LOOKING TO THE FUTURE: THE SCOPE, VALUE AND OPERATIONALIZATION OF INTERNATIONAL HUMAN RIGHTS LAW

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ABSTRACT

The international human rights system of which international human rights law (IHRL) is a part has been critiqued for being ineffective, too legal, insufficiently self-critical, and elitist, with some claiming that it self-generates some of the challenges it faces. This Article challenges this presentation of IHRL and in doing so, sets out three priorities for its future development. These are first, that it should continue to engage in critical analysis of how IHRL can effectively respond to the complex and multifactorial challenges it faces. Second, rather than refrain from developing due to critiques of overexpansion, IHRL should prioritize the articulation and adaptation of how IHRL applies to groups who struggle to enjoy their rights in practice and to new contexts and global challenges, such as artificial intelligence. Third, it should develop and deepen the methodology to the operationalization of IHRL further to ensure that it embeds within the agendas of key actors that can bring about change, including across state agencies as well as within businesses and social movements.

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I. INTRODUCTION

In recent years, scholarship has burgeoned on the challenges faced by the international human rights system. This literature has critically assessed the effectiveness and impact of international human rights law (IHRL).[1] These themes are often examined through the lens of compliance with treaty commitments and implementation, referring to both the "legal implementation," of the decisions or recommendations of international human rights bodies,[2] and "the operational delivery of human rights within communities and beyond."[3] Scholars have analyzed the mainstreaming of human rights beyond institutions and agencies with a dedicated mandate on human rights, for example, mainstreaming human rights throughout the United Nations (UN).[4] Some have focused on the "pushback" and

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1 *See generally* KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY (Princeton Univ. Press 2019); Rebekah Thomas et al., *Assessing the Impact of a Human Rights-Based Approach across a Spectrum of Change for Women's, Children's, and Adolescent's Health*, 17 HEALTH & HUM. RTS. J. 11 (2015) (discussing the challenges with measuring human rights impact due to the integration of human rights into policies and practices but also the need to measure individual, structural and societal change).

2 *See, e.g.*, COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 504–17 (Cambridge Univ. Press 2014); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 114–24 (Cambridge Univ. Press 2009); Cossette Creamer & Beth Simmons, *Ratification, Reporting and Rights: Quality of Participation in the Convention against Torture*, 37 HUM. RTS. Q. 579, 583 (2015); Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 505 (2011).

3 For an extensive discussion of these terms, *see* Paul Hunt, *Configuring the UN Human Rights System in the "Era of Implementation": Mainland and Archipelago*, 39 HUM. RTS. Q. 489, 497 (2017).

4 Geoff Gilbert & Anna Magdalena Rusch, *Rule of Law and United Nations Interoperability*, 30 INT'L J. REFUGEE L. 31 (2018).

"backlash" experienced by parts of the system.[5] This has included critiques of the international human rights system, particularly the global institutions established to promote and protect human rights and international human rights law (IHRL). The system has been invariably critiqued for being ineffective, too legal, insufficiently self-critical, and elitist.[6] As a result, some claim that the system self-generates some of the challenges it faces.[7] IHRL and its related institutions have also been criticized both for overexpansion of rights and for addressing the human rights implications of enduring and emerging global challenges, such as climate change, artificial intelligence, and inequality.[8]

This Article challenges these critiques and in doing so, identifies three priorities for the future of IHRL, if it is to remain an effective branch of international law mandated to promote and protect human rights. This Article first examines the claim that the international human rights system is insufficiently self-critical and generates many of the pressures it is experiencing.[9] It questions this proposition and suggests that a priority for IHRL is to diagnose the complex and multifactorial threats to human rights and critically assess how it can best contribute to addressing these threats. Part II makes this point in three ways. First, claims that IHRL and its related institutions constitute a major source of pushback and backlash have to be approached with care as history demonstrates the potential for states and other actors to levy criticisms at IHRL and its institutions as a means of pursuing particular political agendas, rather than revealing intrinsic deficiencies within IHRL. Second, pushback and backlash on the international human rights system are multifactorial and variable depending on the actor, issue, and point in time. It is difficult,

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5 Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. CONTEXT 197, 198 (2018) (arguing "there is a difference between mere *pushback* from individual Member States or other actors, seeking to influence the future direction of an IC's case-law and actual *backlash* in terms of critique triggering significant institutional reform or even the dismantling of tribunals, the latter typically involving the collective action of Member States"); *see also* Malcolm Langford, *Critiques of Human Rights*, 14 ANN. REV. L. & SOC. SCI. 69, 70 (2018) (observing that while critiques of human rights are not new, the volume has increased as has the "apocalyptic predictions").

