

THE HUMAN RIGHTS JUSTIFICATION FOR CONSENT

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ABSTRACT

Human rights actors have advocated and implemented changes in how international human rights law is made and interpreted to reduce a State's control over the content of its human rights obligations. Such efforts are premised on the view that State consent is an impediment to development of human rights. This article argues, however, that State consent is essential to the protection of the human right of self-determination, a right which guarantees people collective control over their political, economic, social, and cultural development. Thus, efforts to expand international human rights without State consent are in tension with human rights.

Because consent is essential to protecting the right to self-determination, efforts to limit State consent must be undertaken consistently with the traditional methodology for adjudicating rights competitions: proportionality analysis. Proportionality requires that limitations upon self-determination be based upon a human rights rationale that is proportionate to the restriction in question. Advocates for diminishing the role of State consent in human rights lawmaking have not conducted this analysis.

Proportionality analysis reveals the need to develop additional human rights rationales to support restrictions on self-determination. It also reveals the need to modulate restrictions on self-determination to better match the rationales proffered.

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1. INTRODUCTION

“The international human rights program is more than a piecemeal addition to the traditional corpus of international law By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.”¹ Michael Reisman’s prophetic words from 1990 foreshadowed a continuing struggle within international law generally, and human rights law specifically, to adapt international law developed during an age of States’ rights to a system ever-more organized around the protection of human rights.

One area where this struggle has been ongoing has been with respect to the mechanisms by which international human rights obligations are created. It is axiomatic to describe the international legal system as voluntary: a State is bound only by those international legal obligations to which it consents.² This statement is an oversimplification of even traditional doctrine, which has recognized that customary norms bind unaware or objecting States.³ But State consent is the primary grounds for international legal obligation.

A primarily voluntary legal system has traditionally been justified as an attribute of State sovereignty; consent ensures that State autonomy is limited only if the State agrees.⁴ But a voluntary legal system has drawbacks if the goal is protection of human rights as opposed to States’ rights. An international human rights regulatory system developed through consent is riddled with geographic gaps, is normatively thin, and evolves slowly given the encumbrances of consent-based lawmaking.⁵ It also gives States

¹ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 872 (1990).

² See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“The rules of law binding upon States . . . emanate from their own free will Restrictions upon the independence of States cannot therefore be presumed.”).

³ See *infra* notes 31–33 and accompanying text (describing difficulty in reconciling peremptory norms and the obligations of newly created States with the consent principle).

⁴ See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 782 (2003) (linking sovereignty to consent as the foundation of international law).

⁵ See *infra* Section 2.1 (providing human rights criticisms of the consent principle).

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complete control over the development of human rights obligations, which is in tension with the reality that States are the primary violators of human rights and undermines the global cosmopolitan ethos.⁶ Scholars, international institutions, and human rights activists have been consequently critical of the voluntary international legal system.⁷

To ameliorate these concerns, many international legal actors have advocated for the diminishment of the consent principle. The International Court of Justice has promulgated a rule easing the formation of custom in the face of contrary practice.⁸ Scholars and activists have advocated for an ever-growing list of *jus cogens* norms from which persistent objection is not permitted.⁹

In treaty law, institutions involved in interpreting human rights treaties employ a teleological approach to interpretation that can result in locating obligations not agreed to by the parties.¹⁰ The Human Rights Committee (HRC), a treaty monitoring body (TMB) created by the International Covenant on Civil and Political Rights (ICCPR), has claimed the right to sever invalid reservations and hold States responsible for the original treaty provision, without subsequent opportunity for the State to exit the treaty.¹¹

All of these efforts are premised on the belief that reducing the domain for State consent is a normative positive for a system oriented around protection of human rights. But this analysis suffers from an important flaw: it treats consent solely as a

⁶ *Id.*

⁷ *Id.*

⁸ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27) [hereinafter *Nicaragua Case*] (announcing that contrary practice would be treated as confirming the existence of custom if defended consistently with a putative rule).

⁹ See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 292 (2006) (detailing efforts to expand the category of *jus cogens* norms with little or no evidence of general acceptance by the international community as such).

¹⁰ See *infra* notes 97–116 and accompanying text (describing uses of this approach by human rights adjudicatory bodies).

¹¹ See U.N. Human Rights Comm., General Comment No. 24 (52): General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, 52d Sess., Nov. 2, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) (claiming the right to sever invalid reservations while leaving State bound to the original treaty provision).

protection of States' rights in opposition to human rights. In fact, State consent is critical to the protection of human rights.

The consent principle protects the collective right to self-determination. The right to self-determination grants all peoples a continuing entitlement to use their respective States to self-direct development free from external intervention.¹² This right reflects the intrinsic value that communities who share a common life place on self-government as a vehicle to make decisions about how to develop as a society.¹³ Consent protects self-determination because it gives the people of the State the right to decide which international human rights obligations to accept, which in turn conditions the manner in which society develops.¹⁴

This connection between consent and self-determination is important for two reasons. First, consent is both an aid and an impediment to the protection of human rights. While the latter is well accounted for in human rights scholarship, the former is not. Second, because the consent principle is an essential component of the human right to self-determination, infringements upon the principle must be supported by a legitimate human rights reason and be proportionate to that reason. Such analysis is rarely, if ever, conducted by those advocating for diminishment of the consent principle.

Proportionality analysis reveals two important realities about existing practice. First, the only accepted human rights rationale within practice to date for restricting self-determination is the need to enforce accepted community obligations on outlier States.

¹² Self-determination is a treaty-based right located in both Covenants. *See* International Covenant on Civil and Political Rights art. 1, para. 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); International Covenant on Economic, Social and Cultural Rights art. 1, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (containing the same language as appears in Article 1(1) of the ICCPR). Given that most States of the world are parties to either the ICCPR or ICESCR, the self-determination right described herein applies to most States. Though there are strong arguments that the conception of self-determination described here is also customary, this Article does not take on the task of proving that this is so.

¹³ *See infra* notes 155-59 and accompanying text (describing philosophical underpinnings of self-determination).

¹⁴ *See* James Crawford, *Democracy and International Law*, 64 *BRIT. Y.B. INT'L L.* 113, 121 (1993) (claiming a heightened interest for popular participation on human rights questions given their impact on the internal life of the State).

Though some of the restrictions on self-determination described in this Article advance this accepted rationale, others do not. Where there is no accepted community obligation at stake, those interested in restricting consent must identify an alternative human rights justification. This Article explores some alternatives.

Second, the strength of the justification required to restrict self-determination varies depending upon the extent to which the consent principle is constricted. The developments in human rights lawmaking described here vary greatly in terms of their level of infringement on self-determination and, therefore, the strength of the human rights rationale needed to support the restriction.

This Article proceeds in three parts. Part 1 lays out the problems associated with the application of the consent principle to human rights law. Part 2 argues that this conventional account should be reconsidered given that State consent is essential to the protection of the human right to self-determination. Part 3 argues that aspects of human rights practice should be reconsidered in light of this important role for State consent.

2. THE HUMAN RIGHTS CONSENT PROBLEM

This Part undertakes four tasks. First, it describes the traditional State sovereignty driven account of consent in international lawmaking. Second, it explains why and how this account has been challenged by the emergence of human rights as a central guiding principle of the international system. Third, this Part describes efforts to ameliorate these concerns. Fourth, it examines the scholarly critiques of these reform efforts.

2.1. *The Consent Principle*

There is no more axiomatic rule in international law than the consent principle propounded by the Permanent Court of International Justice in the *Lotus Case*: a State is bound only by those international legal obligations to which it consents.¹⁵ This rule emanates from a natural law conception of States: States, like men, are free, independent and equal entities in the state of

¹⁵ See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“The rules of law binding upon States . . . emanate from their own free will Restrictions upon the independence of States cannot therefore be presumed.”).

nature.¹⁶ As such, States possess rights by virtue of being States, the bundle of which constitute international legal sovereignty.¹⁷ Sovereignty includes recognition that States as autonomous entities have the right to decide whether to surrender a portion of their natural freedom and enter into international obligations.¹⁸ Consent is a marker of the State's agreement to limit its autonomy pursuant to a commitment to the international community.¹⁹

In practice, this account of international law is incomplete. Treaties and customary law respect State consent in different ways, and customary law in particular has nonconsensual elements.

States create treaty obligations through their affirmative consent.²⁰ States use reservations to modify the content of the treaty obligation to match their consent.²¹ Reservations to multilateral human rights treaties are permissible so long as they

¹⁶ EMER DE Vattel, *THE LAW OF NATIONS* xiii (Joseph Chitty ed., 1863).

¹⁷ See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 14 (1999) (explaining that international legal sovereignty is derived from Vattel's concept of equal States living together in the state of nature). State sovereignty remains the formal guiding principle of the international legal system. See U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); *id.* at art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .").

¹⁸ See Louis Henkin, *International Law: Politics, Values, and Functions*, 216 *RECUEIL DES COURS* 9, 26-29 (1989) ("State autonomy suggests that a State is not subject to any external authority unless it has voluntarily consented to such authority."); see also Ambassador Richard N. Haass, Director, State Dep't Policy Planning Staff, Remarks to the School of Foreign Service and the Mortara Center for International Studies at Georgetown University: *Sovereignty: Existing Rights, Evolving Responsibilities* (Jan. 14, 2003) available at <http://2001-2009.state.gov/p/rem/2003/16648.htm> (describing the attributes of sovereignty in a post-Westphalian world).

¹⁹ Consent is manifested through formal mechanisms, such as signature of the treaty or exchange of instruments of ratification. See Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.").

²⁰ See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 21 (May 28) [hereinafter Genocide Convention Case] ("It is well established that in its treaty relations a State cannot be bound without its consent . . .").

²¹ VCLT, *supra* note 19, at art. 1(d) (defining "reservation").

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do not violate the object and purpose of the treaty.²² Where a reservation is invalid, the reserving State is not bound by the provision without the reservation because it never consented to such an obligation.²³ Rather, it is either not party to the treaty in its entirety, or simply not party to the provision with the disputed reservation.

Traditional customary norms are located through uniform, extensive, and widespread state practice done with a sense of legal obligation (*opinio juris*). Those States engaging in practice that leads to custom affirmatively consent to the norm by opting to act consistently with the rule.²⁴ Customary law does not merely obligate those States participating in the norm creation, however, as all non-persistently objecting States are bound. But not all States contribute practice relevant to the creation of each customary norm. Sometimes States do not confront the issue that is the subject of the custom. In other situations, the State may not have come into being until after the norm was formed. States in those situations are bound by the customs absent persistent objection, thus creating an obligation without affirmative consent.

The doctrine of tacit consent presumes consent from a failure to dissent from the norm.²⁵ States can dissent from the formation of custom in two ways. First, groups of States can prevent the formation of putative customary norms through contrary

²² *Id.* at art. 19(c); Genocide Convention Case, *supra* note 20, at 24 (“The object and purpose of the Convention . . . limit . . . the freedom of making reservations . . .”).

²³ States generally self-police whether their reservations meet this requirement. A reservation to a multilateral human rights treaty is valid as long as at least one other party to the treaty does not object to the reservation; if all State parties object—exceedingly unlikely with a multilateral human rights treaty—the reserving State is not a party to the treaty. See VCLT, *supra* note 19, at art. 20(4)(c), (5). Any particular State that objects to a reservation is free to decide that the treaty is not in force between it and the reserving State. See *id.* at art 20(4)(b) (“An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State . . .”).

²⁴ See INT’L LAW ASS’N, LONDON CONFERENCE (2000), FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 39 (2000) (explaining that those States whose practice initiates the formation of custom consent to be bound by the rule).

²⁵ See *id.* (explaining tacit consent theory).

practice.²⁶ Contrary practice defeats the conclusion that a norm is custom if it is sufficient to disprove uniform, widespread, and extensive practice. Second, traditional custom permits an outlier State—whose action in contradiction to the rule is insufficient to prevent the formation of custom—to block application of a customary rule to itself by openly and persistently objecting to the rule at the time it is created.²⁷

The fit between customary law and the consent principle is imperfect, however. *Jus cogens* or peremptory norms are in some instances nonconsensual. The VCLT defines a peremptory norm as “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.”²⁸ Given that the test for a norm achieving peremptory status is general acceptance by the international community, there is by definition an element of consent in its achieving elevated status.²⁹

But general acceptance does not mean each and every State has consented. Once a norm achieves *jus cogens* status, dissenting States lose the right to remain outside the norm through persistent objection. As a consequence, it is possible that a *jus cogens* norm will bind a State that affirmatively indicated a desire not to be bound by the norm. For example, once the apartheid norm became peremptory, it bound South Africa and Rhodesia, even if they were persistent objectors to such a norm in the past.³⁰

Moreover, the doctrine of tacit consent appears illusory. The tacit consent doctrine presumes States agree to customary norms when assuming statehood because acceptance of customary law is an inherent part of being a State.³¹ But assuming people within a

²⁶ See *id.* at 9 n.21 (“[C]ontrary practice can undermine and, if sufficiently constant and widespread, destroy an existing customary rule.”).

²⁷ See *id.* at 27 (affirming validity of persistent objector rule).

²⁸ VCLT, *supra* note 19, at art. 53.

²⁹ See Henkin, *supra* note 18, at 61 (1989) (describing “authentic systemic consent”).

³⁰ See Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 15 (1985) (analyzing why the *jus cogens* prohibition on apartheid bound South Africa and Rhodesia despite their apparent persistent objection).

³¹ See ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 13–25 (1987) (explaining customary norms are inherited obligations required to

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State opted out of statehood to avoid a customary norm, whichever State is sovereign over those people and within that territory would nevertheless be bound by the norm.³² Thus, new State or not, all people reside within the jurisdiction of a sovereign bound by the norm, rendering consent illusory. Similar criticism can be made toward attributing tacit consent to States who were unaware entirely of the formation of a custom until after it was formed.³³ Lack of knowledge about putative customary law is not equivalent to consent.

These two areas of practice demonstrate inconsistencies with respect to the role of State consent in traditional international legal theory and practice. An accurate rendition of the consent principle provides that State consent is the primary and typical route by which international legal obligations are created with limited departures in customary law.

2.2. Human Rights Criticism of the Consent Principle

Human rights scholars challenge the consent principle as an impediment to the protection of human rights. Human rights theory provides that humans, not States, ought to be the central animating figures of international law.³⁴ The State is not a true person of course, and its anthropomorphic characterization misses

participate in the international order); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 44-45 (1995) (describing these rules as associative obligations of participation in the international system).

