of the agent, the agent claims rights to freedom and well-being, which Gewirth labels "generic rights."[250]

Here one might object that claiming rights introduces a new element into the discourse not justified by what precedes it. Gewirth addresses this objection when he considers what would happen, still staying within the agent's own point of view, if she were to deny she has these generic rights.[251] And let us do it bearing in mind the agent's earlier claim that her freedom and well-being are necessary goods to do X for purpose E. Here we might note that from the agent's point of view this means she must have freedom and well-being.[252] But that implies if she were to now deny rights to freedom and well-being, she would be denying that all other persons ought to refrain from interfering with her freedom and well-being.[253] This is because the rights claim at stake implies a duty on the part of others not to interfere with her freedom and well-being. And so, were the agent to now deny from her point of view that she has these rights, she would have to accept that she may not have freedom and well-being.[254] But, since it has already established that a rational agent doing X for purpose E would claim freedom and well-being as necessary goods, her acceptance now that she does not have freedom and well-being would be a contradiction.[255] The point is not that she is afforded these rights but rather what she must claim to be consistent with her doing X for purpose E. Thus, from the point of view of the agent, she must, at least, impliedly claim rights to freedom and well-being whenever she acts.[256]

Now it is important to not overstate what has been shown thus far. All that has been established so far is that acting for a purpose commits the agent to a claim of rights from her own point of view as a strictly prudential matter.[257] It does not mean anyone else has to acknowledge her claim or that she has to acknowledge a similar claim by anyone else.[258] Thus, to make this prudential claim into a moral claim others would have to acknowledge, it is necessary to bring other agents into the analysis.[259] This is done when the agent recognizes that

250 GEWIRTH, *supra* note 227, at 50.
251 *See id.*
252 *Id.*
253 *Id. See also* GEWIRTH, *supra* note 228, at 80.
254 GEWIRTH, *supra* note 227, at 50–51.
255 GEWIRTH, *supra* note 228, at 80. *See also* GEWIRTH, *supra* note 227, at 50.
256 GEWIRTH, *supra* note 227, at 51.
257 *Id.* at 51.
258 *See id.*
259 *See id.*

the *sole* basis or sufficient reason upon which she made her rights claim was her choice to do X for purpose E.[260] It was not based on any particular feature about her, only that she is an agent who seeks to do some action for some purpose she regards as good. But if that is the case then "it is necessarily true of every agent that [s]he must hold or accept at least implicitly that [s]he has rights to freedom and well-being."[261] Put another way, each agent recognizes by acting that any other agent could validly make the same claim, since there would be nothing to separate her from any other agents making the same claim. Thus, because our agent, from her own point of view, claims rights to freedom and well-being, she cannot deny to her fellow agents those same rights that on the same basis she claims for herself; to do so would be to contradict herself.[262] Consequently, Gewirth believes that every rational agent logically must accept "that all prospective agents have the generic rights."[263] This conclusion, derived from the aforesaid argument, leads Gewirth to state the following principle: "*Act in accord with the generic rights of your recipients as well as of yourself*."[264] Gewirth calls this the Principle of Generic Consistency ("PGC").[265] Because it is based on what any agent logically must accept on pain of contradiction as rights that we all share, he believes it to be the supreme principle of morality and the foundation of human rights.[266]

It should be noted that an important consequence of Gewirth's argument "is that he is able to construe moral questions as objective ones, without appealing to the idea that moral truths are known by intuition, and at the same time preserve the autonomy of morality."[267] This follows from the fact that the PGC is categorically in the interests

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260 *See id.*

261 *See id.*

262 Here is how the generalization works as an instance of the "logical principle of universalizability": [I]f some predicate *P* belongs to some subject *S* because *S* has the quality *Q* (where 'because' is that of sufficient reason or condition), then it logically follows that every subject that has *Q* has *P*. If any agent *A* were to deny or refuse to accept this generalization in the case of any other prospective purposive agent, *A* would contradict [her]self.
Id. at 52.