6 *See* STEPHEN HOPGOOD, THE END TIMES OF HUMAN RIGHTS 4–5 (Cornell Univ. Press 2013) (arguing the international system is too international); ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 137 (2014) (arguing the system is ineffective); Andrew Fagan, *The Gentrification of Human Rights*, 41 HUM. RTS. Q. 283, 285 (2019) (arguing the international system is too elite); Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 314 (2017).

7 *See* John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. (forthcoming Nov. 2019) (manuscript at 1) (on file with author).

8 *See*, *e.g.*, HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH (2019) (critiquing international human rights law for being overly expansive in dealing with every "social issue"); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (Harv. Univ. Press 2018) (critiquing human rights for not dealing with inequality).

9 *See* Tasioulas, *supra* note 7.

therefore, to make generalized or universally applicable statements about the weight of particular pressures.[10] Moreover, apportioning responsibility for pushback and backlash to "internal pressures" risks underplaying the significant structural factors, global challenges, and shifts in scope conditions that currently present major threats to human rights and need to be addressed. Third, the multidisciplinary scholarship on human rights, particularly in relation to compliance, implementation, and mainstreaming, displays a critical edge and is increasingly engaged with in an interdisciplinary manner, including within international legal literature. This scholarship thus displaces the inference made by some scholars that the international human rights system lacks self-reflection by overly focusing on external threats but is rather engaged in critical analysis of how to address the complex challenges faced by human rights. In this regard, this Article suggests that rather than trying to compartmentalize potential sources of pressure on IHRL based on whether they are "internal" or "external," a priority for the future of IHRL is to diagnose the range of threats to human rights and to critically assess the extent to which the international human rights system—which includes, but is not limited to IHRL—can effectively anticipate these threats and societal needs.

In Part III, this Article argues that a second priority for IHRL is to develop effective approaches to interpreting how IHRL applies to groups who are unable to enjoy their rights in practice, such as the current debates on the rights of older persons, as well as to adapt existing IHRL to new contexts, such as climate change and artificial intelligence. Rather than respond to critiques of the "endless" or "over-expansion"[11] of IHRL by freezing its development, IHRL needs to ensure that it continues to apply and remain relevant where human rights are at risk. This can be achieved by demonstrating that IHRL rarely expands to pronounce entirely new rights, although in exceptional circumstances this will be appropriate. Rather, most activity labelled as "expansion" is more accurately characterized as the articulation of how existing IHRL applies to particular groups or new contexts. This distinction needs to be made much clearer so that the articulation and application of IHRL to particular groups and new contexts through interpretative and adaptive techniques, is prioritized in order to ensure that IHRL remains relevant and resilient to the needs of changing societies. This point is often missed by commentators who argue that IHRL endlessly expands in a generalized manner without assessment the type of instruments being created.

In Part IV, this Article acknowledges that IHRL cannot address the threats posed to human rights on its own, but rather a multidisciplinary approach continues to be required, particularly where the threats emanate from changes in scope and structural conditions in society or relate to global challenges, such as artificial

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10 *See* Karima Bennoune, *In Defense of Human Rights*, 52 VAND. J. TRANSNAT'L L. (forthcoming Nov. 2019) (discussing the use of general statements).

11 HANNUM, *supra* note 8, at 32.

intelligence and climate change.[12] However, IHRL stands a better chance of forming a part of wider approaches where it is embedded within the agendas, policies, and practices of actors that are in a position to impact human rights.[13] In this regard, the operationalization dimension to the implementation of IHRL will remain central to the future agenda of the branch. As major actors within and across states, the operationalization of human rights by businesses continues to be critical. In addition, operationalization of IHRL within the different levels of the state reflects an underexamined part of the implementation agenda. This includes ministries beyond the foreign office and the ministry of justice,[14] as well as at the local and the municipal levels. The operationalization of IHRL also needs to be considered in relation to the agendas of social movements, and in dealing with global challenges. This is not with the view to expand or change IHRL, but to articulate the value added of including IHRL within wider approaches to social and political change. The multidisciplinary, multilevel, mainstreaming, and operationalization of human rights all introduce new layers of complexity, particularly from a management perspective, as the international human rights system now constitutes a complex and diffuse regime. The development of synergies within the system therefore reflects a key dimension that will impact the future of IHRL.