³² See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 513 (2000) (stating inconsistencies in customary practice).

³³ See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537 (1993) (criticizing the practice of giving weight to State silence when "many states do not know that the law is being made and thus have not formed an opinion").

³⁴ See, e.g., ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 289-327 (Will Kymlicka et al. eds., 2004) (arguing that a justice-based account of legitimacy oriented around protection of human rights should replace State sovereignty as the legitimating principle for international law); FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 57 (1998) (describing shift in focus of the international legal system based upon an acceptance that internal legitimacy of States to people should be the foundation of respect for State sovereignty). Anne Peters goes still further, arguing that the contest between State sovereignty and human rights as the "Grundnorm" for international law has been resolved in favor of human rights. Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 514 (2009).

why States matter: they are primarily discretionary associations that exist to advance the interests of their people. As such, State sovereignty is valuable only for the instrumental benefits it provides for the protection of human rights.³⁵

The diminishment of the importance of sovereignty within human rights theory undermines the foundations of the consent principle. While a primarily voluntary legal system protects States' rights, that goal is less salient as sovereignty wanes in importance. As critically, the consent requirement arguably impedes the protection of human rights in at least three ways.

First, the consent principle results in international human rights regulation akin to a thin slice of Swiss cheese. It contains holes in coverage because a State or group of States may decline to consent to an otherwise widely agreed-to treaty norm, or may block application of a custom to it through persistent objection. The regulations that do exist are characterized by a "relative lack of normativity," in order to foster consensus between widely divergent cultures and self-interested governments.³⁶

Consider, for example, the mandate found in the International Covenant on Civil and Political Rights (ICCPR) that States criminally prohibit hate speech that amounts to incitement of discrimination, hostility, or violence.³⁷ Some States like China are not parties to the ICCPR at all; others, like the United States, have taken a reservation to the treaty that restricts the application of the provision within its territory.³⁸ Thus, there are geographic spaces where this provision does not apply.

³⁵ See TESÓN, *supra* note 34, at 40 (arguing that sovereignty is valuable for its instrumental benefits in protecting human rights and has moral weight only with respect to States that are internally legitimate); Peters, *supra* note 34, at 514 ("State sovereignty . . . has a legal value only to the extent that it respects human rights, interests, and needs.").

³⁶ See Philip Alston, *Introduction, in HUMAN RIGHTS LAW* xi, xii (Philip Alston ed., 1996) (providing standard critique of human rights law).

³⁷ See ICCPR, *supra* note 12, at art. 20, para. 2 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

³⁸ The U.S. reservation excludes any obligation to pass criminal laws inconsistent with the First Amendment to U.S. Constitution. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/I-V-4.en.pdf> (last visited Oct. 25, 2013) (providing a full record of all U.S. reservations to the ICCPR).

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Moreover, the terms like “national, racial, or religious hatred” are subject to divergent interpretations, especially given cultural differences.³⁹ This vagueness gives States wide interpretative latitude over the content of human rights norms.⁴⁰ While such vagueness is frequently characteristic of rights generally, municipal legal systems include adjudicatory institutions whose job it is to fill gaps in statutory and constitutional language.⁴¹ By contrast, the ICCPR creates no adjudicatory institution with a mandate to provide a binding interpretation of what these terms mean for the Parties.⁴² The result is that States have such wide interpretative discretion that most or all conduct may conceivably be defended as consistent with the rule.

A relatively thin, gap-riddled international human rights regulatory scheme protects States’ rights. Geographic gaps in coverage respect the right of the sovereign in that territory to opt out of international regulation. The thinness of the norms preserves States’ flexibility in application of the norms.

But such a system has normative problems from the perspective of the protection of human rights. It prevents realization of universal human rights, a core objective of the human rights movement,⁴³ because the same right means different things in different places.⁴⁴

³⁹ ICCPR, *supra* note 12, at art. 20, para. 20. See Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in IV COLLECTED COURSES OF THE EUROPEAN ACADEMY 153, 188 (1995) (arguing that cultural diversity among treaty parties makes a shared meaning for treaty terms hard to find).

⁴⁰ See Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 60–63 (2003) (“[T]he relatively open meaning of the basic norms of international human rights law leaves a great deal of interpretive latitude to states.”).

⁴¹ See Harlan Grant Cohen, *International Law’s Erie Moment*, 34 MICH. J. INT’L L. 249, 250–55 (2013) (contrasting acceptance that municipal courts will engage in gap filling with concerns about international adjudicatory institutions engaging in similar activities).

⁴² As discussed later, the ICCPR creates a Human Rights Committee to monitor State compliance, which has at times asserted a right to play this role, although such a role was not formally granted in the treaty. See NOWAK, *infra* note 82, at 668–69 (characterizing the Human Rights Committee as a “quasi-judicial organ” in large part due to its “lack of internationally binding effect”).

⁴³ See Universal Declaration of Human Rights art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as

It may also provide insufficient protection to people from abuse by States. States can exploit gaps in the law to abuse people.⁴⁵ The United States, for example, used the existence of gaps in the legal framework governing conflicts with non-State actors to arguably torture detainees in its conflict with al Qaida.⁴⁶ Preventing such abuses from occurring is a core objective of the human rights movement.

Second, the consent principle slows the pace of development of human rights norms. The traditional international lawmaking mechanism has an inherent “status quo bias” because of the hurdles that exist with respect to creating new law or altering existing law.⁴⁷ This bias is particularly stark with respect to human rights.

Securing consensus between groups of States on new human rights treaty obligations is a cumbersome process due to deep cultural differences that exist with respect to the practices that are the subject of human rights norms. Once treaties exist, any amendments must be approved by a State party before it is bound, which empowers laggard States to resist changes unless their particular concerns are addressed.⁴⁸ Though the Vienna Convention on the Law of Treaties allows regular practice between treaty parties to modify the meaning of a treaty without new

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

⁴⁴ See Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 877-79 (1985) (worrying that “international human rights” loses its meaning if it means different things in different places).

⁴⁵ See Louis Henkin, Univ. Professor Emeritus & Special Serv. Professor, Columbia Univ., *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, Address at Fordham University School of Law (Feb. 23, 1999), in 68 FORDHAM L. REV. 1, 12 (1999) (condemning States who abuse gaps in law made possible by sovereignty to commit atrocities).

⁴⁶ See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 204 (2011) (describing risks inherent in acknowledging gaps in international law).

⁴⁷ See Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHL. J. INT'L L. 515, 525-26 (2009) (arguing that a desire to overcome this bias partially explains the use of “soft law”).

⁴⁸ See VCLT, *supra* note 19, at art. 40, para. 4 (“The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement . . .”).

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negotiations,⁴⁹ there is limited inter-State practice on human rights questions because most human rights activity takes place within the State.⁵⁰

The process of locating new customary norms is even slower.⁵¹ Demonstrating that there is a pattern of uniform, widespread, and extensive State practice with respect to a human rights norm will take significant time, both to actually develop and to be documented by the actor seeking to establish a custom. The pace may be further retarded by the search for evidence of *opinio juris*, separate and apart from the consistent practice.⁵²

This slow pace of legal development is a function of a system oriented toward protecting States' rights. States make a momentous choice when opting to surrender a portion of their domestic sovereignty to international regulation, especially where the issue in question is the relationship between the government and its people. They must be afforded proper time to make this decision.

But a slow pace of evolution potentially harms the protection of human rights. Human rights terms, perhaps more than other kinds of treaty terms, acquire different meanings over time.⁵³ For example, the meaning of "cruel, inhuman or degrading,"⁵⁴ by definition is not static, as practices once widely accepted are later viewed as barbaric and inconsistent with human rights. Allowing

⁴⁹ See VCLT, *supra* note 19, at art. 31, para. 3 (attributing weight in treaty interpretation to subsequent practice between treaty parties).

⁵⁰ See Simma, *supra* note 39, at 187-88 (describing lack of practice). Most practice, such that it is, consists of statements made at bodies like the Human Rights Council and the Third Committee.

⁵¹ See Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 513, 514 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983) (quoting Sir Robert Jennings) ("Customary law . . . is based upon the passage of a long period of time . . .").

⁵² See John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 446-47 (2007) (arguing that ICRC erred in conflating state practice and *opinio juris* in its customary IHL study).

⁵³ See Andrew Drzemczewski, *The Sui Generis Nature of the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 54, 61-62 (1980) (describing the ECHR as evolving).

⁵⁴ See generally United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; ICCPR, *supra* note 12, at art. 7.

States to perpetrate conduct widely considered cruel today because such conduct was viewed as permissible at earlier points in time is difficult to reconcile with the purpose of protecting human rights.⁵⁵

2.3. *Loosening the Consent Principle*

Given these tensions between State consent and international human rights, it is not surprising that many scholars, human rights advocates, and human rights institutions have sought to loosen the consent requirement. This Part describes these efforts.

2.3.1. *Customary Law*

Though there has always been a nonconsensual element to customary law, the ability of States to dissent from customary norms is on the wane. The International Court of Justice (ICJ) has promulgated a rule, now widely accepted, that makes it harder for States to dissent from putative customary law through contrary behavior.⁵⁶

Under traditional doctrine, all instances of contrary State practice are accounted for in determining whether widespread, uniform practice fueled by *opinio juris* exists to create customary law.⁵⁷ This rule has made it difficult for human rights custom to form because large amounts of contradictory State practice exist even with respect to the most sacred human rights, such as the prohibition on torture.⁵⁸

Such a rule protects the right of States to dissent from customary law through practice. But it appears not to protect human rights. Customary law provides a unique opportunity to bind all States to any particular norm, given the risk that some

⁵⁵ See Drzemczewski, *supra* note 53, at 62 (arguing ECHR needs to evolve to “keep pace with social and legal advances made within the domestic legal structures of member States”).

⁵⁶ See *supra* note 8 and accompanying text (discussing the ICJ’s holding in the *Nicaragua Case*).

⁵⁷ The methodology for determining whether a practice is customary law is to look for “extensive and virtually uniform” State practice to support a custom. *North Sea Continental Shelf Cases*, Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20). States may try and alter customary law by engaging in contrary practice, but such practice must also “obtain[] the acquiescence of others” or be incorporated into a treaty amendment for it to supplant custom. INT’L LAW ASS’N, *supra* note 24, at 25.

⁵⁸ See Bellinger & Padmanabhan, *supra* note 46, at 212–13 (describing difficulties inherent in locating human rights custom).

number of States will choose not to join any particular human rights treaty. Thus, the harder it is to create customary law, the more likely it is that there will be geographic gaps in human rights protection. Moreover, the traditional rule enshrines a slow pace for legal development given the indefinite and perhaps infinite time it will take for the world's States to arrive at widespread, extensive, and uniform practice with respect to any human rights question.

The ICJ sought to modify this rule in the *Nicaragua Case*.⁵⁹ In that case, the Court evaluated whether the prohibition on the use of force and intervention in the internal affairs of other States, found in Article 2(4) of the U.N. Charter, is customary law.⁶⁰ There are many examples of States violating the literal terms of Article 2(4), making it difficult to establish customary law under the traditional test.⁶¹ But the ICJ announced that inconsistent State practice should be treated as a violation of the custom, as opposed to evidence that no custom exists, if the State justifies its conduct consistently with the custom.⁶²

While this ruling was made in the context of the law governing armed conflict, its impact has been felt more intensely in international human rights law. The ability of States to dissent from a putative human rights custom through contrary behavior is

⁵⁹ The powers of the ICJ are limited to deciding disputes between States, and it has no formal authority to alter rules on the formation of custom. Statute of the International Court of Justice art. 59, June 26, 1945, 3 U.S.T. 1153 [hereinafter ICJ Statute] ("The decision of the Court has no binding force except between the parties and in respect of that particular case."). But the ICJ approach in the *Nicaragua Case* has been widely adopted by States and scholars as the method for evaluating contrary practice in the context of human rights and humanitarian norms. See, e.g., Jean-Marie Henckaerts, Customary International Humanitarian Law: A Response to US Comments, 89 INT'L REV. RED CROSS 473, 478-86 (2007) (arguing application of *Nicaragua* rule is essential to prevent "violators [from] dictat[ing] the law or stand[ing] in the way of rules emerging").

⁶⁰ U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

⁶¹ Indeed, the Court in the *Nicaragua Case* itself found that the United States and Nicaragua both violated Article 2(4) of the Charter by providing weapons and logistical support to rebel groups in Nicaragua and El Salvador, respectively. *Nicaragua Case*, *supra* note 8, ¶ 195.

⁶² *Id.* ¶ 187 (finding that the content of Article 2(4) was indeed customary law).

significantly compromised. Rather than contrary practice registering dissent, States' explanations of their actions are also evaluated.

On the surface, this change may not appear dramatic; if a State does not believe a rule exists, why would it attempt to defend its action consistent with the putative rule? In reality, States have political or economic reasons to describe their conduct in a manner that is pleasing to the international community, which are unrelated to accepting the existence of a legal obligation.⁶³ Requiring States to disavow those contrary policy objectives in order to dissent from creation of a customary norm imposes potentially significant additional costs on dissent.

Consider the sometimes proclaimed customary duty to prosecute those involved in international crimes, such as genocide, crimes against humanity, and serious war crimes. Scholars have described this duty as customary⁶⁴ despite the regularity with which States have granted amnesties to those who allegedly committed such crimes.⁶⁵ They make this claim by using the *Nicaragua* rule to convert the contrary practice of States into a form of consent to the rule. These scholars argue that if a State granting amnesty invokes exigent circumstances—like national reconciliation or fragility of the democratic transition—to explain amnesties, they are implicitly accepting that they need to explain deviations from the rule.⁶⁶ Why else would they feel the need to offer an explanation for choosing amnesties over prosecutions?

⁶³ See Bellinger & Haynes, *supra* note 52, at 445 (explaining that States will verbally support resolutions at international organizations for reasons that have nothing to do with judgment on the existence of a legal norm).

⁶⁴ See, e.g., Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 15-16 (1994) (arguing there is customary duty to prosecute war crimes and crimes against humanity and a developing custom with respect to human rights violations); Naomi Roht-Arriaza, Comment, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 489 (1990) (describing an "emerging" customary duty to prosecute).

⁶⁵ See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 295-99 (2007) (marshaling significant evidence of States' practices which are inconsistent with the existence of a customary duty).