263 *Id.*

264 *Id.*

265 *Id.* at 52–53.

266 *Id.* at 53–54.

267 DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY 143 (1991).

of every prospective purposive agent to hold that their freedom and well-being is not interfered with and correspondingly that they do not interfere with the freedom and well-being of others.[268]

Furthermore, the PGC encompasses both positive and negative rights insofar as one can expect that others would claim the same basic rights to freedom and well-being, not only when seeking to be free of interference but also when in need of conditions necessary to the very possibility of action, as one might claim for oneself.[269] Thus, on an individual basis, the PGC would require that, if someone were drowning and another agent could save the person at no comparable cost to oneself, the agent should do so, for as a rational agent, she would want the same done for herself.[270] Additionally, although the PGC can only be established within the dialectically necessary method, because anyone could make use of this method to reach exactly the same result, it follows that the PGC can be asserted as an assertoric moral principle separate from the dialectically necessary method that affords its justification.[271]

Finally, having presented Gewirth's justification for a supreme principle of morality that grounds human rights, it is now necessary to investigate more specifically the components that describe the right to freedom and make up the right to well-being. The right to freedom "consists in a person's controlling his actions and his participation in transactions by his own unforced choice or consent and with knowledge of relevant circumstances, so that his behavior is neither compelled nor prevented by the actions of other persons."[272] "Hence, a person's right to freedom is violated if he is subjected to violence, coercion, deception, or any other procedures that attack or remove his

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268 *See id.* Jurgen Habermas has a similar, although less severely rationalistic, view of moral knowledge to that of Gewirth. In his discussion of Discourse Ethics, Habermas writes:

Ethical knowledge retains its capacity to provide orientation, however, only within the horizon of the established everyday practice of individuals socialized into a specific culture . . .. [W]e would destroy our ethical knowledge by submitting it to scientific examination, because theoretical objectification would dislodge it from its proper place in our life. JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 22 (Ciaran P. Cronin trans., MIT Press 1993) (1991). However, being "socialized into a specific culture" runs the risk that ethical claims will not be truly universal because they will not necessarily be cross-cultural unless founded upon a preexisting social understanding that is already present.

269 ALAN GEWIRTH, SELF-FULFILLMENT 94 (1998).

270 Below I will discuss how this principle supports rights such as those protected by the ICESCR.

271 *See* GEWIRTH, *supra* note 228, at 154–56, 161.

272 GEWIRTH, *supra* note 227, at 56.

informed control of his behavior by his own unforced choice."[273] Having freedom thus requires an area of personal autonomy in the sense of self-rule and privacy where a person is free of having to engage with others.[274] Interferences with freedom may have different degrees of significance depending on the extent to which the interference affects an individual's free choice, which also serves to provide a connection between freedom and well-being.[275] However, here one needs to be careful so as not to obscure the separate contributions made by the right to freedom from the right to well-being, which can get obscured when one only focuses on the objects to which the freedom is directed.

In other words, freedom is often described as presenting both a negative sense of *freedom from* as well as a positive sense of *freedom to*.[276] This is seen when one claims freedom from starvation to correlate with the freedom to eat.[277] It is in this positive sense that the separation of freedom from well-being gets obscured.[278] For if the agent is to be free from interference from others, that will involve a different set of concerns from his ability to eat, the latter of which seems more related to his well-being.[279] Indeed, well-being may properly involve different levels of concern that do not manifest themselves when one focuses only on freedom.[280] While the two concepts will often go together, they are not different variations of the same.