By focusing on implementation (particularly operationalization), the international human rights system is also able to respond to another sustained critique, which is the claim that it overly focuses on courts. The operationalization of human rights requires a plurality of methods and approaches. Such pluralization thereby relieves the pressure and expectation placed on courts to be one of the main or only means of realizing human rights. Recognition of the place of courts within a plural methodology may then create space for the revaluing of the critical role that courts have played in the development of IHRL and the delivery of justice for individuals and groups. This point is often missed in scholarship and in practice with courts, often depicted negatively due to the absence or the inadequacy of other structures. Since judicial approaches to human rights typically work best when part of wider strategies, the pluralization of methods should enhance the effectiveness of courts.[15]

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12 *See* Cesar Rodriguez-Garavito, *The Future of Human Rights: From Gatekeeping to Symbiosis*, 20 SUR – INT'L J. HUM. RTS. 499, 502 (2014) (noting that "important topics such as climate change, which profoundly affect human rights . . . cannot be understood or acted upon without the participation of professionals from other fields.").

13 This is the approach adopted, for example, by the EU. *EU Action Plan on Human Rights and Democracy*, COUNCIL OF THE EUROPEAN UNION 31–36 (Dec. 2015), https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf [https://perma.cc/6GYX-RWMV] (archived Sept. 16, 2019).

14 *See* Hunt, *supra* note 3, 511–12 (discussing the use of various specialized agencies "brought into relationship with the United Nations").

15 *See* Bennoune, *supra* note 10; *see also* James T. Gathii, *Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79 LAW & CONTEMP. PROBS. 37, 60–61 (2019) (noting

II. THE FUTURE OF IHRL I: EFFECTIVELY DIAGNOSING AND ADDRESSING THE MULTILAYERED THREATS TO HUMAN RIGHTS

Responding to recent lectures on the future of IHRL by Philip Alston, the UN Special Rapporteur on Extreme Poverty and Human Rights, and Zeid Ra'ad Al Hussein, who was, at the time, the UN High Commissioner for Human Rights, John Tasioulas has pointed to "a startling omission."[16] He argues that both authors examine "external" threats to human rights, such as populism, but neither "contemplates the possibility that some of the most serious pressures on IHRL are internally generated, pressures arising from serious defects in the elaboration of human rights law and the self-understanding of its practitioners and scholars."[17] He charges the internally generated pressures within IHRL with the "breeding [of] scepticism about human rights law that may end up becoming, by a foreseeable if not justifiable process of blowback, scepticism about human rights morality itself."[18] Tasioulas therefore attributes significant responsibility for the current pushback and backlash on human rights to IHRL and its institutions rather than external factors.[19]

This Part of the Article examines the claim that the pushback on human rights is "self-generated" by showing how claims of self-generation can often be used as a distraction technique and overlook the current critical approaches to IHRL from within. This Part also suggests that such an apportionment of responsibility for "blowback" on human rights risks diverting attention away from the complex and multifactorial reasons for pushback. It suggests that rather than seeking to attribute responsibility for pushback to "internal" or "external" sources, the international human rights system needs to prioritize the development of effective ways in which to address the range and complexity of challenges the system is facing.

A. *Scrutinizing the Validity of Claims that Backlash is Self-Generated*

Claims that IHRL self-generates pushback and backlash require close scrutiny, as states and other actors have sometimes levied criticisms at IHRL and its institutions, not because of an intrinsic failing, but as a vehicle for the pursuit of a particular set of domestic

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that more than just litigation is necessary and a goal of compliance should only be "one of a broader set of strategies in the effort to democratize authoritarian societies").

16 *See* Prince Zeid Ra'ad Al Hussein, U.N. High Comm'r for Human Rights, Speech at the BIICL Annual Grotius Lecture: Is International Human Rights Law Under Threat? (July 26, 2017) (transcript available at the British Institute of International and Comparative Law); Tasioulas, *supra* note 7 (discussing Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 1–15 (2017)).

17 *See* Tasioulas, *supra* note 7; Ra'ad Al Hussein, *supra* note 16.

18 *See* Tasioulas, *supra* note 7; Ra'ad Al Hussein, *supra* note 16.

19 *See* Tasioulas, *supra* note 7; Ra'ad Al Hussein, *supra* note 16.

politics. For example, Sonia Cardenas shows how norm collision can materialize in different sociopolitical contexts raising the potential for pushback, and even backlash, against human rights.[20] States can build counterdiscourse[21] by critiquing the international human rights system, IHRL or its institutions, claiming that they are overreaching, unduly interfering in domestic affairs, or adopting overly evolutive interpretations of the law.[22] Such an approach presents the system, including IHRL and its institutions, as "part of the problem," whereas it may actually be a guise or vehicle for the promotion of a particular political position.