⁶⁶ See Roht-Arriaza, *supra* note 64, at 496-97 (dismissing amnesties offered by Uruguay, Chile, and El Salvador as contrary practice disproving a customary duty to prosecute); see also Edelenbos, *supra* note 64, at 21 (making general point). But see Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 58 (1996) (disputing factual accuracy of claim).

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But, in reality, such States may not accept a duty to prosecute. States which use amnesties may have felt constrained not to openly reject the existence of a duty to prosecute because they feared that departures from a pro-human rights stance would disrupt Western aid upon which the States were dependent. Thus, even though their statements acknowledge that Western States might view a duty to prosecute as customary, they may not be a statement of agreement to that effect. Alternatively, States simply may have been offering reasons why they opted for one policy over another, with no intention of accepting any legal obligation. Requiring States to forego those policy or economic benefits to record dissent from the duty to prosecute imposes a significant new burden on the consent principle.⁶⁷

International human rights practice has also seen a dramatic increase in claims from scholars and advocates that human rights are peremptory, and therefore bind even dissenting States. The persistent objection rule in customary law protects the consent principle by giving States the right to opt out of customs with which they disagree through timely, persistent, and open objection to the rule.⁶⁸ As described in Part 1.1, the consent principle recognizes a limited exception to this rule in the case of peremptory norms, identified as such by their recognition and acceptance by the international community of States.⁶⁹ The existence of this exception reflects willingness, even in the sovereignty-driven account of consent, to recognize that a small number of peremptory norms will trump the sovereign right of individual States to control the content of their international legal obligations.

⁶⁷ Bruno Simma argues that the *Nicaragua* rule is justifiable when evaluating practice that is inconsistent with an existing rule of custom, but far less sensible when examining practice to determine whether there is custom in the first place. Simma, *supra* note 39, at 220. The diminishment of the consent principle only arises in the latter circumstance. States have traditionally enjoyed the ability to dissent from the formation of custom through contrary practice, a right made more difficult by this rule. By contrast, once a rule is formed, States have no right to dissent through contrary practice, as such conduct would be a violation of the rule until sufficient practice has accumulated to defeat the conclusion that the rule still exists.

⁶⁸ See *supra* Section 2.1 (discussing the foundation of the consent principle and the persistent objector rule).

⁶⁹ See VCLT, *supra* note 19, at art. 53 (defining peremptory norm).

But an important benefit accrues for the protection of international human rights from increasing the number of peremptory norms. *Jus cogens* norms solve the problem of geographic gaps in coverage because they are by definition applicable globally, not providing States the opportunity to dissent through persistent objection.⁷⁰ Not surprisingly then, human rights advocates and scholars have created a cottage industry in proclaiming human rights norms *jus cogens*.⁷¹

Some notable human rights scholars contend that all human rights are *jus cogens*.⁷² Other scholars, taking a slightly more restrained view, have argued that a wide range of human rights norms are *jus cogens*, including the duty to assassinate political leaders in certain circumstances,⁷³ the right to development,⁷⁴ and the right to free trade.⁷⁵

In making these pronouncements, scholars and activists must wrestle with the difficulty of establishing that a particular norm or body of norms is generally accepted and recognized as peremptory

⁷⁰ Jonathan Charney made a more direct effort at restricting the right of persistent objection, arguing that persistent objection be permitted only during the period before a custom is formed. If that objection was insufficient to prevent the formation of custom, even those States, which had been in persistent and open objection to the norm, should be bound, he contended. Charney, *supra* note 30, at 22. Professor Charney's argument has not been widely adopted, however. See INT'L LAW ASS'N, *supra* note 24, at 27 (confirming existence of persistent objector rule despite scholarly criticism).

⁷¹ Prosper Weil predicted this outcome in 1983, stating "virtually nothing . . . prevent[s] an irresistible tide of rules of general international law from swelling, one after another, [into] the category of high grade norms . . ." Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 427 (1983).

⁷² See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 38-39 (1995-96) (arguing all of human rights law is *jus cogens* to which persistent objection does not apply); Simma, *supra* note 39, at 229-230 (asserting persistent objection is inconsistent with the structure of human rights).

⁷³ See Louis René Beres, *Prosecuting Iraqi Crimes Against Israel During the Gulf War: Jerusalem's Rights Under International Law*, 9 ARIZ. J. INT'L & COMP. L. 337, 357-58 (1992) (arguing Israel may have a *jus cogens* duty to assassinate Saddam Hussein).

⁷⁴ See Shashank Upadhye, *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law?*, 8 CARDOZO J. INT'L & COMP. L. 61, 66-68 (2000) (citing to General Assembly resolutions to support this claim).

⁷⁵ Michael H. Allen, *Globalization and Peremptory Norms in International Law: From Westphalian to Global Constitutionalism?*, 41 INT'L POL. 341, 342 (2004) (commenting on how the "the problem of markets has produced a new peremptory norm, that of Free Trade").

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by the international community of States as a whole. Scholars and activists often have asserted that norms fall into this category without the presentation of much—or any—evidence that there is general support in the international community for treating the norms as such.⁷⁶

As an example consider again the customary duty to prosecute. Some scholars argue that this duty is not only customary, but also *jus cogens* and thereby not subject to persistent objection.⁷⁷ But they do so without providing evidence that there is general acceptance in the international community that this duty is non-derogable. M. Cherif Bassiouni, for example, asserts the duty to prosecute is “inderogable” and “mandatory” based upon the conclusions of the international community that crimes which are the subject of the duty are peremptory limitations on State power.⁷⁸ Bassiouni makes no effort to catalog evidence that the duty to prosecute itself is viewed as peremptory by States.

While many States have engaged in practice inconsistent with the norm historically, in recent years African States have openly challenged the legal status of the duty to prosecute. These States argue that such a duty impedes peace, and have pushed to reconsider the role of amnesties in transitional societies.⁷⁹ Amnesties issued by such States would count against the existence of custom even under the *Nicaragua* rule because the contrary practice is accompanied by verbal rejection of the custom. But if characterized as *jus cogens*, amnesties issued by African States are simply illegal under international law because persistent objection is not recognized. The result is that geographic gaps in coverage of

⁷⁶ See Shelton, *supra* note 9, at 292 (criticizing the practice of writers and international tribunals to assert norms as peremptory “without presenting any evidence”).

⁷⁷ See M. Cherif Bassiouni, *Searching for Peace and Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17 (1996) (arguing that *jus cogens* nature of crimes against humanity, genocide, war crimes, and torture creates a *jus cogens* duty to prosecute); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2608–09 (1990–1991) (describing the ways in which a position permitting derogations from the duty to prosecute is “untenable”).

⁷⁸ Bassiouni, *supra* note 77, at 17.

⁷⁹ See Vijay M. Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, 55 COUNCIL SPEC. REP. 3, 18 (describing concerns of African States at the 2010 ICC Review Conference).

human rights norms are closed at the cost of the right of States to dissent from such norms.

2.3.2. *Treaty Law*

Unlike customary law, treaty law has traditionally epitomized the consent principle—States only have those treaty obligations to which they have consented. But TMB and human rights courts have used techniques in interpreting their treaties that diminish the consent principle.

Human rights treaties have created a range of institutions to monitor treaty compliance and/or adjudicate disputes arising under treaties. Most U.N. sponsored international human rights treaties have TMB, which are empowered to monitor State compliance with the treaties.⁸⁰ In the course of their duties, TMB issue concluding observations regarding State performance with the treaty, general comments regarding interpretation of the treaty, and, in some cases, views on disputes regarding compliance with the treaty raised by private actors and States.⁸¹ As a formal matter, TMB have not been given lawmaking authority.⁸² But as a practical matter, their treaty interpretations are very influential in shaping States' understandings with regard to their obligations under the treaty.

The International Law Association found that most States, while rejecting any formal lawmaking authority for TMB, in practice use the interpretation provided by TMB as the applicable legal standard, whether in reporting on compliance to the TMB or in interpreting the treaty in their national courts.⁸³ Even in the rare

⁸⁰ There are currently eight human rights treaty monitoring bodies with a ninth body, covering disabilities, slated to come into existence. See Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 914 (2009) (listing the human rights treaty monitoring bodies).

⁸¹ See *Human Rights Treaty Bodies*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM'R FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Nov. 2, 2012) (describing three primary functions of treaty bodies as concluding observations, communications, and general comments).

⁸² The ICCPR parties, for example, intended the HRC to play a supporting role in assisting the Parties in implementing the treaty, not a court-like legal development role. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 669 (2d ed. 2005) (explaining the decision to name the HRC a "committee" instead of a "court" or "tribunal").

⁸³ INT'L LAW ASS'N, BERLIN CONFERENCE (2004), FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES 631-57 (2004).

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instances where a State puts forward an alternative interpretation, the TMB interpretation is used as a baseline for a dialogue with the State on the nature of the obligation in question.⁸⁴

Some regional human rights instruments have created human rights courts with jurisdiction to hear disputes arising under the treaty.⁸⁵ Unlike TMB, the pronouncements of these courts are binding with respect to the parties to the case.⁸⁶ The decisions of these courts are not formally binding on other parties to the treaty.⁸⁷ But the likelihood that subsequent cases will be brought against the State parties resulting in a similar outcome creates an even stronger impetus for compliance by all parties than TMB interpretations.⁸⁸

The traditional approach to treaty interpretation uses the expectations of the State parties to the treaty as the touchstone for interpretation.⁸⁹ Such a rule protects State sovereignty by leaving

⁸⁴ For example, while the United States disagrees with the HRC's interpretation of the ICCPR as covering extraterritorial conduct, it nevertheless provides information to it on such conduct. See U.S. DEP'T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS annex 1 (Oct. 21, 2005), available at <http://www.state.gov/g/drl/rls/55504.htm> (providing information on activities outside the territorial United States "as a courtesy matter"). Doing so spawned an iterative dialogue between the United States and the HRC on U.S. extraterritorial activities that mirrored the dialogue on activities taking place in the United States.

⁸⁵ See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 9, 1950, 213 U.N.T.S. 221 [hereinafter "ECHR"]; American Convention on Human Rights art. 33, 52, Nov. 22, 1969, 9 I.L.M. 673 (1970) [hereinafter "American Convention"] (creating the Inter-American Court of Human Rights).

⁸⁶ See ECHR, *supra* note 85, at art. 46(1) (describing the jurisdiction of these courts as "compulsory" in "all matters concerning the interpretation and application of the present Convention"); American Convention, *supra* note 85, at art. 68(1) ("The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.").

⁸⁷ See, e.g., American Convention, *supra* note 85, at art. 68(1) (affirming that only States party to a decision are bound by it).

⁸⁸ See Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 67 INT'L ORG. (forthcoming 2013) (arguing that gay rights decisions by the ECtHR have influenced policies of States that are not parties to the decision).

⁸⁹ Such an approach is not the same as an originalist approach to treaty interpretation. The Vienna Convention on the Law of Treaties, which employs a consent-based approach to treaty interpretation, requires treaties be interpreted as the parties would agree today. To that end, while the negotiating history of the

in the hands of States alone the creation and modification of treaty obligations. It is incumbent upon non-State institutions engaged in treaty interpretation to display fealty to State expectations so as to avoid infringing on State autonomy.

But such an interpretative technique is dissonant with a system oriented around the protection of human rights, as discussed in Part 2.2. Securing consensus on treaty terms requires negotiating terms that are open-ended and vague, with wide latitude in implementation. Simply applying the provisions as drafted might result in little restriction on State conduct. Fealty to the expectations of the State parties will also retard the evolution of human rights treaty terms, given the paucity of inter-State practice available to alter the original meaning of the terms.

To ameliorate these concerns, human rights bodies engaged in treaty interpretation often use a teleological approach to interpretation. Such an approach is based upon the rule in the VCLT requiring treaties to be interpreted consistently with their object and purpose—here protecting human rights.⁹⁰ These bodies argue that this purpose requires them to employ plausible interpretations of treaty text that are most favorable to human rights, as opposed to an interpretation that prioritizes fealty to State consent.⁹¹

Two examples illustrate this approach. First, the Women's Committee has used a teleological approach to treaty interpretation to locate at least a partial right to an abortion within the Convention for the Elimination of Discrimination Against Women (CEDAW).⁹² CEDAW Article 12 provides that "States

treaty is relevant to interpretation, so too are subsequent agreements and inter-State practice of treaty parties. VCLT, *supra* note 19, at art. 31(3).

⁹⁰ VCLT, *supra* note 19, at art. 31(1) (requiring treaties be interpreted in light of their "object and purpose").

⁹¹ See, e.g., MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 3 (Ian Brownlie ed., 1995) (describing the approach taken by the Committee on Economic, Social and Cultural Rights).

⁹² The HRC has also engaged in a teleological approach to treaty interpretation on the abortion question. It has interpreted Articles 7 and 17 of the ICCPR to require States to provide at least a medical exception to abortion laws. *Llantoy Huamán v. Peru*, Comm'n No. 1153/2003, ¶¶ 6.3–6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (U.N. Hum. Rts. Comm. Nov. 22, 2005). It has done so despite strong evidence that these provisions were not intended to cover abortion rights. There was an intense debate about abortion in the context of

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Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”⁹³

There is strong evidence that the States negotiating this Article did not intend to eliminate laws criminalizing abortion. States specifically rejected including the phrase “family planning services” within Article 12, because they feared that phrase would bring abortion into the article’s ambit, thereby hurting ratification rates.⁹⁴ Moreover, States with restrictive abortion laws ratified the treaty without reservation to Article 12, which they would likely not have done if they thought the provisions implicated abortion.⁹⁵ Other States have, in their dialogue with the Women’s Committee, rejected the argument that Article 12 has implications for abortion.⁹⁶ There was also no subsequent practice or agreement between the Parties modifying Article 12.⁹⁷

Despite the evidence that States did not intend to cover abortion within Article 12, and the absence of subsequent practice modifying the treaty, the Women’s Committee has nevertheless interpreted it to confer abortion rights. In its General

Article 6. See NOWAK, *supra* note 82, at 153–55 (describing debate regarding whether Article 6 “life” begins at conception). The absence of such a debate in the context of Articles 7 and 17, as well as the decision of States with total abortion bans to join those provisions without reservation, suggests strongly that these provisions were not intended to have abortion implications.

⁹³ Convention on the Elimination of All Forms of Discrimination Against Women art. 12(1), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13.

⁹⁴ See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 145 (1993) (noting the rejection of the term “family planning services”).