Unlike the right to freedom, which properly speaking is more procedural in that it protects an agent's unforced ability to consent to participate in voluntary transactions, including consent to the decision procedures of government; well-being can be divided among three different types of goods, *basic*, *nonsubtractive*, and *additive*, based on the degree of importance they hold to an agent's purposive fulfillment.[281] Basic goods are the preconditions necessary to be an agent; they include life, physical integrity, and mental equilibrium.[282] Examples where basic well-being is attacked include being killed or maimed, being subjected to debilitating torture, psychological harm

273 *Id.* at 56–57.
274 *Id.* at 57.
275 *See* GEWIRTH, *supra* note 228, at 254.
276 *Id.* at 250–51.
277 *See id.* at 251.
278 *See id.*
279 *See id.* at 251–52.
280 *See id.*
281 GEWIRTH, *supra* note 227, at 55.
282 *Id.* at 55–56.

(which might occur with the use of drugs or alcohol), or mentally damaging propaganda, or where a starving person could be saved at no comparable cost to another.[283] "Nonsubtractive goods are the abilities and conditions required for maintaining undiminished one's level of purpose-fulfillment . . . ."[284] A person's nonsubtractive well-being is affected when she is lied to, cheated, had her property stolen, been defrauded or defamed, suffered broken promises, been prevented from being able "to plan for the future," or made subject to "debilitating conditions of physical labor or housing . . . ."[285]

In contrast, additive well-being goes in the opposite direction. Additive well-being refers to those abilities and conditions that are needed to increase "one's level of purpose-fulfillment and one's capabilities for particular actions."[286] A person's additive well-being is thus attacked or limited when one's "self-esteem is attacked," one is denied adequate healthcare, education, or a decent standard of living, the person is subject to racial, gender (including transgender), religious, nationality, or sexual orientation discrimination, or one is placed in an environment that encourages ignorance, misinformation, or superstition.[287] It is also important to note, because of their different relation to purpose-fulfillment, that basic well-being is obviously more salient to being an agent generally followed by nonsubtractive well-being and then additive well-being. More will be said about the significance of this difference below.

Many of the rights that the PGC would support are those found listed in the UDHR, the ICCPR, and the ICESCR, where now a difference in how they might apply can be more fully specified. This should give rise to the thought that these components of the theory might offer valuable assistance to the ICJ, the ICC, and the HRC, as well as the various domestic courts involved in determining whether a human right is involved or in resolving conflicts of rights.

VII. RESOLVING CONFLICTS OF RIGHTS WHILE ALSO LIMITING RELATIVISM IN THE APPLICATION OF RIGHTS

So where do we go from here? Except for provisions in the ICCPR and ICESCR requiring member states to submit periodic compliance reports, and the HRC to hear complaints from individuals

283 *Id.* at 56.
284 *Id.*
285 *Id.*
286 *Id.*
287 *Id.*

whose states have agreed to the First Protocol, most other treaty provisions are left to be enforced either by the ICJ, when the states or the U.N. agree to submit them, the ICC, if the alleged violation involves a high government official, or, more often, the domestic state courts who have occasion to hear cases of human rights violations. That being so, it is essential that there should be available a general interpretative framework to assist these bodies in deciding cases to ensure consistency in the application of human rights across the globe.

Buchanan's earlier expressed concern that human rights got international recognition only because no grounding had ever been provided now begs for such a justification. Since no justification will be found in any of the international documents adopted or as part of the customary rules that have come about by state practice and *opinio juris,* it will have to be located elsewhere, in the best philosophical grounding for the very rights at stake. Such a justification could then be placed alongside the actual rights being considered to determine the best constructive interpretation of those rights in specific cases. Especially because the justification would likely give rise to the very same rights being considered, it is worth considering for the rational grounding that it is likely to provide for how the rights should then get applied. And so, I suggest that the justification we should follow is the one that Gewirth has offered for human rights, which not only grounds all the rights identified in the IBHR, but also provides the missing justification that will allow those rights to be interpreted without appeal to local cultural, religious, or other traditions. The idea here is that when we juxtapose the IBHR against the grounding that Gewirth has offered, we provide a way forward for courts to then apply the rights with less likelihood that the application will succumb to the kind of relativist concerns expressed in the previous sections.[288]

Human rights can only conflict with other human rights. This avoids the earlier concern of how to evaluate a human right against a non-human right value. Additionally, Gewirth's approach gives rise to a way to evaluate human rights since all human rights are derived by way of a dialectical approach that affirms individual voluntariness or purposiveness. As such they can be evaluated but only against one another, and always in terms of how well they serve to promote the freedom and well-being of all voluntary purposive human actors. Gewirth writes:

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288 For a discussion of other approaches to resolving the relativist and conflicts of rights issues that seem less satisfying, see Xu & Wilson, *supra* note 204, at 41–52.