Scholars have used European Court of Human Rights decisions on prisoner voting to make this point.[23] Following the then Prime Minister David Cameron's claim that prison voting made him feel "physically ill,"[24] commentators questioned whether these cases are representative of the European Court overreaching itself, particularly as it appeared to lead to "inter-state contagion" with Russia following suit.[25] Zoe Jay challenges such an account.[26] She observes that the United Kingdom has a high level of compliance with the decisions of the European Court, which indicates that it is not generally opposed to the court. However, the British government tends to push back against cases that touch on issues that are deemed controversial domestically. She argues that this is not because the court has overreached itself but because certain decisions conflict with a domestic narrative of human rights that is different from the European Court's.[27] She argues that cases, such as those on prisoner voting and deportation, fall into this category because they involve "criminals and terrorists."[28] This means that the cases result in pushback not because of the position of the European Court *per se* but because of a domestic political view based

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20 *See generally* SONIA CARDENAS, CONFLICT AND COMPLIANCE: STATE RESPONSES TO INTERNATIONAL HUMAN RIGHTS PRESSURE (Cambridge Univ. Press 2007).

21 This term is taken from Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, *in* THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 5 (Thomas Risse et al. eds., Cambridge Univ. Press 2013).

22 *See* Campbell McLachlan, *The Assault on International Adjudication and the Limits of Withdrawal*, 68 INT'L & COMP. L.Q. 499, 513–16 (2019) (discussing and critiquing these arguments).

23 Zoe Jay, *Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights*, 19 BRIT. J. POL. & INT'L REL. (2017).

24 Alex Aldridge, *Can "Physically Ill" David Cameron Find a Cure for His European Allergy?*, GUARDIAN, May 6, 2011, https://www.theguardian.com/law/2011/may/06/david-cameron-european-law-allergy [https://perma.cc/4CB6-NKHF] (archived Sept. 4, 2019).

25 Philip Leach & Alice Donald, *Russia Defies Strasbourg: Is Contagion Spreading?*, EJIL TALK! (Dec. 19, 2015), https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/ [https://perma.cc/KEP8-B7A8] (archived Sept. 4, 2019).

26 Jay, *supra* note 23.

27 *Id.*

28 *Id.*; *see also* Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEORETICAL INQUIRIES L. 411, 418 (2013).

on parliamentary sovereignty and a claim that a "foreign" court does not understand "British values."[29]

However, these critiques of IHRL and its institutions, and the wider system, can shift.[30] This is possible because the critiques are rooted in political positions which can change and are also not necessarily representative of all political positions or parts of the state. For example, Alice Donald has pointed out that the British government has so far failed to implement the European Court of Human Rights' decision on prisoner voting. However, a joint committee of both houses of parliament drafted a bill on the voting eligibility of prisoners as a means of implementing the decision.[31] This both underscores that states are not monoliths and that where the composition of the part of the state opposed to a decision by an international court changes, the position on implementation may also change. In this regard, backlash against the international rule of law often results from objections to legal interpretations (even well established and previously uncontroversial) that do not fit with contemporary, local politics and the self-identity of a state rather than jurisprudence that might be framed as pushing at the edges.

This is particularly important as while IHRL and its institutions require some level of sensitivity, a balance also has to be struck in how far they should—and are willing—to adapt to political pushback and backlash or claims that they have "'caused" the backlash, as this may be tied to the politics of the day.[32] Moreover, pushback and backlash can also sharpen and trigger a countermovement by other states and nonstate actors in support of the international rule of law. This can include the emergence of new supporters and leaders of international law within states and beyond. For example, Steven Jensen points to moments in history in which smaller states have turned the course of history and garnered support for the international rule of law in the face of challenge.[33] This connects to a recent assessment of the future of the International Criminal Court in which Mark Kersten asks whether the court has gone too far towards practicalities in order to

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29 *Id.*

30 Alice Donald, *Tackling Non-Implementation in the Strasbourg System: The Art of the Possible?*, EJIL TALK! (Apr. 28, 2017), https://www.ejiltalk.org/tackling-non-implementation-in-the-strasbourg-system-the-art-of-the-possible/ [https://perma.cc/KV76-XY3B] (archived Sept. 4, 2019); *see also* Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter*, 25 EUR. J. INT'L L. 205 (2014); Courtney Hillbrecht, *The Power of Human Rights Tribunals: Compliance with The European Court of Human Rights and Domestic Policy Change*, 20 EUR. J. INT'L REL. 1100 (2014).