⁹⁵ See DOUGLAS A. SYLVA & SUSAN YOSHIHARA, INT’L ORGS. RESEARCH GRP., RIGHTS BY STEALTH: THE ROLE OF UN HUMAN RIGHTS TREATY BODIES IN THE CAMPAIGN FOR AN INTERNATIONAL RIGHT TO ABORTION 31–32 (2009), *available at* <http://c-fam.org/images/WhitePapers/Rights.By.Stealth.pdf> (explaining how States did not construe Article 12 to include reproductive rights).

⁹⁶ See *id.* at 42–44 (describing efforts by treaty bodies to use expansive interpretations of treaty provisions to override democratic opposition to legalizing abortion in Poland, Ireland, Namibia, and Nicaragua).

⁹⁷ Such subsequent agreements are exceedingly rare in human rights law, given that most practice is intra-State rather than inter-State. Simma, *supra* note 39, at 188. Subsequent practice must be inter-State to modify the treaty in order to comply with the consent principle, as it must reflect a shared, agreed to change in interpretation of the treaty provisions.

Recommendation 24, the Women's Committee explained that eliminating discrimination against women in the health services context requires removing legal barriers to women's medical procedures, such as abortion.⁹⁸ Such a requirement led the Women's Committee to interpret Article 12 to require States to repeal "laws that criminalize medical procedures only needed by women."⁹⁹ Specifically, it stated that "legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion," when possible.¹⁰⁰

Another example of a teleological approach to treaty interpretation is found within the decisions of the European Court of Human Rights (ECtHR) on the right of non-refoulement, or right not to be transferred to face torture or cruel, inhuman or degrading treatment.¹⁰¹ The European Convention on Human Rights (ECHR) does not contain an express non-refoulement provision. Article 3 of the ECHR prohibits torture, but does not make mention of transfers.¹⁰² European States parties have argued that they did not intend to create a non-refoulement obligation when negotiating Article 3,¹⁰³ nor is there evidence that the subject was raised during the negotiations of the provision.

⁹⁸ Rep. of the Comm. for Elimination of Discrimination Against Women, 20th Sess., Jan. 19–Feb. 5, 1999, General Recommendation 24, art. 12, ¶ 14, U.N. Doc. No. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999).

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 31(c).

¹⁰¹ The HRC has similarly used an evolutionary interpretative approach to locate a non-refoulement right within Article 7 of the ICCPR. U.N. Human Rights Comm., General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., Mar. 29, 2004, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). It has done so despite evidence that the Parties never intended for the prohibition on cruel, inhuman and degrading treatment to include a non-refoulement provision. See Vijay M. Padmanabhan, *To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement*, 80 *FORDHAM L. REV.* 73, 107–112 (2011) (describing evidence to this effect).

¹⁰² See ECHR, *supra* note 85, at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

¹⁰³ Observations of the Governments of Lithuania, Portugal, Slovakia, & the United Kingdom in the case of *Ramzy v. Netherlands*, App. No. 25424/05, Eur. Ct. H.R. (2005), available at http://www.redress.org/Government_intervenors_observations_in_Ramzy_case%20_21November.pdf.

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Nevertheless, the ECtHR has used a teleological approach to interpretation to locate within Article 3 non-refoulement protection. The Court explained that the object and purpose of the treaty, which is to protect human rights, and “to promote the ideals and values of a democratic society,” requires expanding Article 3.¹⁰⁴ The Court found the Article 3 non-refoulement right to be absolute, rejecting potential security exceptions.¹⁰⁵ It recently expanded the protection to include the right not to be transferred to face trial where evidence at that trial may have been obtained using torture.¹⁰⁶

Teleological treaty interpretation is difficult to reconcile with an international legal system oriented around State sovereignty.¹⁰⁷ When institutions depart from indicia of State consent in their treaty interpretations, they seek to use either their power to issue binding decisions or the power of the bully pulpit to constrict State

¹⁰⁴ Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 27 (1989) (citation omitted).

¹⁰⁵ Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1855–56 (1996).

¹⁰⁶ Othman v. United Kingdom, App. No. 8139/09, Eur. Ct. H.R. (2012).

¹⁰⁷ Scholars have made the argument that States in effect consent to human rights institutions engaging in gap filling when those institutions are given authority to make binding interpretations of the treaty. See Bruno Simma, *Consent: Strains in the Treaty System*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY*, *supra* note 51, at 485, 497 (arguing that the open-ended nature of human rights terms combined with creation of an adjudicatory institution invites judge-driven lawmaking). Though the creation of these institutions implies consent to some judge-made law, it is unlikely that parties to treaties like the ECHR intended for human rights courts to depart from the general rule that the intent of the parties should be the touchstone for interpretation. The United Kingdom, for example, has expressed its view that the ECtHR’s non-refoulement jurisprudence exceeds the Court’s mandate. See John F. Burns, *Britain Releases and Curbs Extremist*, N.Y. TIMES, Feb. 14, 2012, at A6 (describing the hostile reaction of Conservative MPs to ECtHR decision rejecting deportation of a radical Muslim cleric).

Andrew Guzman and Tim Meyer argue there is a division between parties to human rights treaties as to the extent to which they favor courts assuming a lawmaking function. They contend that States that wish for greater international regulation of human rights create international adjudicatory institutions out of the expectation that these institutions will create jurisprudence that will, overtime, pressure non-participating States to accept greater levels of international supervision. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 202 (2010). This theory suggests that some State parties to a human rights treaty consent to teleological treaty interpretation, while other parties do not. The constriction of the consent principle occurs with respect to non-consenting States.

prerogative in recognizing new international obligations.¹⁰⁸ Such pressure constricts the consent principle to varying extents depending upon the intensity of coercion behind the effort. Coercion is greater with human rights courts, who issue binding judgments, than with TMB.

They do so because of the benefits in ameliorating some of the concerns about a voluntary human rights system described in Part 1.2. These decisions add a detailed heft to previously thin provisions, thereby combating normative thinness. They also allow potentially static treaty provisions to evolve with changing social expectations, which is unlikely to occur if one were to wait for States to “update” treaty terms through subsequent agreement or practice.

One TMB interpretation with particular effect on the consent principle is the HRC’s jurisprudence on reservations. A persistent source of irritation in human rights treaty practice for some scholars and activists is the use of reservations by treaty parties to alter their obligations arising under treaties.¹⁰⁹ Reservations permit States to join multilateral human rights treaties while undertaking only those obligations they wish to undertake. While reservations help increase the number of parties to a human rights treaty,¹¹⁰

¹⁰⁸ Thomas Fuller and Abraham Sofaer have argued that when States comply with TMB pronouncements they implicitly consent to their lawmaking role. See Thomas C. Fuller & Abraham D. Sofaer, *Sovereignty: The Practitioners’ Perspective*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 24, 38–39 (Stephen D. Krasner ed., 2001) (arguing that a State’s decision to comply constitutes consent to the obligation). It is generally the case that States retain control over whether to comply with treaty obligations, whether through non-compliance or treaty-exit. But it is important not to conflate the prerogative of compliance with the right to determine the content of international legal obligations. The former permits noncompliance with international law only with the stain of law breaking, while the latter avoids that stigma.

¹⁰⁹ See, e.g., Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 351–352 (2000) (accusing the United States of abusing the use of reservations to avoid providing its people the protections of the ICCPR); William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79, 79–80 (1997) (criticizing reservations to CEDAW that in effect rob the provisions of practical meaning).

¹¹⁰ See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 24 (May 28) (stating that increasing the number of adherents to the Genocide Convention is one of its purposes).

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they also incur several burdens of the consent principle identified in Part 1.2.

Reservations contribute to the 'thin slice of Swiss cheese' nature of human rights regulation. States or groups of States use reservations to exclude applicability of particular treaty provisions from their territory and jurisdiction, thereby creating geographic holes in treaty application. States also use reservations to modify the content of treaty provisions in order to maximize flexibility for State compliance. Doing so 'thins' out the norms, as it allows a wide-range of compliant conduct. In so doing, reservations undermine the general premise of 'universal' human rights, turning them instead into an *a la carte* menu.

As described in Part 1.1., States are limited in the reservations they may employ, however, as they must be consistent with the "object and purpose" of the treaty.¹¹¹ But in reality, this rule fails to provide a meaningful restraint on reservations to multilateral human rights treaties. States rarely police the reservations of other States to human rights treaties because they are of limited interest to other States. When they do, the remedy is for the provision or the treaty itself to not enter into force between the reserving State and objecting State.¹¹² Because the obligations within the treaty are not reciprocal, the reserving State suffers no tangible harm if the provision or treaty is not in force between it and the objecting State. Meanwhile the people of the reserving State remain without the protection of the treaty provision as drafted.

Frustrated with the impact of reservations, the HRC announced in General Comment 24 that where reservations are inconsistent with the object and purpose of the treaty, it would sever the reservation and hold the State to the original treaty provision without the reservation.¹¹³

¹¹¹ *Id.* at 29.

¹¹² See VCLT, *supra* note 19, at art 20(4)(b) ("An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State . . ."); *id.* at art. 21(3) ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.").

¹¹³ U.N. Human Rights Comm., General Comment No. 24 (52), *supra* note 11, ¶ 18.

The result is a weaker consent principle. Consider the experience of Trinidad & Tobago with respect to its reservations to the Optional Protocol (OP) to the ICCPR. The OP grants the HRC jurisdiction to hear complaints regarding alleged State violations of the ICCPR. Trinidad & Tobago joined the OP with a reservation denying the HRC jurisdiction over petitions by death row prisoners.¹¹⁴ When a death row prisoner brought a claim to the HRC alleging a violation of the ICCPR, the HRC heard the claim despite the reservation.¹¹⁵ The HRC found that the reservation violated the object and purpose of the treaty, and was invalid and severed.¹¹⁶ The result is that the HRC exercised jurisdiction over petitions by death row prisoners despite Trinidad & Tobago's lack of consent to it doing so.

From a traditional sovereignty perspective, this outcome is worrisome as it results in a State being bound to an obligation to which it did not consent.¹¹⁷ But if the protection of human rights is

¹¹⁴ See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1871–81 (2002) (providing a detailed history of the reasons for Trinidad & Tobago's reservation to the Optional Protocol to the ICCPR).

¹¹⁵ See *Kennedy v. Trin. & Tobago*, Commc'n No. 845/1999, ¶ 6.7, U.N. Doc. CCPR/C/67/D/845/1999 (U.N. Hum. Rts. Comm. Dec. 31, 1999) (finding the reservation was inconsistent with the object and purpose of the ICCPR because it singled out a discrete group for reduced procedural protections for human rights).

¹¹⁶ *Id.*

¹¹⁷ See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 436–37 (2000) (arguing severability is inconsistent with State consent).

Ryan Goodman makes the admittedly counterintuitive argument that a rebuttable presumption in favor of severance actually better protects consent because of the costs of requiring States to re-ratify treaties with invalid reservations. Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 536–37 (2002).

Goodman's argument depends upon two assumptions that are more protective of consent than the approach of the HRC. First, Goodman argues that the touchstone for the rebuttable presumption is whether the State intended the reservation to be an essential condition of ratification. *Id.* at 536. The HRC makes no such inquiry. Second, Goodman assumes States can exit from a treaty if the presumption is applied incorrectly. *Id.* at 556. By contrast, the HRC views exit from the ICCPR as impermissible. See U.N. Human Rights Comm., General Comment No. 26 (61): General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, 61st Sess., Oct. 29, 1997, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) ("The Committee is therefore firmly of the view that international law does not

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the measuring stick, then the HRC approach makes much more sense. It reduces the ability of States to employ invalid reservations—which harm core human rights equities—while preserving the protections of the treaty more generally.

2.3. Critiques

These developments in human rights practice have been criticized for inappropriately moving away from State sovereignty as the foundational principle of international law. If sovereignty, and not human rights, remains the guiding principle of all international law including human rights, then efforts to constrict the consent principle are inappropriate.

The United States has frequently asserted such a position. During its 2006 presentation regarding U.S. compliance with the ICCPR, a U.S. official informed the HRC that “[i]t was not for the Committee to change his country’s obligations flowing from the Covenant or to issue authoritative guidance in that respect.”¹¹⁸ Consistent with this statement, the United States rejects recommendations from TMB that create unintended obligations for the United States because lawmaking is outside the mandate of TMB.¹¹⁹ Other States, including France¹²⁰ and the Netherlands,¹²¹ have criticized TMB in similar terms.

permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.”).

¹¹⁸ U.N. Human Rights Comm., Consideration of Reports Under Article 40 of the Covenant: Second and Third Periodic Reports of the United States of America, 87th Sess., July 18, 2007, ¶ 105, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006).

¹¹⁹ For example, the Committee against Torture interpreted the Convention Against Torture’s prohibition on cruel, inhuman, and degrading treatment as requiring closure of the U.S. detention facility at Guantanamo Bay. U.N. Comm. Against Torture, Considerations of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, 36th Sess., May 1–19, 2006, ¶ 22, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006). The then-Legal Adviser to the U.S. Department of State, John Bellinger, responded by rejecting the authority of the Committee Against Torture to make such a recommendation. See Colum Lynch, *Military Prison’s Closure Is Urged; U.N. Panel Faults Detention Policies*, WASH. POST, May 20, 2006, at A1 (quoting Bellinger stating recommendation is “skewed and reaches well beyond the scope and mandate of the committee”).

¹²⁰ See Rep. of the Human Rights Comm., Observations of States Parties Under Article 40, Paragraph 5, of the Covenant ¶ 7, U.N. Doc. A/51/40; GAOR, 51st Sess., Supp. No. 40 (1996) (“France points out that the Committee, like any other treaty body or similar body established by agreement, owes its existence

A small number of American scholars have backed this position.¹²² These scholars argue that many liberal positions favored by academics and NGOs, but rejected by the U.S. government, are repackaged as human rights obligations in order to win otherwise lost battles.¹²³ Under this account, international human rights law seeks to strip legislative and judicial power away from Congress and the federal courts¹²⁴ and place them instead in the hands of NGOs and the global elite.

John Bolton makes this argument in the context of the duty to prosecute. Bolton challenges the proposition that a duty to prosecute is positive for human rights, viewing this effort at geographic gap filling as an effort to impose the “value preferences” of academics and activists on unsuspecting States.¹²⁵ He instead favors leaving the decision to undertake such an international duty in State hands.¹²⁶ Bolton explains that such decisions go to the heart of “national autonomy” properly protected by State sovereignty, and fears that efforts to undermine

exclusively to the treaty, and has no powers other than those conferred on it by the States parties . . .”).