> [W]hen a human right is overridden, it must be by another human right, especially when the latter's Object is more necessary for action than the former's. Even when a right is overridden by considerations of the general welfare, the latter criterion, to be genuinely overriding, must be composed of the rights of individuals. For example, the national defense or even the rules of the road involve the rights of individuals to security from attack and to safety.[289]

This passage is important for two reasons. First, it implies that when a state asserts a compelling interest that cannot be satisfied without overriding a human right, its justification must be based on the presence of other human rights, which, in the context, prove more essential to ensuring voluntary purposive human action than the right in question if not overridden. Second, the aforesaid passage supports the claim that the generic rights which the PGC prescribes serve as both the baseline and the common denominator for determining not only what human rights there are but also how to resolve conflicts of rights.[290]

This last point acknowledges that while the PGC remains absolute as a "categorically obligatory moral principle," the specific individual human rights at stake are only prima facie; they can be overridden but only in contexts where doing so would promote the operation and protection of the system of human rights generally.[291] An example of a human right that can be overridden is the right to freedom when it is being used to attack the well-being of an innocent other. In that instance, the system of human rights could not be maintained if the right to freedom would prohibit all interference, even to safeguard the well-being of innocent others, especially when this can be done at no comparable cost to oneself.[292] In situations where overriding a human right would not promote the operation and protection of the human rights system generally, the right at stake is not justly overridden. This explains our earlier discussion of *jus cogens* not being derogated, and those rights specified in Article 4(2) of the ICCPR that likewise should not be derogated, even in times of public emergency. For it is highly unlikely, even in grave situations, that the system of human rights

289 GEWIRTH, *supra* note 227, at 6 (emphasis added).

290 GEWIRTH, *supra* note 228, at 64 (noting that the generic rights the PGC prescribes "are 'human rights' in that they are rights that all humans have as human agents").

291 GEWIRTH, *supra* note 227, at 57–58.

292 *See id.* at 58–59.

generally would be advanced by overriding the rights specified as *jus cogens* or in Article 4(2).

But what about when human rights themselves are in conflict? How should a court approach deciding which right to override, and would the overridden right have any further status in the case once the override decision had been made? Here we take heed of how the PGC operates to determine when an override is justified. Gewirth sets out two criteria for resolving conflicts of rights at the individual level, and then a third criterion will be applied at the institutional level. Gewirth calls these applications "direct" and "indirect." "The criteria stem from the *PGC*'s central requirement that there must be respect for freedom and well-being among all prospective purposive agents."[293] The first criteria is the "prevention or removal of transactional inconsistency."[294] A transactional inconsistency occurs "[i]f one person or group violates or is about to violate the generic rights of another."[295] In such a circumstance, the PGC is violated because both agents stand alike in their claim to the rights each of them has with respect to the other. As a result, the agent whose rights would be otherwise violated can justly protect against the violation, even using lethal force, if necessary to protect basic well-being, since the transactional inconsistency is being created by the action of the other agent. Put more directly, self-defense is justified. This will be important when we turn to institutional applications, as it certainly justifies nation states who are innocently attacked to appeal to Article 51 of the U.N. Charter, which provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures to maintain international peace and security."[296]

The second criterion for resolving conflicts of rights at the individual level is when the conflict is between rights of different degrees of needfulness for action.[297] For example, one's basic well-being might conflict with another's nonsubtractive well-being, or another's nonsubtractive well-being might conflict with others' additive well-being. "Since every person has rights to the necessary conditions of

293 *Id.* at 58.