31 *See* Donald, *supra* note 30.

32 *See* KAREN J. ALTER, NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 335–66 (Princeton Univ. Press 2014); *see also* Langford, *supra* note 5, at 79.

33 STEVEN L.B. JENSEN, THE MAKING OF INTERNATIONAL LAW: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES (Cambridge Univ. Press 2016); *see also* ANN MARIE CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS (Princeton Univ. Press 2001).

illustrate its impact and effectiveness and in doing so, has lost some of the aspiration that was at the heart of its establishment.[34] Accordingly, claims that "internal pressures" are the cause (fully, partially, or at all) of backlash require critical assessment and location with more complex and nuanced readings of the relationship between the local and the international at any moment in time.[35]

B. *Recognizing the Complexity and Multifactorial Nature of Backlash*

Claims that some of the most serious pressures to IHRL are self-generated risks underplaying the complexity and multifactorial nature of the current backlash on international law and global governance, of which IHRL and its institutions are a part.[36] It also fails to engage with the importance of changes or pressures on "'enabling' environments,"[37] or what Thomas Risse and Stephen Ropp refer to as "scope conditions" for the realization with human rights.[38]

Risse and Ropp identify five scope conditions that impact the realizability of human rights. First, they observe that "regime type [democratic or authoritarian] seems to matter."[39] This not only applies with regard to the regime type generally but also in relation to the existence and role of social mechanisms, including courts ("domestic, foreign or international") that "would bring democracies back into compliance," as well as "mechanisms of persuasion, naming and shaming [which] are particularly effective with regard to stable democratic regimes."[40] They identify the second scope condition as whether states have "the kinds of efficient and effective administrative structures and institutions that would allow them to enforce and implement central decisions."[41] They frame the third condition as

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34 Mark Kersten, *Whither the Aspirational ICC, Welcome the "Practical" Court?*, EJIL TALK! (May 22, 2019), https://www.ejiltalk.org/whither-the-aspirational-icc-welcome-the-practical-court/ [https://perma.cc/R6TX-BD48] (archived Sept. 4, 2019).

35 *See* THE HUMAN RIGHTS PARADOX: HUMAN RIGHTS AND ITS DISCONTENTS 3–28 (Stern et al. eds., Univ. of Wisconsin Press 2014).

36 *See* THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? (Heike Krieger et al. eds., Oxford Univ Press 2019); Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRACT. 1, 1–15 (2017); Douglas Guilfoyle, *The Future of International Law in an Authoritarian World*, EJIL TALK! (June 3, 2019), https://www.ejiltalk.org/the-future-of-international-law-in-an-authoritarian-world/ [https://perma.cc/D5RE-HGLF] (archived Sept. 4, 2019) (outlining some critiques of international law); Madsen, Cebulak & Wiebusch, *supra* note 5, at 198 (discussing that commentators often explain backlash "en bloc" rather than unpacking the different types of "pushback" and "backlash"); Ra'ad Al Hussein, *supra* note 16; McLachlan, *supra* note 22, at 499.

37 Thomas et al., *supra* note 1, at 12.

38 *See* Risse & Ropp, *supra* note 21, at 5; *see also* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 621–703 (2004); CARDENAS, *supra* note 20.

39 *See* Risse & Ropp, *supra* note 21, at 16.

40 *See id.* at 17.

41 *See id.*

whether "rule implementation" is centralized or decentralized given that states are not "unitary actors."[42] They characterize the fourth scope condition as material power, and the fifth as social pressure.[43] They suggest that the last two scope conditions can "relate to any given rule target's vulnerability to external (as well as domestic) pressure."[44] Bruce Bueno de Mesquita *et al*. similarly emphasize the role of scope conditions in the realization of human rights, particularly by asking "what aspects of democracy are most consequential in improving a state's human rights record."[45] They find that "full" democracy, accountability, and "political participation at the level of multiparty competition" are most central to the delivery of human rights.[46]

In their lectures, Alston and Zeid Ra'ad Al Hussein not only focus on the significant shifts that are occurring globally in the scope conditions identified by Risse and Ropp and Bueno de Mesquita *et al.*, but they also identify other structural, political, and social factors that are combining to create serious challenges for human rights, such as populism, poverty, and inequality.[47] These sit together with other factors, such as the role of multinational companies, and enduring and emerging global challenges, such as climate change and artificial intelligence, all of which have serious implications for the enjoyment of human rights.