¹²¹ See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee in its Concluding Observations, ¶ 19, U.N. Doc. CCPR/CO/72/NET/Add.1 (Apr. 29, 2003) (rejecting Committee’s reading of the ICCPR conferring certain responsibilities to the Netherlands over Srebrenica).

¹²² See, e.g., John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 212–15 (2000) (describing plot by human rights advocates to undermine U.S. sovereignty).

¹²³ See *id.* at 213–14 (citing opposition to the U.S. death penalty as an example of this phenomenon).

¹²⁴ See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1567–82 (2003) (raising concerns about delegation of decision making to international institutions); Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT’L L. 327, 333 (2000) (describing sovereignty-based concerns about looking to the writings of “legal academics, human rights activists, and international institutions” in interpreting human rights norms); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 72–73 (2000) (explaining constitutional concerns of international delegation).

¹²⁵ Bolton, *supra* note 122, at 213.

¹²⁶ See *id.* (highlighting the case of General Augusto Pinochet as a situation with “compelling arguments” in support of the state, here Chile, having sole decisionmaking authority over whether or not to prosecute).

that autonomy are part of efforts to bring the United States and other States to the heel of the “globalist” agenda.¹²⁷

Other critics view sovereignty as a protection for developing States and their cultures. These critics argue that human rights are often the culturally contingent preferences of the internationally powerful imposed on the weak.¹²⁸ If so, State sovereignty is a potential bulwark against imposing the values of particular States or social groups on dissenting cultures.¹²⁹

This criticism is most trenchant when made by developing world critics who view consent as a protection for weaker States from the moral imperialism of Western Europe and the United States.¹³⁰ The consent principle ensures that the developing world’s values are included within the human rights corpus, essential if human rights are to be truly global.¹³¹

Makau Mutua, for example, describes a “savages-victims-saviors” metaphor at the core of human rights law, in which Western actors demonize States with non-Western cultural foundations as savages for victimizing their own population.¹³² This metaphor, he contends, permits human rights law and its advocates to portray themselves as saviors, much as missionaries or colonialists once did.¹³³ The result is a “Eurocentric ideal” of

¹²⁷ See *id.* at 212–13 (examining elaborate “globalist” conspiracy to undermine sovereign prerogative).

¹²⁸ See, e.g., MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 10 (2002) (categorizing Western authors’ characterization of the universal human rights movement as “a black-and-white construction that pits good against evil”); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1190 (2007) (“[T]he presumed universal may also be the hegemonic.”); Weil, *supra* note 71, at 441 (describing nonconsensual formation of customary norms as transferring lawmaking authority to a “de facto oligarchy” of the international community).

¹²⁹ See MUTUA, *supra* note 128, at 108 (arguing that any right that is in conflict with self-determination should be void because of the need to protect weaker cultures from the “evangelization” of stronger cultures).

¹³⁰ See M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1139–40 (1999) (noting that human rights cases in U.S. court are like “a current affairs topics primer of the trouble-spots of the non-Western world”).

¹³¹ See MUTUA, *supra* note 128, at 14 (arguing that resisting the current Eurocentric human rights model is essential to the future of human rights as a global movement).

¹³² *Id.* at 10–12.

¹³³ *Id.*

human rights that lacks legitimacy in the developing world.¹³⁴ Consistent with this view, *Mutua* extols consent as a sacrosanct protection from Western domination.¹³⁵

Other scholars defend consent as a tool to secure State compliance with human rights norms. International human rights law largely depends on voluntary compliance because of the general absence of coercive enforcement mechanisms.¹³⁶ While, in other areas of international law, States may use their full range of diplomatic and economic tools to enforce international commitments, violation by one State of its human rights commitments is of little interest to other States.¹³⁷ Thus, States are largely left to self-comply with human rights obligations.

Given the dependence on self-compliance, diminishing the role of consent in lawmaking may increase the risk of noncompliance.¹³⁸ States are likely to be less willing to comply voluntarily with legal obligations to which they never agreed. If the goal of human rights law is to change State behavior, then it is pointless to create rules that States have no intention of following.

Thus, scholars have raised important reasons why the protection of human rights may be aided, or at least not hindered, by the consent principle. Consent aids both in the determination of what constitutes a human right and in the enforcement of such

¹³⁴ *Id.* at 12.

¹³⁵ *See id.* at 108 (“[T]he most fundamental of all human rights is that of self-determination and . . . no other right overrides it.”).

¹³⁶ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 235 (2d ed. 1979) (“The forces that induce compliance with other law . . . do not pertain equally to the law of human rights.”).

¹³⁷ *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 629 (2004) (noting that externalities from human rights violations, such as massive refugee flows, are sporadic and localized).

¹³⁸ There are different theories offered as to why this might be so. *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 10-14 (2005) (offering an explanation from a rationalist perspective); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 *U. ILL. L. REV.* 71, 119-21 (2008) (offering an explanation from realist, liberal and expressive perspectives).

Scholars have chronicled systematic noncompliance to human rights treaty obligations. *See, e.g.,* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 1940 (2002) (describing violations of human rights treaties as “common”). Studies of this sort raise a question about the extent to which consent is an accurate proxy for compliance under any circumstances.

rights. But these arguments have important limits on their effectiveness.

Though the risk of moral imperialism is one that gives human rights practitioners and scholars pause, at the core of the human rights movement is the belief that there are universal human rights. Once one is convinced that man has identified such a right, hand wringing about consent risks the appearance of moral relativism that is routinely dismissed within human rights scholarship.¹³⁹

Similarly, the argument that consent is important for compliance smacks of apologetics for State power, which is in significant tension with human rights. If in fact a human right exists, then the fact that many States will not carry out that right is not an argument against recognizing it. To this end, Andrew Guzman directly challenges the argument that compliance is a relevant metric by which to evaluate the content of rights.¹⁴⁰ He contends that even if a small number of States alter their behavior to comply with a right, while acknowledging that most do not, human rights nevertheless benefits.¹⁴¹

Instead, the place of consent within the human rights corpus will be more secure if human rights benefits to consent are identified that do not depend on questioning the universality of rights or apologizing for State power. Part 3 develops such an argument.

3. CONSENT AND SELF-DETERMINATION

Part 1 described the human rights consent problem. The consent principle, rooted in protection of States' rights, raises concerns from the perspective of the protection of human rights. These burdens have led to diminishment of the consent principle in human rights theory and practice. Though there have been critics of this effort, they have failed to mount an effective challenge to the premise that a system oriented toward the

¹³⁹ See MUTUA, *supra* note 128, at 34 (describing criticisms of his work on the grounds that he is a relativist).

¹⁴⁰ See generally Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012).

¹⁴¹ *Id.* at 752-53 (arguing that the existence of the proper rules is more important than the level of consent or compliance).

protection of human rights ought to reduce the scope of the consent principle.

This Part argues the consent principle is essential to the exercise of the collective human right of self-determination. It has two objectives. First, it describes the contours of the human right of self-determination, including an explanation of the values protected by that right. Second, it links the consent principle to self-determination.

3.1. Human Right of Self-Determination

The collective human right to self-determination emerges from the intrinsic value of self-government to actualization of human potential. Members of a community share experiences and cooperate together such that over time they create a common life. That life has value to its members separate and apart from the instrumental benefits they receive from the community.¹⁴² This insight is at the heart of “culture,” which people value intrinsically because it provides a sense of belonging to a community with shared attributes and a framework through which to enjoy individual rights.¹⁴³

Self-governing communities place inherent value on exercising control over their own political, economic, social and cultural development.¹⁴⁴ Avishai Margalit and Joseph Raz explain that membership in communities is an aspect of human personality, and therefore well-being, which requires the opportunity to express membership.¹⁴⁵ A primary method for doing so is

¹⁴² See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 51-63 (1977) (detailing the collective aspect of human rights).

¹⁴³ See ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* 79 (1991) (describing culture as “the way of life with which its members identify and which gives meaning to their pursuits and projects” and noting that part of participating in a culture is to “adopt the perspective of ‘our’ interests rather than ‘my’ interests”).

¹⁴⁴ See MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* 2 (1982) (noting the origin of self-determination as recognition of the nation as “a community of organization, of life, and of tradition”) (internal quotations omitted).

¹⁴⁵ See Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 440 (Sept. 1990) (explaining the value in self-government as “the value of entrusting the general political power over a group and its members to the group”).

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participation in the public life of the community, including through political activity. Self-government is requisite for such activity to be meaningful.

Self-government requires protection from external intervention into local decision-making. External intervention can unduly influence or override local decisions, thereby undermining the promise of self-government.¹⁴⁶

International law actualizes this philosophical insight through the collective right to self-determination. Consistent with its privileging of the State as its primary unit of measurement,¹⁴⁷ international law recognizes the people of a State as a community that enjoys the right of self-government.¹⁴⁸ The people of the State are sovereign, and provide the government its powers through their consent to be governed.¹⁴⁹ They must be able to direct their development, free from external intervention, in order to realize the promise of self-government.

This concept first bloomed as a principle in response to colonialism and foreign occupation, which deprive communities of their opportunity to self-govern.¹⁵⁰ The U.N. Charter includes self-

¹⁴⁶ See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 35-36 (1995) (distinguishing external and internal elements of collective rights).

¹⁴⁷ The State is the unit recognized in international law as responsible for representation of its peoples' interests on the international plane. It was for this reason that colonized peoples were presumed to be able to exercise self-determination only by forming their own State, free from the oppression of their colonial masters. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 71-89 (1995) (detailing the practice related to external self-determination).

¹⁴⁸ See Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 210 (1980) (describing States as "presumptively . . . the arena" in which self-determination is exercised).

¹⁴⁹ See Mortimer Sellers, *Republican Principles in International Law*, 11 CONN. J. INT'L L. 403, 407-08 (1996) (describing the influence of the American revolution on self-determination).

¹⁵⁰ During the pre-World War II period, a small number of influential political leaders advocated for self-determination as a concept to guide international affairs. See CASSESE, *supra* note 149, at 14-19 (explaining that Lenin's view was that ethnic or national groups enjoy the right to choose their own sovereigns); Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2 (1976) (describing Woodrow Wilson's argument that every people have the right to choose the sovereignty under which they live). Wilson's ideals influenced the Versailles Treaty ending World War I, especially in setting the German-Danish border and freeing the Slavs in Czechoslovakia from Austro-Hungarian rule, but were

determination as a principle guiding the United Nations.¹⁵¹ This principle was invoked as the basis upon which newly decolonized territories could seek statehood if approved by its people through plebiscite. This principle was used to support the decolonization of Africa and Asia; the struggle against racist regimes in South Africa and Rhodesia; and is invoked to support creation of an independent Palestinian State and as a basis for resolution of sovereignty over Kashmir.¹⁵²

Self-determination evolved into a collective human right in both Covenants that together serve as an international bill of rights.¹⁵³ Both the ICCPR and ICESCR begin with an identical right: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹⁵⁴ This right is the first human right found in the Covenants because

severely compromised in other areas. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 53 (1992). However, self-determination had relatively little purchase before World War II. See *Report of the Committee of International Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, OFFICIAL J. OF THE LEAGUE OF NATIONS, Oct. 1920 (rejecting the existence of a right of self-determination that gave national groups the right to separate themselves from their existing State without consent).

¹⁵¹ See U.N. Charter art. 1, para. 2 (describing development of "friendly relations . . . based on respect for the principle of . . . self-determination of peoples" as a purpose of the United Nations).

¹⁵² World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31–Sept. 8, 2001, *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* ("Durban Declaration"), ¶ 63, at 18, U.N. Doc. A/CONF.189/12 (Jan. 25, 2002) ("We recognize the inalienable right of the Palestinian people to self-determination and to the establishment of an independent State."); Interim Rep. of the U.N. Comm'n for India & Pakistan, ¶ 75, U.N. Doc. S/1100 (Nov. 9, 1948) ("The Government of India and the Government of Pakistan reaffirm their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people . . .").

¹⁵³ One hundred sixty-seven (167) States are parties to the ICCPR and one hundred sixty (160) States are parties to the ICESCR, meaning that a commitment found in these treaties are legal obligations for the vast majority of States. See generally ICCPR, *supra* note 12; ICESCR, *supra* note 12.

¹⁵⁴ ICCPR, *supra* note 12, at art. 1, para. 1; ICESCR, *supra* note 12, at art. 1, para. 1.

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negotiators agreed that self-determination is a prerequisite for enjoyment of individual rights.¹⁵⁵

The text of the Covenants, their negotiating history, and subsequent practice show the human right to self-determination guarantees: (1) the people as a whole in all countries and territories of the world;¹⁵⁶ (2) a continuing and permanent right to (3) use the State to direct development free from external intervention.

First, the Covenants are clear that the human right to self-determination extends to peoples as a whole in all countries and territories.¹⁵⁷ For example, the American people as a whole enjoy the right to self-determination. The use of the word “all” in the text of the Covenant provisions provides textual support for this interpretation. The negotiating history indicates it was used after the rejection of many phrases designed to limit the term to portions of a population,¹⁵⁸ or to colonized peoples.¹⁵⁹

States have generally interpreted Article 1 to apply to the population of States as a whole. When India ratified the ICCPR

¹⁵⁵ China, Lebanon, Poland, and Yugoslavia, among other States gave precedence to self-determination. MARC J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 20–21 (1987). See also NOWAK, *supra* note 82, at 13 (describing firm rejection by negotiating parties of the view that self-determination is not a human right). This view prevailed over Western concerns that self-determination was insufficiently clear to be defined as a human right. BOSSUYT, *supra* note 157, at 20 (chronicling the negative comments of Australia, Belgium, France, Great Britain, and Sweden).

¹⁵⁶ In addition to the people of a sovereign nation as a whole, Article 1 also includes within its ambit significant national or ethnic groups within a multinational State. Such peoples are in contrast to ethnic, linguistic, and religious minorities who were granted separate protection by Article 27 of the ICCPR, and were apparently excluded from Article 1 protection. See CASSESE, *supra* note 147, at 61 (noting that the word “peoples” would have been excluded from the text had it not been for the “clear understanding that it was not intended to refer to minorities”). The difference between minorities and sub-national peoples is slippery and not well developed in the ICCPR negotiating history or practice. NOWAK, *supra* note 82, at 20–22.

¹⁵⁷ Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 201–03 (1986).