294 *Id.*

295 *Id.*

296 U.N. Charter art. 51.

297 GEWIRTH, *supra* note 227, at 59. *See also* ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 45 n.15 (1996).

action, one right takes precedence over another if the good that is the object of the former right is more necessary for the possibility of action, and if that right cannot be protected without violating the latter right."[298] A recent example in the individual case might include lying to a member of Myanmar's military about the location of Rohingya Muslim women and girls to avoid "unspeakable sexual violence at the hand of powerful men, many wearing military or police uniforms."[299] While normally lying would constitute a violation of nonsubtractive well-being, it is justifiable in instances where the lie would prevent an unjustified violation of basic well-being under the PGC, and that justification should be taken into account by a human rights court deciding whether the person committing the lie can be justly charged with aiding and abetting an enemy of the state.

Turning now to the role of institutions generally, especially those engaged with legal practices, Gewirth notes the importance of impartial institutions if the protection of human rights is to be sustained.[300] The way he does this makes use of indirect applications, as in the legal case mentioned above. Here, "the *PGC*'s requirements are imposed in the first instance on social rules and institutions" requiring them "to serve to protect or foster the equal freedom and well-being of the persons subject to them."[301] This is to be accomplished on two different criteria corresponding to the state's obligations to protect the freedom and well-being of all prospective human agents. Turning first to the freedom criterion, or what Gewirth calls the "*procedural* applications," one distinguishes instances involving *optional* versus *necessary* applications.[302] Optional applications require persons to be afforded the opportunity "to form or to participate in voluntary associations," such as political parties, social clubs, religious organizations, etc.[303] Attempts to force individuals into or out of such organizations would constitute a violation of this aspect of procedural freedom.[304] With regard to government participation, however, since governments pretty much exist everywhere, it is necessary or required

298 GEWIRTH, *supra* note 227, at 59.

299 Djaouida Siaci, *The Mass Rape of Rohingya Muslim Women: An All-Out War Against All Women*, MIDDLE E. INST. (Sept. 29, 2019), https://www.mei.edu/publications/mass-rape-rohingya-muslim-women-all-out-war-against-all-women [https://perma.cc/HLS8-4EAY].

300 GEWIRTH, *supra* note 227, at 60.

301 *Id.*

302 *Id.* at 61.

303 *See id.*

304 *See, e.g.*, ICCPR, *supra* note 46, arts. 8, 11, 13, 18, 22–23, 27.

that "a general decision procedure using the civil liberties to provide the authoritative basis, through elections and other consensual methods, of specific laws or governmental officials" be made available.[305] In short, democratic governments are justified while non-democratic governments, especially those that oppress their people, are clearly not.

The second criterion of indirect applications, which Gewirth describes as *instrumental*, corresponds to the three levels of well-being previously discussed, which also brings together our notions of a minimal and supportive state.[306] It too has two distinct scales: the *static* and the *dynamic*.[307] The first connects to what earlier were described as basic and nonsubtractive applications of well-being as would be expected to be protected in the minimal state; the second, *dynamic* scale, is more related to the supportive state since it ties in with how we think about additive well-being.[308] The first seeks to "protect persons from occurrent violations of their rights to basic and other important goods and to punish such violations."[309] The second "serve[s] to provide longer-range protections of basic and other rights where these cannot be obtained by persons through their own efforts."[310] The second is thus focused on positive rights, not just negative rights, while the first is more focused on negative rights. The second may be limited, however, where a state has insufficient resources to meet the positive need. In such circumstances, as previously mentioned, wealthier states should be called upon to assist in the effort.