In such a context, narrowing or overweighting responsibility for backlash against human rights to one source—whether "internal" or "external"—overlooks the scale, complexity, and multifactorial nature of pushback and backlash and its connectedness to wider structural, social, and political contexts. It suggests that blowback can be understood (and thus resolved) in a one-dimensional way. Yet, a range of actors take issue with the international human rights system, including IHRL, for different reasons and at different points in time.[48] Some may reject the system entirely; others may take issue with a particular aspect, such as a specific decision, and generalize a position against the system, an institution, or IHRL from there; and still others may be supportive of some aspects of the system but not others.[49] Accordingly, the priority for the future of IHRL and the international human rights system more generally, is to assess how to effectively address the pushback in all its complexity.

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42 *See id.* at 18.

43 *See id.* at 20.

44 *See id.*

45 Bruce Bueno de Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 INT'L STUD. Q. 439, 439 (2005).

46 *See id.*

47 Alston, *supra* note 36; Ra'ad Al Hussein, *supra* note 16.

48 *See* Langford, *supra* note 5 (for a detailed overview of different critiques, including from different disciplinary perspectives).

49 *See* Madsen, Cebulak & Wiebusch, *supra* note 5, at 197 (noting that backlash is often used as a universal term, whereas there is a difference between pushback and backlash).

C. *Recognizing Human Rights as a Self-Reflective Field*

The preceding sections have demonstrated the range and complexity of the challenges facing the international human rights system. In such contexts, critical assessments of the threats to human rights and how to effectively respond to them are needed in scholarship and practice.[50] However, some commentators, characterize human rights scholars and practitioners as displaying an "uncritical enthusiasm"[51] for legalization and judicialization. This critique can be interpreted on two levels. First, it carries negative connotations about legalization and judicialization of human rights that risk diminishing the critical achievement of both acts in transforming human rights from "interests" to rights that can be claimed.[52] Second, it suggests that human rights scholarship lacks the critical edge necessary to assess how it should adapt and respond, including through self-reflection and without being reactive, to significant and complex changes in society that are presenting serious risks to human rights.

In the earlier phases of the international human rights system—as a staged work in progress—the focus was on standard setting and the building of institutions, many of which took the form of (quasi-) judicial bodies.[53] At least at the international level, there was a leaning towards law building and ex post-*facto* accountability through the litigation of human rights claims.[54] However, this phase should not be interpreted as a fetishization or monopolization process by law but rather as a critical achievement in the categorization of human interests into legally claimable rights.[55] As Hurst Hannum recognizes in his recent monograph, "the notion that all people in the world possess certain rights – which their own government is obliged to protect – was nothing short of revolutionary."[56] This point is often overlooked in critiques of IHRL (which for some are in any case, "overstated,"[57]) which fail to properly engage with the impact the conferring of legal rights and their protection through legal processes

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50 *See* Bennoune, *supra* note 10.

51 *See* Tasioulas, *supra* note 7.

52 Hannah Hilligoss, Filippo A. Raso & Vivek Krishnamurthy, *It's not enough for AI to be "ethical"; it must also be "rights respecting"*, MEDIUM (Oct. 9, 2018), https://medium.com/berkman-klein-center/its-not-enough-for-ai-to-be-ethical-it-must-also-be-rights-respecting-b87f7e215b97 [https://perma.cc/M7HD-N83V] (archived Sept. 4, 2019) (for a contemporary example of the role of international human rights law in regulating artificial intelligence, noting that noted that "the human rights regime provides the clarity and certainty of law. It transforms voluntary promises of ethical behavior into mandatory requirements for compliance with an established body of law.").

53 *See* Costas Douzinas, *The Paradoxes of Human Rights*, 20 CONSTELLATIONS 51, 57 (2013) (arguing that "[r]ights allow us to express our needs in language by formulating them as a demand").

54 *Id.*

55 *Id.* at 64.

56 HANNUM, *supra* note 8, at 1; *see also,* Bennoune, *supra* note 10.

57 *Id.*

has meant, symbolically and practically, for many people whose rights have been infringed.[58] The achievement and importance of the legalization of human rights should therefore not be underplayed as their conversion from ethical principles or human interests to legal rights that can be claimed was—and continues to be—groundbreaking and transformative across the globe.