¹⁵⁸ States rejected qualifiers like “large compact national groups,” “ethnic, religious or linguistic minorities,” and “racial units inhabiting well-defined territories” because it was believed that people should be understood in a “general” sense. G. A. Res. 10 (II), ¶ 9, at 14, U.N. Doc. A/2929 (July 1, 1955).

¹⁵⁹ The Soviet Union led the effort to limit the right of self-determination to people living under colonial rule or foreign occupation, but was rebuffed by the other negotiating States. CASSESE, *supra* note 147, at 49.

and the ICESCR, it entered a declaration stating that Article 1 extends only to “peoples under foreign domination,” and not “to sovereign independent nations or to a section of a people or a nation.”¹⁶⁰ India felt compelled to make such a declaration because it was concerned that the phrase “all peoples” is generally interpreted to include the people as a whole of sovereign States.¹⁶¹ France, West Germany, and the Netherlands confirmed India’s fear by raising objections to the Indian declaration on grounds it was an invalid reservation, indicating their deep disagreement with India’s interpretation of the provision.¹⁶²

The HRC also interprets the right of self-determination to extend to the people as a whole of a sovereign State. It rejects reservations to Article 1(1) that restrict the scope of protection to extend to anything less than the people as a whole of the State.¹⁶³ The HRC admonished Azerbaijan when it asserted that Article 1(1) extended protection only to former colonies. The HRC stated it “regretted” this position, noting its view that the ICCPR guarantees the right of self-determination to “all peoples and not merely to colonized peoples.”¹⁶⁴

Anne Peters challenges the claim that self-determination is a right owed collectively to the people of a State, arguing it is better

¹⁶⁰ See *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en#EndDec (last visited July 25, 2012) (“India declares that the words ‘the right of self-determination’ appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.”).

¹⁶¹ See CASSESE, *supra* note 147, at 60 (characterizing Indian declaration as a reservation).

¹⁶² See U.N. TREATY COLLECTION, *supra* note 160 (listing objections to declarations and reservations).

¹⁶³ U.N. Human Rights Comm., General Comment No. 24 (52), *supra* note 11, ¶ 9.

¹⁶⁴ Rep. of the Human Rights Comm., ¶ 296, U.N. Doc. A/49/40; GAOR, 49th Sess., Supp. No. 40 (Vol. II) (1994). It also appears that Azerbaijan’s concern was with respect to Article 1 extending rights to minority groups, not to the Azerbaijani people as a whole. See U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Initial Reports of States Parties due in 1993: Azerbaijan, ¶ 4, U.N. Doc. CCPR/C/81/Add.2 (Mar. 8, 1994) (raising concerns about “micronationalism” and claims of “regional groupings within States”).

conceived of as an individual right.¹⁶⁵ While she acknowledges that the “technical” rights-holders with self-determination are “peoples,” she dismisses the argument that the right is intended to be held by a collective.¹⁶⁶ Peters argues that the concept of “peoples” is arbitrary, given the difficulty in distinguishing between peoples and minorities.¹⁶⁷ To attribute legal significance to an arbitrary grouping makes little sense. She also questions whether the Covenants—otherwise filled with individual rights—would begin with a collective right.¹⁶⁸ Instead, Peters claims that self-determination protects an individual’s right to determine his or her fate, in and through the community.¹⁶⁹

Peters’ approach is inconsistent with the negotiating history and State practice surrounding the provision as just described. The HRC has specifically rejected this view, concluding it cannot hear claims through its communications procedures for violations of Article 1(1) because its jurisdiction is limited to individual rights, and Article 1(1) protects collective rights.¹⁷⁰

Moreover, the collective privileged by the Covenants—the people of a sovereign State—is not arbitrary given that international law has a history of prioritizing the State as the

¹⁶⁵ Peters, *supra* note 34, at 541. Such a view is consistent with scholars who claim there is generally no room in liberal human rights theory for collective rights. Tesón, for example, argues that collective rights—which cannot be reduced to a collection of individual rights—are social policies masquerading as rights. TESÓN, *supra* note 34, at 133. Such a deception is undertaken for rhetorical purposes, he argues, as it strengthens the rhetorical appeal of the social policy. *See id.* at 136–37 (opposing granting social policies the rhetorical weight accorded to individual rights).

Such criticism fails to account for the presence of collective rights in most international and domestic rights instruments. *See* BUCHANAN, *supra* note 34, at 77 (describing aspects of freedom of association and federalism as by definition collective rights). It also attributes a false clarity to a dichotomy between individual and collective rights. *See id.* at 77–79. Individual rights can often be justified in collective terms and vice-versa. *Id.* Insisting that collective rights be described in individual terms, as Peters does with self-determination, obscures an important attribute of the right.

¹⁶⁶ Peters, *supra* note 34, at 541.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See* A. B. v. It., Commc’n No. 413/1990, ¶¶ 3.2, 4, U.N. Doc. CCPR/C/40/D/413/1990 (U.N. Human Rights Comm. Nov. 2, 1990) (rejecting individual claims for violation of Article 1(1)); Rep. of the Human Rights Comm., ¶¶ 401–02, U.N. Doc. A/42/40; GAOR, 42d Sess., Supp. No. 40 (1987) (same).

relevant unit of measurement. Self-determination is premised on the idea that the people of the State are sovereign within the State, thus making the people of the State an appropriate collective to exercise the right. Though, as Peters suggests, the concept of “peoples” becomes more complicated in multi-ethnic States,¹⁷¹ this problem at the margins does not undermine the validity of “the people” as a whole of the State as a collective rights-holding entity.

More fundamentally, Peters’ approach ignores the normative value attached to belonging to a self-governing community with the capacity to direct development as it sees fit separate and apart from the instrumental individual benefits that such a community confers. The human experience values culture and community as intrinsically valuable and, in the process, develops a sense of shared interests separate and apart from individual interests.¹⁷² Thus, to describe self-determination in individual terms is to miss a significant portion of what the right describes.¹⁷³

Second, the right to self-determination enjoyed by all peoples is continuing and permanent and not extinguished by statehood. The original draft text of the ICCPR prepared by the Human Rights Commission stated that “[a]ll peoples . . . shall have the right of self-determination.”¹⁷⁴ The “shall” was dropped during the U.N. negotiations of the provisions.¹⁷⁵ The chairman of the U.N. Committee assigned to negotiate the text explained to the larger group of States that this change was designed to emphasize that the right was permanent, and not extinguished with statehood.¹⁷⁶

¹⁷¹ Peters, *supra* note 34, at 541.

¹⁷² See BUCHANAN, *supra* note 34, at 79 (arguing against reducing collective rights solely to the instrumental benefits they confer to individuals).

¹⁷³ Even under Peters’ approach, consent is relevant to the protection of self-determination. Under Peters’ analysis individuals possess the right to participate in the public life of the State “to determine their fate in and through the community.” Peters, *supra* note 34, at 541. Diminishing the consent principle in human rights lawmaking constricts an individual’s right to determine one’s fate through the community, because it reduces the extent to which the community controls matters important to the human experience. The individual’s right to determine his or her fate through the community is diluted by a decrease in community powers. This cost to individual rights is not currently considered a factor in evaluating proposals that diminish consent either.

¹⁷⁴ See G.A. Res. 10 (II), *supra* note 158, at 13 (providing original draft text).

¹⁷⁵ CASSESE, *supra* note 147, at 54.

¹⁷⁶ See *id.* (quoting the Chairman of the Third Committee Working Group).

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Reporting on Article 1 by State parties to the ICCPR and the ICESCR confirms that States understand the Article 1 requirement as continuing. The HRC in General Comment 12 wrote that, while States were always including Article 1 within their reports on compliance with the treaty, they were too often limiting that information to election laws.¹⁷⁷ Instead, the HRC asked States to provide information on the “constitutional and political processes which in practice allow the exercise of this right.”¹⁷⁸ Consistent with this request, even established States long since removed from colonialism report on measures they have taken to comply with Article 1.¹⁷⁹

Third, this continuous right enjoyed by all peoples entitles them to use the political institutions of the State to direct development without external intervention. Such a right emerges from the face of the text granting peoples the right to “freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸⁰

The negotiating history of the provision indicates that States wanted to enshrine a “very comprehensive conception of the right of self-determination.”¹⁸¹ To that end, the world’s peoples are free to “establish its own political institutions, to develop its own economic resources, and to direct its own social and cultural evolution, without the interference of other peoples or nations.”¹⁸²

¹⁷⁷ Rep. of the Human Rights Comm., General Comment 12 (21): Article 1, 21st Sess., ¶ 3, U.N. Doc. A/39/40; GAOR, 39th Sess., Supp. No. 40 (1984).

¹⁷⁸ *Id.* ¶ 4.

¹⁷⁹ See, e.g., U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodical Reports of States Parties Due in 1993: Peru, ¶¶ 5–8, U.N. Doc. CCPR/C/83/Add.1 (Mar. 21, 1995) (describing how Peru satisfied Article 1 through establishment of a republican form of government allowing for democratic participation by all of its citizens).

¹⁸⁰ ICCPR, *supra* note 12, at art. 1, para 1; ICESCR, *supra* note 12, at art. 1, para. 1.

¹⁸¹ G.A. Res. 10 (II), *supra* note 158, at ch. IV, ¶ 12. This broad conception of self-determination even provoked concerns that it would lead to discrimination against foreigners within the State, although Parties were confident other provisions in the Covenants prevented such an outcome. See *id.* at ch. IV, ¶ 13 (noting worries that it would prompt “burning of foreign books and the confiscation of foreign investments”).

¹⁸² *Id.*

The HRC hewed to this broad interpretation in General Comment 12.¹⁸³ There, the HRC admonished, “States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.”¹⁸⁴ This link between self-determination and non-intervention has been repeated in resolutions of the General Assembly¹⁸⁵ and by the ICJ.¹⁸⁶

There are good reasons to believe that States view this three-part understanding of self-determination as customary.¹⁸⁷ Most States of the world have accepted the collective right to self-determination as a treaty obligation by joining either or both of the Covenants.¹⁸⁸ Moreover, the three-part formulation described here is repeated in numerous international agreements and resolutions of international organizations.¹⁸⁹

¹⁸³ Antonio Cassese employs a similar interpretation of this term in his treatise on self-determination. Cassese explains that Article 1(1) protects a State’s political institutions from outside interference, in particular, reinforcing the customary prohibitions on interference with the political independence and territorial integrity of another State. CASSESE, *supra* note 147, at 55.

¹⁸⁴ Rep. of the Human Rights Comm., General Comment 12 (21), *supra* note 177, ¶ 6.

¹⁸⁵ See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 5, U.N. Doc. A/RES/2131 (Dec. 21, 1965) (“Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”); see also Jean Salmon, *Internal Aspects of the Right to Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 253, 258 (Christian Tomuschat ed., 1993) (describing self-determination and non-intervention as “two sides of the same coin”).

¹⁸⁶ *Nicaragua Case*, *supra* note 8, ¶ 205 (condemning interference in the choice of political, economic, social and cultural systems).

¹⁸⁷ Self-determination is often described as a *jus cogens* norm. See, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 101 (2d ed. 2006) (including self-determination within the list of peremptory norms). However, it appears that only the application of self-determination to colonized peoples achieves this lofty status. See, e.g., Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, ¶ 70, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (by Héctor Gros Espiell) (arguing self-determination is peremptory in its anti-colonial form).

¹⁸⁸ See ICCPR, *supra* note 12, at art. 1, para 1 (“All peoples have the right of self-determination.”); ICESCR, *supra* note 12, at art. 1, para. 1 (containing the same right).

¹⁸⁹ See, e.g., Organization of the African Union, *African Charter on Human and Peoples’ Rights*, art. 20, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (Jun. 27, 1981) (“[All peoples] shall freely determine their political status and shall pursue

This Article does not, however, undertake the potentially painstaking task of proving it is so. Nevertheless, most States of the world have accepted self-determination as a binding obligation through ratification of one or the other of the Covenants.¹⁹⁰ The text of these treaties and the practice thereunder demonstrates that the people as a whole of a State have a collective continuing right to self-direct development free from external intervention.

3.2. *Self-Determination and Consent*

The consent principle is essential to the realization of the collective right to self-determination. The link between self-determination, and consent to human rights obligations, stems from the relationship between political, economic, social, and cultural development, and human rights. Part of directing development involves deciding which international human rights obligations to accept because these obligations set the conditions within which development will occur.¹⁹¹ For example, the decision whether or not to permit women to choose abortions impacts issues as diverse as the role of religion within society, women's health, and women in the workplace. Similarly, the decision of a transitional society on whether to prosecute those who committed serious international crimes influences the distribution of political power, development of the rule of law and domestic legal structures, and the economic well-being of victims and victims' families.

their economic and social development according to the policy they have freely chosen."); Conference on Security and Cooperation in Europe [CSCE] Final Act, at 7 (Aug. 1, 1975), available at <http://www.osce.org/mc/39501?download=true> ("By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/RES/2625 (XXV) (Oct. 24, 1970) ("[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. . .").

¹⁹⁰ See *supra* note 188 and accompanying text (identifying the right of self-determination in the Covenants).

¹⁹¹ See Crawford, *supra* note 14, at 121 (claiming a heightened interest for popular participation on human rights questions given their impact on the internal life of the State).

It is through the State that the people of a State communicate the decision on whether to undertake international human rights obligations to other States and international actors.¹⁹² The act of consent is a manifestation of self-determination because it represents the people's decision on whether and how to condition development with international commitments. Self-determination mandates that other States and the international community respect this decision in order to permit the people to develop its society 'freely.'

This value for the consent principle is different from the values attributed to consent by the conventional theories described in Part 1. Specifically, the link between consent and self-determination locates a value for consent that is neither sovereigntist, nor relativist, nor apologist.

The traditional understanding of consent roots its value in States' rights, a sovereigntist conception that is challenged by the idea that humans, not States, are the core protected entities in international human rights law.¹⁹³ By contrast, the link between consent and self-determination demonstrates that consent is valuable because of the ability it gives humans to participate meaningfully in self-directing the development of their State. Its value is intrinsic to human rights, not extrinsic.

Consent has also been valued by some scholars for providing different cultures, especially subordinate developing cultures, the opportunity to have their voices heard in the development of human rights.¹⁹⁴ Consent respects the different conceptions of human rights that exist globally. This argument is potentially relativist in nature; consent protects pluralism in a world in which there is no right answer to what human rights law should require.