I point out these two different applications because they very much relate to our understanding of the rights promoted by the ICCPR and the ICESCR, respectively. In this sense, they tie in with many of the existing legal norms that make up the IBHR. Perhaps even more importantly for our purposes of interpreting these rights, because of what was said earlier about the direct applications, there is also a tie here to how international and domestic courts should decide human rights cases. This is made clear when we distinguish the distinct role of a court from an institution like the U.N., or even from countries negotiating a multilateral human rights treaty, which sounds much like

305 GEWIRTH, *supra* note 227, at 61; *see also* ICCPR, *supra* note 46, arts. 6–7, 9–10, 12–16, 19, 21, 25.

306 GEWIRTH, *supra* note 227, at 61.

307 *Id.*

308 *Id.* at 61.

309 *Id. See also* ICCPR, *supra* note 46, arts. 17, 20, 24–25.

310 GEWIRTH, *supra* note 227, at 61; *see also* ICESCR, *supra* note 47, arts. 3, 6–15.

one might expect of a legislative process. In the latter instances, both sides seek their own advantage in service to their respective interests, although under the above guidelines they should still ensure the proper protection of human rights. While in the former instance, courts such as the ICJ, the ICC, and various domestic courts are created or given authority to resolve disputes involving IHL and IHRL based on an assumption built into the system that they will treat the parties before them equally and fairly, and only serve to determine what the law means without bias.[311] Put another way, it means that the courts will operate to preserve the continuity and authority of the legal system in the best way they know how or, as Ronald Dworkin puts it, "[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."[312] Dworkin explains this by having new cases fit past cases that ought not to be overruled.[313] And if after the fit is established and there remains a controversy as to the correct result, Dworkin would look to the political morality of the society to produce the best constructive interpretation of the community's legal practice.[314] In the case of international law, the political morality of the society would be best laid out, not just by identifying with whatever local political morality may presently be in vogue, but by finding what a rational person ought to accept given the variety of local disparities that exist among the various cultures and religious traditions. Here too the PGC can aid in the way courts interpret the scope of a human right or resolve a conflict of rights in terms of how well the interpretation supports voluntary purposive human action.

Joseph Raz makes a somewhat similar point regarding how courts should decide cases. Raz writes that,

> The need to consider changing and developing the law to improve it, to adapt it to changing conditions, and to do justice to the litigants in the case before the court is a major influence on the way the law is interpreted. It is not, however, part of the answer to the question 'why interpret?'. On the contrary. So far as that question is concerned considerations of

311 *See, e.g.*, ICCPR, *supra* note 46, art. 14.

312 DWORKIN, *supra* note 203, at 225 ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, or procedural due process that provide the best constructive interpretation of the community's legal practice.").

313 *See id*. at 238–39.

314 *Id.* at 239–44.

> equity and the role of the courts in developing the law are considerations which militate against assigning interpretation a major role in legal reasoning. In themselves they would suggest that legal reasoning in the courts should have the same character as legislative reasoning . . ..
>
> . . . The reasons for conducting so much of legal reasoning as an interpretative reasoning are respect for authority and the case for continuity, and especially the first. The need for continuity plays a similar role in legislative reasoning, without giving it interpretative character. It is only in combination with the courts' respect for authority that it supports interpretative reasoning.
>
> So the factors which determine the character of legal interpretation divide into two: authority and continuity, which provide the reason for interpretation as well as contributing to the determination of its character, and equity and the development of the law, which in themselves are no reason to interpret at all, but given that we have reason to interpret they contribute to the determination of its character.[315]

Such arguments as these provide a basis for believing that courts should operate with a far narrower set of values and methods of interpretation than those who have perhaps created the background treaties or state practice under which the courts will operate. This means that the language of interpretation, which combines continuity with authority, equity, and fairness, or is the best constructive interpretation of the community's legal practice, is what judicial decisions must manifest if they are to be accepted as authoritative. Domestic courts, as was suggested earlier, will attempt to follow this pattern but may get held up if local cultural or religious bias enter their analyses, as may be likely if the case involves a conflict of human rights with an existing local value or tradition. Consequently, a framework like that proposed by Gewirth, which first tries to present a non-question begging approach to justifying human rights generally, and only then explains how conflicts of rights should be resolved, would hopefully provide the very kind of authoritative help that domestic courts need to ensure rational, consistent, and unified decisions across cultures when deciding human rights cases. This result will only occur, however, if domestic courts are willing to follow the framework because they see it as authoritative.