The question arises, however,whether appreciation of the role of legalization necessarily equates to a lack of critical thinking about the law and judicial institutions. In the past, human rights scholarship has been criticized for splitting between high optimism and significant criticism,[59] rather than taking a more nuanced approach to the field.[60]

However, the sustainability of claims that human rights scholarship and practice lacks critical pathways can now be questioned. While not necessarily labelled as critical scholarship on human rights, the growth in literature and policy analysis on the effectiveness, implementation, and mainstreaming of human rights displays a critical and reflective edge, while still committing to the normativity of human rights and the international human rights system.[61] This literature is multidisciplinary and increasingly interdisciplinary, particularly with international legal scholarship drawing on the work of other disciplines, such as political science, sociology, and international relations.[62] It represents a varied and layered body of critical work that examines the factors that account for the (in)effectiveness and (non)implementation of human rights, as well as the relationship of human rights to wider social, political, and economic contexts.[63]

Moreover, within international legal scholarship and practice, while legalization and judicialization have long been recognized as a critical component to realizing human rights, they have equally been understood as insufficient on their own.[64] This is because the realization of human rights requires a much more complex and multifactorial approach. This accounts for the emphasis in scholarship and practice on creative and dynamic ways in which to realize human rights, with a greater emphasis on a plurality of means to secure the implementation, mainstreaming, acculturation, and orchestration of

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58 Gathii, *supra* note 15, at 46.

59 HUMAN RIGHTS FUTURES 1–3 (Stephen Hopgood et al. eds., Cambridge Univ. Press 2017).

60 Fagan, *supra* note 6, at 285.

61 *See, e.g.*, HILLEBRECHT, *supra* note 1; Hunt, *supra* note 3.

62 *See, e.g.*, HILLEBRECHT, *supra* note 1; Hunt, *supra* note 3.

63 *See, e.g.*, HILLEBRECHT, *supra* note 1; Hunt, *supra* note 3.

64 *See* Gathii, *supra* note 15, at 37 (discussing the role of courts as an important partner and catalyst); *see also* Bennoune, *supra* note 10 (manuscript at 18) ("Human rights scholars and advocates who are not lawyers sometimes downplay the importance of law and legal guarantees which make up one set of tools–and sometimes a critical one–in the human rights toolbox.").

human rights.[65] This includes recent developments in the Human Rights Council to pay more attention to prevention, which has traditionally been neglected in favor of a focus on accountability.[66] Indeed, reflecting on Philip Alston's lecture, Ron Dudai observes that,

> there is always a need for nuanced criticism among human rights advocates; while he distances himself from it, Alston's piece is itself, for me, actually a great example of critical human rights scholarship: committed to the principles but ready to engage in self-critique, questioning some long-held beliefs . . . but doing it as a form of "insider critique" versed in the art and craft of human rights practice.[67]

This is the type of (self-)reflective scholarship that is increasingly evident in human rights scholarship and will be critical to assessments of the threats to human rights and the ways in which the international human rights system, with IHRL as a part, can effectively respond and adapt to changing local, national, and global politics and power bases. A key priority therefore for scholarship and practice is to intensify critical studies into how to address the multifactorial nature of pushback on human rights.

III. THE FUTURE OF IHRL II: PRIORITIZING THE INTERPRETATION AND ADAPTATION OF IHRL TO PARTICULAR GROUPS AND NEW CONTEXTS

Beyond diagnosing and addressing pushback on the international human rights system, a further priority for IHRL is the interpretation and articulation of how IHRL applies to particular groups and to new contexts. As discussed in this part of the Article, this is critical if IHRL is to be effective and resilient in a changing world. This is an issue which has not received sufficient attention.

In the last decade, there has been a distinct cautionary approach to the adoption of new legal instruments. The reasons for caution in the pursuit of new treaties vary but are often based on principled, political, or pragmatic readings of what is possible.[68] Some commentators argue that, in the current climate, attempts to develop a new law are not a good use of time and resources as they are unlikely

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65 *See* Tom Pegram, *Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries*, 21 EUR. J. INT'L REL. 595, 595 (2015); Goodman & Jinks, *supra* note 38, at 625–26; HILLEBRECHT, *supra* note 1; Hunt, *supra* note 3.

66 *See* Human Rights Council Res. 39/7, U.N. Doc. A/HRC/39/L.8, at 1–2 (Sept. 21, 2018).