By contrast, the relationship between consent and self-determination posits nothing about whether different cultures do or do not agree about the content of rights, or whether there is a right answer to what human rights law ought to require. Rather, humans value participating in communities that decide rights

¹⁹² See *id.* at 129 (explaining that international law has traditionally viewed the established government of a State as the voice for all its people).

¹⁹³ See *supra* Sections 2.1 and 2.2 (describing the traditional consent principle and human rights challenges to consent).

¹⁹⁴ See *supra* note 129 and accompanying text (discussing Mutua's view of the necessity of self-determination to protect weaker cultures).

questions for themselves, free from external intervention. Whether they ultimately arrive at the same substantive decision as other communities is revealing as to the existence of a genuine global consensus on the content of rights.

Lastly, consent is praised by some scholars for promoting State compliance with human rights norms, which is ultimately the goal of human rights law.¹⁹⁵ But letting the desire for State compliance to drive the content of rights is an apologist position because it conforms the law to State power. Valuing consent for its relationship to self-determination is not apologist. Consent matters, not because States are powerful, but because the people within States value participation in self-directing communities, free from external intervention.

While consent is necessary for the protection of self-determination, it is not sufficient to protect self-determination. As with any group right, there is the risk that the individuals exercising that right on behalf of the group act in ways that benefit themselves at the expense of the group.¹⁹⁶ The extent to which a State represents its people varies significantly from State to State.¹⁹⁷ The government may not represent its people because of how it came to power or how it has behaved once it was in power.¹⁹⁸ Or, the people of the State may not form a single community engaged in pursuit of a common life—a problem common in multi-ethnic States. Historian Samuel Moyn argues that it was disillusionment with the ability of States to satisfy self-determination that, in part,

¹⁹⁵ See, e.g., Helfer, *supra* note 138, at 73 (claiming a role for consent in promoting compliance with international law).

¹⁹⁶ See BUCHANAN, *supra* note 143, at 78 (“[G]roup rights encourage hierarchy and create the possibility of opposition between the interests of those who control the exercise of the right and the interests of other members of the group.”).

¹⁹⁷ See, e.g., MUTUA, *supra* note 128, at 90 (noting that African States act inconsistently with the rights of their people in order “to maintain their personal privileges and retain power.”); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1966 (1996-97) (“[T]he idea that the governments of Burma, Nigeria, or Somalia speak for their people is patently false.”).

¹⁹⁸ This analysis is based upon a distinction developed by Fernando Tesón. See TESÓN, *supra* note 34, at 57 (distinguishing between vertical and horizontal illegitimacy in States).

spawned the desire for greater international regulation of human rights.¹⁹⁹

Even though States are not always representative of their people, there are at least two reasons why the relationship between consent and self-determination should nevertheless be privileged in human rights lawmaking. First, any effort to diminish the consent principle in response to unrepresentative States will necessarily harm the self-determination of those within representative States. This reality holds true because there is no agreed test on what constitutes a representative State.

Some western States argue that self-determination mandates that governments provide their citizens with the civil and political rights needed to participate in the public life of the State.²⁰⁰ Australia informed the HRC that it “interpreted self-determination as the matrix of civil, political and other rights required for the meaningful participation of citizens” in the public life of the State.²⁰¹ Similar statements have been made to the U.N. Third Committee by Germany,²⁰² the United Kingdom,²⁰³ and the United States.²⁰⁴

The HRC, while not directly interpreting Article 1(1) of the ICCPR in this way, has argued that the “related . . . but distinct”

¹⁹⁹ See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 118–19 (2010) (arguing that human rights law emerged into its current form from 1970s due to disillusionment with previous utopian theories including self-determination).

²⁰⁰ Antonio Cassese identifies ICCPR rights that he believes are required to ensure participation in the public life of the State: freedom of expression; peaceful assembly; free association; and the right to vote. CASSESE, *supra* note 147, at 53.

²⁰¹ Rep. of the U.N. Human Rights Comm., ¶ 428, U.N. Doc. A/43/40; GAOR, 43d Sess., Supp. No. 40 (1988).

²⁰² See U.N. Third Comm., Summary Record of the 4th Meeting, ¶ 47, U.N. Doc. A/C.3/37/SR.5; GAOR, 37th Sess. (1982) (arguing a nation has fully realized self-determination if “individual citizens could fully enjoy their fundamental rights and freedoms, such as freedom of speech, freedom of information, freedom of assembly and association as well as [travel rights]”).

²⁰³ See Geoffrey Marston, *Subjects of International Law—States—Self Determination*, 1984 BRIT. Y.B. INT’L L. 430, 432 (contending that self-determination requires “rights to freedom of thought and expression; the rights of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections”).

²⁰⁴ See CASSESE, *supra* note 147, at 303 n.47 (quoting a 1972 statement by the U.S. delegate to the UN General Assembly’s Third Committee stating “[F]reedom of choice is indispensable to the exercise of the right of self-determination”).

Article 25(a) guarantees every citizen the right to participate in the public life of the State.²⁰⁵ It reads this provision of the ICCPR as requiring governments to permit their citizens to participate in government through freedom of expression, assembly, and association.²⁰⁶

Some scholars build on this argument and claim there is an emerging right to democracy in international law. Thomas Franck and James Crawford both locate a right to democracy based in part on the right to self-determination. Franck defines this right as “free, fair and open participation in the democratic process of governance”²⁰⁷ Crawford argues that democracy requires the State to protect a range of rights, including freedom of expression and assembly.²⁰⁸

Not surprisingly, many States reject the argument that democracy is a *sine qua non* of a representative State. The General Assembly affirms that it is the “concern solely of peoples to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitutional and national legislation.”²⁰⁹ States that are non-representative from a Western liberal perspective sometimes argue that their peoples chose to create a political system that, while different from liberal democracy, is nevertheless an acceptable exercise of self-determination.²¹⁰

²⁰⁵ U.N. Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 25 (57), 57th Sess., ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996).

²⁰⁶ *Id.* ¶ 8.

²⁰⁷ Franck, *supra* note 150, at 59.

²⁰⁸ Crawford, *supra* note 14, at 116.

²⁰⁹ *See, e.g.*, G.A. Res. 45/151, U.N. Doc. A/RES/45/151 (Dec. 18, 1990) (asserting that nations should respect the principles of national sovereignty in the election process).

²¹⁰ *See* Rep. of the Human Rights Comm., U.N. Doc. A/42/40, *supra* note 170, ¶ 286 (explaining how the people of Zaire opted for “Mobutisme,” or a system without political parties organized under teachings of former President Mobutu); Rep. of the Human Rights Comm., ¶ 506, U.N. Doc A/46/40; GAOR, 46th Sess., Supp. No. 40 (1991) (describing Sudan’s argument that its people opted for government under Shariah law that cannot by definition provide all the civil and political rights found in the ICCPR).

There are reasons to be doubtful that human rights law can resolve this dispute. A State will never agree that international law demands a standard of representation to satisfy self-determination that it cannot satisfy. Thus, a consent-based process is highly unlikely to produce a required standard of representation.

Moreover, there may not be one international standard by which to judge whether a State is representative of its people. It may be difficult for those outside of a State to judge the fit between a government and its people because they do not have the same experiences as those within the State.²¹¹

Brad Roth argues, for example, that the people of a State may opt for an illiberal form of government out of a preference for unity, stability, decisive leadership, and better long-term planning free from the pressures of electoral politics.²¹² Without opining here on whether this claim has merit, arguments of this sort demonstrate the difficulty one faces in asserting States are illegitimate representatives of their own people based on a failure to provide civil and political rights. A more extreme repudiation of the government appears required.²¹³

Because human rights law cannot distinguish between representative and unrepresentative States, except at the margins, limiting restrictions on consent to unrepresentative States is infeasible. Instead, any restrictions on consent will draw in both representative and unrepresentative States. And, as a consequence, such restrictions will burden the self-determination of those in representative States.

Consider, for example, the decision by TMB and human rights courts to employ a teleological approach to treaty interpretation.²¹⁴ Such an approach prioritizes the purpose of protecting human rights as understood by the TMB or court over indicia of State consent. Assuming the government of North Korea does not represent its people, departing from the consent of the North Korean government does not appear to implicate self-determination. But the teleological interpretative approach is not

²¹¹ Walzer, *supra* note 148, at 212.

²¹² BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 27-28 (1999).

²¹³ *Id.* at 419; Walzer, *supra* note 148, at 214.

²¹⁴ See *supra* Section 2.3.2 (discussing treaty interpretation practices by TMB and human rights courts).

limited to locating obligations of unrepresentative States. Sweden too would be constrained by the TMB or court treaty interpretation. And departures from the consent of Sweden would impinge on the self-determination of the Swedish people.

Second, the departures from the consent principle described in Part 1 do not transfer decision making on rights questions to institutions or individuals that are any more representative of unrepresented peoples than their dysfunctional States. In customary law, the *Nicaragua* rule diminishes the ability of any particular State to dissent from a putative custom through contrary behavior.²¹⁵ Thus, a State like North Korea, which does not represent its people, cannot block the formation of human rights law through its contrary practice without verbal repudiation of the underlying right.

But this outcome does not give the otherwise disenfranchised North Korean people any voice in formation of human rights customs. Rather, it merely shifts decision-making authority from one unrepresentative institution (the government of North Korea) to other institutions that do not represent the Korean people, other States. Other departures from the consent principle transfer similar authority from unrepresentative States to TMB, human rights courts, and even activist groups and scholars.

This discussion suggests that, while improving the representation States afford their people is critical to satisfying the promise of self-determination, restricting the consent principle is no solution. It does not provide disenfranchised peoples any greater say in the content of human rights law. And it does restrict the self-determination of those living within effectively representative States.

4. CONSEQUENCES

Part 2 establishes a human rights dimension to consent not accounted for in the traditional State sovereignty based account of the concept. Consent is essential to the protection of the collective right to self-determination. This link means that efforts to reorient the international system toward the protection of human rights should value consent for the benefits it provides human rights.

²¹⁵ See *supra* note 8 and accompanying text (discussing the ICJ's holding in the *Nicaragua Case*).

Such an approach has not been taken because the relationship between consent and self-determination has gone largely unnoticed.²¹⁶ This Part re-imagines the consent principle as one rooted in human rights law and explores the consequences for human rights lawmaking.

The most important insight provided in this Article is that consent is a normative positive for the protection of human rights. A valuable part of the human experience is the ability to participate in a community with control over its development. This requires control over international human rights obligations. In exercising this control, peoples may opt for amorphous and indefinite obligations to allow discretion in implementation on the local level. They may also opt out of particular human rights obligations entirely. Such outcomes are not per se negative to the protection of human rights, but rather may reflect the successful execution of self-determination.

This human rights value suggests tools like the margin of appreciation, which grants States deference to their interpretation of their rights obligations, has a stronger foundation in human rights law than previously imagined.²¹⁷ States should be given a degree of freedom to make their own choices about how to best comply with human rights obligations because of the impact those obligations have on social development. Critics of the ECtHR's use of the margin of appreciation in its jurisprudence²¹⁸ take an unduly

²¹⁶ Scholars do sometimes note in passing that departing from the consent principle is problematic from a democracy or self-determination perspective, but rarely linger upon this point. See MICHAEL IGNATIEFF, *WHOSE UNIVERSAL VALUES? THE CRISIS IN HUMAN RIGHTS* 21–23 (1999) (arguing that allowing human rights to override State consent automatically undermines the human right of self-determination); Goldsmith, *supra* note 124, at 333 (describing democratic legitimacy concerns in relying on academics and human rights activists to determine the content of law); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 *LAW & CONTEMP. PROBS.* 115, 146 (2008) (noting that an overly expansive understanding of core human rights norms can threaten self-determination and autonomy); Helfer, *supra* note 138, at 78 (stating the challenge to democracy posed by international delegation increases with nonconsensual lawmaking).

²¹⁷ See Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,” 2 *Eur. Ct. H.R. (ser. A)* at 20–21 (1968) (providing rationale for use of the margin of appreciation, translated here as “margin of discretion”). The margin of appreciation, however, reserves for the Court final say on interpretation of the treaty.

²¹⁸ See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 *N.Y.U. J. INT'L L. & POL.* 843, 852 (1999) (locating tension between the

cramped view of human rights. Granting communities the ability to make choices about how to organize society, rather than being a concession to power politics or outdated conceptions of sovereignty, permits people to exercise control over the contours of their community, a value intrinsic to the human experience.

But like most human rights, self-determination is not absolute.²¹⁹ Most human rights balanced when in conflict with competing rights, which argues in favor of recognizing limitations to the consent principle where supported by a proper, proportionate human rights justification.²²⁰ Such an approach revolutionizes the way human rights law thinks about consent. As a manifestation of State sovereignty, consent must be absolute, or near absolute, to ensure States' rights are vindicated. By contrast,

margin of appreciation and the goal of protecting human rights); Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, 52 HOW. L.J. 277 (2009) (arguing that the scope of human rights should not be determined using societal consensus because it is unworkable, and "endangers both human rights and the rule of law").

²¹⁹ Peremptory norms are the one exception, as they void competing norms located in treaties, are not subject to derogation or limitation, and may be modified only by another norm of the same character. VCLT, *supra* note 19, at art. 53.

²²⁰ Provisions mandating balancing between competing interests are expressly included in multilateral human rights instruments. *See, e.g.*, ECHR, *supra* note 85, at art. 9 (balancing freedom of thought, conscience and religion against the needs of a democratic society to protect "public safety," "public order, health or morals," and "the rights and freedoms of others"); ICCPR, *supra* note 12, at art. 18 (allowing State restriction of freedom of thought, conscience and religion where "prescribed by law" and "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"); ICESCR, *supra* note 12, at art. 2 ("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, including particularly the adoption of legislative measures."). They are also located in newer national constitutions. *See* S. AFR. CONST., 1996 § 27 (requiring a State to take measures to provide health care services, food, water and social security "within its available resources"); INDIA CONST. art. 41 (limiting right to work, education and public assistance to India's "economic capacity and development").

Even in the United States, where rights provisions do not include any express balancing requirements, balancing tests have been employed. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465, 490-91 (1976) (limiting application of the Exclusionary Rule to Fourth Amendment violations where the costs of application were disproportionate to the benefit).

as a human rights value, consent is subject to limitation in order to accommodate competing rights.²²¹

Proportionality analysis is missing with respect to self-determination today. Insufficient attention has been paid to what sorts of human rights justifications support restricting self-determination, and whether departures from the consent principle are proportionate to such goals.