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315 JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 237 (2009).

Here, it would be nice to believe that everything already said to justify human rights would be enough for domestic courts to choose to follow it. But perhaps further support is needed for domestic courts to find the framework truly authoritative, one that is more related to how authority is referenced in political situations. If the ICJ said it would afford great weight to the interpretations the Gewirthian framework provides, much like it earlier said it would do with respect to the HRC's comments, domestic courts would have even greater reason to adopt the framework, since it would ensure greater consistency in decision-making processes involving international human rights generally.[316] But, of course to do this, international courts like the ICJ would need to incorporate into their interpretations of treaties and of CIHRL an ethical modality to allow for the best objective moral reasons that can be discovered to play a part in their deliberations. This doesn't mean that there won't be occasional disputes over outcomes in particular cases or that every court would necessarily agree with every other court's decision. It does mean that where disputes arise, they will arise within rather than outside an interpretative framework that most international and domestic courts should be able to agree upon as providing a common interpretative basis for understanding human rights treaties and resolving human rights disputes. And if that is the case, then, although occasional disputes may continue to arise, there will be less reason to despair and greater cause for hoping that IHRL is becoming a more unified system that states and individuals will be able to rely upon going forward.

VIII. CONCLUSION

This article has sought to resolve a problem that arises when IHRL is adjudicated by the domestic courts of various countries. This problem concerns the influence of local cultural and religious standards that may give rise to relativism in the decisions, since there will be no guarantee of consistency, let alone uniformity, among different domestic court approaches to how best to adjudicate these rights. The problem arises because when IHRL came into existence, beginning

316 *Cf.* Alejandro Chehtman, *The Relationship Between International and Domestic Courts: The Need to Incorporate Judicial Politics into the Analysis*, EUR. J. INT'L L. (June 8, 2020), https://www.ejiltalk.org/the-relationship-between-domestic-and-international-courts-the-need-to-incorporate-judicial-politics-into-the-analysis [https://perma.cc/JQ77-25BX] (noting "how domestic courts perceive their role as 'compliance partners' and how the greater interaction between them and international courts has increased the possibility of collaboration").

with the *Universal Declaration* of 1945 and followed by the ICCPR, along with its two Protocols, and the ICESCR, there was no common foundation for how the rights these documents propounded were to be grounded. As a result, IHRL was more a set of individual treaties and customary state practices that domestic state courts would engage when resolving cases.

This remained true even with the creation of the ICJ, the ICC, and the HRC because matters of interpretation were not fully dealt with, often leaving it to domestic courts to resolve issues concerning the scope of a particular right, especially where the ICJ had said little regarding how these cases should go forward. Part of the problem with the ICJ and the HRC were their limited jurisdictions, which restricted them to only consider those cases in which state parties or a U.N. organ or agency had agreed for them to consider. With the ICJ in particular, there was also the problem of determining the scope of the reservations some states had adopted when signing onto a human rights treaty, especially when the reservation seemed to undermine the "object and purpose" of the treaty. As a result, relativism would come into play in some international court cases and especially in cases decided by domestic state courts, which would be more influenced by cultural and religious values, as well as local procedural rules.

Toward resolving this problem, this article has suggested putting alongside the various documents and customary practices that recognize human rights, a philosophical theory that, without question begging, can provide an objective grounding for human rights interpretations, and which can both confirm most of the rights that these treaties and practices already attest to, while also providing criteria for resolving conflicts of rights in a consistent and rational manner. The goal for doing this is not to demean and certainly not replace the various international and domestic human rights institutions already in existence; rather it is to afford those institutions a guide going forward to ensure that the determinations they make regarding the scope and justification of specific rights in particular cases will stand upon a common rational foundation that is truly universal.