Conventional theory identifies two important situations in which departures from the consent principle are countenanced. First, traditional international lawmaking mandates States behave as States have customarily behaved, even where the outcome is arguably nonconsensual. Second, peremptory norms are binding on all States, including those who persistently object. In State sovereignty terms, such departures from the consent principle have been difficult to justify.²²²

But, in human rights terms, such departures from the consent principle are easier to understand. International law recognizes the right of the international community of States to set community obligations, which individual States are expected to follow.²²³ The peoples of States have the right to self-direct development only within bounds set by the consensus of the international community of States. Thus, to the extent international human rights law evolves to restrict the ability of individual States to dissent from genuine consensus within the international community on the content of rights, then there is an established human rights justification for doing so.

At least two of the legal developments described in Part 1.3. fall into this category. In treaty law, the HRC claims it has the authority to determine whether State reservations are consistent

²²¹ If consent is not present then there must be an alternative constitutive basis for the right in question. The fact that States customarily behave consistently with the right is one such accepted basis. Another basis is the sense among the community of States that the norm is peremptory and not subject to dissent. And, as I argue in forthcoming scholarship, still another constitutive basis for human rights law is the moral obligations of States. Vijay M. Padmanabhan, *Separation Anxiety: The Case for Inclusive Positivism in International Human Rights Law*, 47 VAND. J. TRANSNAT'L L. (forthcoming May 2014).

²²² See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 178-79 (1986) (arguing that State sovereignty mandates that States be permitted to persistently object even to *jus cogens* norms).

²²³ See Henkin, *supra* note 72, at 43-44 (stating human rights law is akin to international constitutional law, which trumps competing national laws).

with the object and purpose of the Covenant. Where they are not, the Committee severs the reservation and holds the State to the original provision.²²⁴ The HRC also claims that a State may not exit from the ICCPR once it becomes party to the Convention.²²⁵ Thus, in totality, the HRC claims the authority to sever invalid reservations and hold the State to the original obligation without granting the State the opportunity to exit from the treaty. Such an approach would result in the HRC holding States to rights standards to which they never agreed,²²⁶ which is a severe restriction of self-determination.

One way to recast the HRC's views on reservations is that they seek to pressure individual States to conform to a community norm, which is in this case represented by the treaty standard in question. Agreements like the ICCPR were negotiated by nearly all of the world's States in existence at the time of negotiation, and today have been ratified by most. As a consequence, the standards within represent a human rights version of community norms, the enforcement of which is an accepted justification for restricting self-determination.

Consider, for example, the U.S. reservation to Article 6(5) of the ICCPR, which prohibits the juvenile death penalty. The U.S. reservation, made when the juvenile death penalty was still lawful in the United States,²²⁷ excludes application of Article 6(5) in situations where juveniles are tried as adults, and therefore eligible for the death penalty.²²⁸ The HRC has written that this reservation

²²⁴ See *supra* notes 115–16 and accompanying text (showing how the HRC took this approach with Trinidad and Tobago's reservation denying the HRC jurisdiction over petitions by death row prisoners).

²²⁵ See U.N. Human Rights Comm., General Comment No. 26 (61), *supra* note 117, ¶ 5 (“The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.”).

²²⁶ See Helfer, *supra* note 138, at 77 (viewing the HRC approach to severance of reservations as an example of nonconsensual lawmaking).

²²⁷ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (overturning earlier cases and holding that the Eighth Amendment forbids execution of minors).

²²⁸ See *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (last visited Oct. 25, 2013) (providing a full record of all U.S. reservations to the ICCPR).

is inconsistent with the object and purpose of the Covenant.²²⁹ Pursuant to the Committee's view of reservations, the United States is bound not to execute juveniles as a matter of treaty law, despite its specific desire not to undertake such an obligation. This approach incurs a significant human rights cost for the American people. Their collective right to self-determination includes an apparent entitlement to decide whether to use the juvenile death penalty to combat crime.

But the HRC acts upon a legitimate human rights justification when it seeks to remove the juvenile death penalty from the remit of self-determination. The international community of States views the prohibition on the juvenile death penalty as a community obligation. The prohibition on the juvenile death penalty has been accepted as an international legal obligation by all States except the United States and Somalia through membership in the Convention on the Rights of the Child.²³⁰ The need for outlier States like the United States to conform to international community expectations on human rights questions is an accepted justification for restricting self-determination.

The same justification sometimes supports the ICJ decision in the *Nicaragua* case. The ICJ concluded that contrary State practice does not count against the existence of a custom if that behavior is defended consistently with the putative custom. As discussed, this approach restricts the ability of States to dissent from customs through contrary behavior alone, a restriction on self-determination. But, where the custom in question is already well established, such a rule pressures outlier States to fulfill community obligations.

This analysis provides a new justification for Bruno Simma's argument that the *Nicaragua* rule is more justifiable in situations where there is a clear custom already in place, as opposed to where

²²⁹ Rep. of the Human Rights Comm., ¶ 279, U.N. Doc. A/50/40; GAOR, 50th Sess., Supp. No. 40, (1995) (stating that the Committee finds the United States's reservations regrettable and incompatible with the "object and purpose of the Covenant").

²³⁰ See Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed . . .").

one is searching to determine whether a new custom has formed.²³¹ If in fact traditional practice demonstrates the existence of a community norm prohibiting particular conduct, then imposing self-determination costs can be justified by the need to enforce community norms.

By contrast, if no such international consensus is evident, some other justification must exist for the restriction on self-determination. Often a putative custom, like the duty to prosecute described in Part 1, lacks evidence that it is well established as a community obligation within the international community of States. In such cases work must be done to identify other human rights justifications for infringing upon self-determination.

The *Nicaragua* rule is not alone in restricting consent in circumstances where vindicating a community obligation is not at stake. Traditionally *jus cogens* norms eliminate a State's ability to dissent only where there is general acceptance of the international community that the conduct prohibited by the norm is outside permissible bounds of State conduct.²³² But, as described in Part 1.3, there are scholars and activists who have advocated for recognizing still more preemptory norms, even in the absence of universal or near universal agreement. Such restrictions must be supported by a human rights justification other than enforcement of community norms.

Similarly, as discussed in Part 1, TMB frequently depart from the consent of States as their touchstone in interpreting treaty obligations. When they do so, the interpretation that they proffer often does not reflect any sort of consensus view within the international community of States on the content of human rights law.

For example, the Women's Committee has pushed forward in interpreting CEDAW to protect some abortion rights.²³³ It did so

²³¹ See Simma, *supra* note 39, at 220 (arguing that the *Nicaragua* rule is sensible in some but not all situations).

²³² VCLT, *supra* note 19, at art. 53. See also Hathaway, *supra* note 216, at 147 (accepting restrictions on the right of an individual State to reject "limits on government action that are shared by nearly every culture and religion, at least in aspiration, if not always in reality"); Henkin, *supra* note 72, at 44 ("[A]n occasional state cannot veto law that reflects the contemporary international political-moral intuition.").

²³³ See *supra* notes 98-100 and accompanying text (analyzing the Women's Committee's General Recommendation 24).

despite the absence of global consensus that laws criminalizing abortion violate a community obligation; indeed, the continued prevalence of criminal restrictions on abortion suggests that no such consensus exists. Such restrictions must be supported by a human rights justification other than pushing outlier States to accept community obligations.

There are at least three potential new justifications for restricting self-determination that are worth considering. First, where there is an accepted community norm, restrictions on self-determination may be required for States to accept secondary obligations necessary to effectuate the accepted norm. Scholars have argued that the duty to prosecute serious violations of international law is peremptory despite the absence of international consensus on the existence of a duty because the crimes being prosecuted are themselves peremptory.²³⁴ TMB and human rights courts have found that the prohibition on torture and cruel, inhuman and degrading treatment includes an implicit, absolute non-refoulement obligation because the prohibition on torture and cruel, inhuman and degrading treatment is absolute.²³⁵

But caution is needed because the justification for the secondary norm may not support the same restriction on self-determination that does the primary norm. For example, the differences in the nature of the duty not to commit torture and to protect against torture by third parties argue in favor of greater self-determination restrictions in the case of the former compared to the latter.²³⁶ It is critical to parse the specific reasons for

²³⁴ See generally Bassiouni, *supra* note 77 (advocating for a duty to prosecute offenses which are forbidden in international law); Orentlicher, *supra* note 77 (summarizing the development of a duty to punish within international law).

²³⁵ See *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1835, 1855-56 (holding the protection of torture, including extradition that will result in torture, is absolute regardless of the undesirability of the individual at issue); U.N. Human Rights Comm., General Comment No. 31 [80], *supra* note 103, ¶ 12 (stating that the ICCPR "entails an obligation not to extradite, deport, expel or otherwise remove a person from [the State's] territory, where there are substantial grounds for believing that there is a real risk of irreparable harm . . ."); see also David Jenkins, *Rethinking Suresh: Refoulement to Torture Under Canada's Charter of Rights and Freedoms*, 47 ALTA. L. REV. 125, 151 (2009) (viewing non-refoulement as *jus cogens*).

²³⁶ See Padmanabhan, *supra* note 101, at 107-12 (arguing that the duty not to torture and the duty to protect against torture by third parties are normatively different).

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restricting consent in situations where there is no consensus that a community obligation exists. Such an inquiry has to date often not been undertaken because of the failure to recognize the self-determination costs.

Second, the need to protect minorities disfavored within the political processes of States may justify restrictions on self-determination. Western legal systems are divided on the ability of political institutions to protect minority rights. If politically vulnerable minorities cannot exercise their voice in State governments, then this failure may be a sufficient justification for restricting self-determination on rights affecting such minorities.

Such a justification reflects Will Kymlicka's distinction between external and internal aspects of collective rights. Kymlicka argues groups must be able to create barriers to prevent outsiders from eroding group identity.²³⁷ But he disagrees with efforts to use group status to force dissenting members of the group to act consistently with group norms.²³⁸ Protecting dissenters may require overriding the decisions of the group.

The difficulty, of course, is how to identify which norms protecting minorities require a departure from the consent principle. So-called minority rights, such as gay rights, women's rights, and rights of religious minorities, also go directly to the heart of the kind of society and culture a people wish to maintain. Removing such choices from the scope of self-determination would be an intense burden on self-determination.

Third, humans may possess moral rights, or rights States ought to provide, separate and apart from legal rights. The moral imperative to protect moral rights through legal obligation may justify departures from the consent principle. The concept of universal human rights posits that humans *qua* humans enjoy entitlements regardless of the State where they live. It is for this reason that human rights are described as "universal" in the Universal Declaration of Human Rights. Moral rights represent a potential natural limit to self-determination, as peoples have no right to use their respective States to develop in a manner that transgresses the moral rights of a portion of its population.

²³⁷ KYMLICKA, *supra* note 146, at 35-37.

²³⁸ *Id.* at 37.

The problem with moral rights is determining their content. There is no accepted methodology to be used to determine the moral obligations of States. While there may be acknowledgment that “ought” restricts the scope of self-determination, its application to concrete restrictions on self-determination will surely be contested. Claims that moral rights restrict self-determination must be carefully evaluated given the human rights cost associated with the claims.

Even with a human rights justification, restrictions on self-determination must be proportionate to the justification proffered. To that end, the restrictions to the consent principle described in Part 1.3. vary greatly in intensity. The more severe the restriction on self-determination, the stronger the human rights justification required to support the restriction.

The most severe restrictions on self-determination occur where the ability of the State to decide whether to undertake a human rights obligation is most constricted. Human rights courts, like the ECtHR, are empowered to issue binding treaty interpretations, and can mandate State compliance. States have arguably delegated to these courts authority to make law to fill in gaps within the treaty regime.²³⁹ But such courts may exercise such authority in a manner that creates obligations that mandate nonconsensual State action, creating a significant challenge to self-determination.

Many of the practices described in Part 2.3. have a similar effect. Efforts to label new norms peremptory seek to fully remove State control over the rights question that is the subject of the peremptory obligation, eliminating even the possibility of persistent objection. So too does the HRC approach on reservations, which attempts to bind States to obligations as written in the ICCPR even where the State has not agreed to that obligation, which results in a nonconsensual treaty obligation.²⁴⁰ Severely restricting State control over its human rights obligations requires the most robust human rights justification.

By contrast, TMB, which are not empowered to issue binding interpretations of their respective treaties, can at most impose reputational costs on States for their failure to abide by the

²³⁹ Simma, *supra* note 107, at 497.

²⁴⁰ See *supra* notes 113–16 and accompanying text (discussing HRC General Comment 24 and its application to the case of Trinidad and Tobago’s reservation about death row inmates).

interpretations.²⁴¹ While these costs are impingements on the consent principle, States retain the option of non-compliance or treaty exit if they do not wish to comply. These opt-outs reduce the extent to which self-determination is hindered. And as a consequence these restrictions on the consent principle may be supported by lesser human rights justifications.

5. CONCLUSION

An international legal system oriented toward the protection of human rights should still care about State consent. Too often, existing debate cabins the reasons one should care about consent to concerns about sovereignty, cultural relativism, or rights implementation. But such a limited remit for consent is based upon a failure of imagination with respect to the role of the State in the protection of human rights.

The collective right to self-determination envisions the people of a State as its sovereign. The people use their State to make decisions about how to shape society for a community interested in a common life. The consent principle gives the people of the State decision making authority over international human rights standards; whether to accept international supervision of commitments; and the pace of rights development. Without such control self-determination is a far less important right. Thus, there is a strong human rights justification for State consent to play an important role in international human rights lawmaking.

But, as justifications for the consent principle shift to self-determination, the contours of the principle itself must evolve. The traditional consent principle, born in the era of States' rights, fails to provide adequate account of the desire of the international community to mandate obligatory community norms. There may be other justifications, such as the need to protect minority rights or the moral rights of man, for restricting self-determination. Thus, the traditional absolute consent principle is obsolete when applied to human rights law.

Restrictions on the consent principle must be proportionate to the justification proffered. Proportionality analysis has not been

²⁴¹ See *supra* notes 80-82 and accompanying text (summarizing the role of limited authority of TMB).

applied consistently in human rights practice and should be applied going forward.

Re-imagining consent in this manner is difficult. But, as Michael Reisman argued in general terms more than twenty years ago, it is essential if we are to reconfigure the international legal system around the protection of human rights.