67 Ron Dudai, *Human Rights in the Populist Era: Mourn then (Re)Organize*, 9 J. HUM. RTS. PRAC. 16, 20 (2017).

68 *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 889–91 (1998) (finding that a multitude of pragmatic reasons limited the development of new norms).

to come to fruition.[69] Others argue that treaties should not be pursued in political contexts in which there is a risk that states may regress rather than progress existing international law, including by rolling back on existing obligations.[70] Moreover, as already discussed, IHRL has moved much more towards compliance, implementation, and mainstreaming of human rights.[71]

While these reflect practical arguments against the pursuit of new legal instruments, IHRL still needs to be capable of development, like any branch of law. This is a particular need with regard to articulating how existing law applies to groups who are not able to enjoy their rights effectively in practice and to new contexts or global challenges, such as climate change or artificial intelligence. However, arguments against the creation of new instruments, particularly when framed as the "overextension" or "overexpansion" of IHRL to address "every social problem"[72] can have the effect of stymying efforts to articulate how IHRL applies to these groups or contexts. This potentially creates a rights-protection gap. In this regard, this Article suggests that a distinction needs to be made between the creation of entirely new legal rights and the implementation of existing rights, through the articulation of how they apply to particular groups or new contexts. While such articulation may require the adoption of new instruments, the exercise is different in nature from the creation of new rights. The ability to articulate how IHRL applies to particular groups and new contexts is a critical dimension to the future of IHRL, if it is to offer effective protection and adapt to a changing world. However, it has not received sufficient attention as a particular category. Accordingly, a key priority for the future of IHRL is to distinguish between the normative development of IHRL and gap-filling exercises, requiring the articulation, codification, application, or implementation of an existing norm or the creation of an institution to support such implementation.[73]

For example, for particular groups, the articulation of how IHRL applies is important because while these groups are already protected under IHRL, they may not be able to enjoy their rights in practice.[74] The exercise is therefore about specifying how existing IHRL applies to enhance compliance by duty bearers and the ability to make rights claims. Very often, the adoption of instruments in relation to the rights of particular groups are mainly declaratory and explanatory of how

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69 Jane McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 INT'L J. REFUGEE L. 2, 8 (2011).

70 *Id.* at 25.

71 Press Release, Secretary-General Toasts to Era of Commitment and Implementation, U.N. Press Release SG/SM/8379 (Sept. 12, 2002).

72 *See* HANNUM, *supra* note 8.

73 *See* Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 634–39 (1986) (writing that many regimes are appealing enough but simply need to be implemented).

74 *Id.*

existing rights apply to particular groups,[75] such as the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, the latter of which Frederic Megret typologizes as an instrument which affirms, reformulates, extends, and innovates in relation to existing rights.[76] As a live debate, the UN Open Ended Working Group on Ageing is currently examining how to effectively protect the rights of older persons.[77] A part of this discussion is whether a treaty on the rights of older persons is needed.[78] While this has been dismissed by some, including human rights actors, as unnecessary, the argument has also been made that a treaty would enable the articulation of how existing IHRL applies to older persons, in order to affirm their existing rights, and would provide monitoring mechanisms that would be attuned to the rights of a group whose experience of human rights abuse is often overlooked by traditional human rights groups.[79] Advocacy for a new treaty should not necessarily be read as an attempt to create "new" rights or extend IHRL further, but it can rather be seen as an attempt to articulate the application of IHRL to a particular group of people whose enjoyment of their existing rights is often at risk.

Making clear distinctions between the creation of new human rights and the articulation and adaptation of existing norms and unpacking critiques of overextension is therefore critical if IHRL is to effectively respond to protection gaps and new circumstances. On the one hand, in some instances, attempts to frame an issue as a human rights issue may be instrumental with the aim of benefiting from the moral authority associated with human rights, as well as providing the means to access national, regional, and international human rights mechanisms.[80] On the other hand, they can reflect critiques of taking a human rights–based approach to a particular social or political context or global challenge, such as poverty, climate change, or artificial intelligence.[81] Instrumental attempts to expand human

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75 *Id.*

76 Frederic Megret, *The Disabilities Convention: Human Rights of Persons with Disabilities or a Disabilities Convention?*, 30 HUM. RTS. Q. 494, 516 (2008).

77 *See* U.N. Programme on Ageing, *Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons*, DEP'T ECON. & SOC. AFF., https//social.un.org/ageing-working-group/ (last visited Oct. 5, 2019) [https://perma.cc/BCL8-L5JZ] (archived Sept. 4, 2019).

78 *See generally* G.A. Res. 67/139, Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons, U.N. Doc. A/RES/67/139 (Feb. 13, 2013) (calling for an improved system to protect the rights of the elderly).

79 Marijke De Pauw, *Towards a New UN Convention on the Rights of Older Persons*, BERKELEY J. INT'L L. BLOG (May 4, 2015), http://berkeleytravaux.com/toward-new-un-convention-rights-older-persons/ [https://perma.cc/93WV-VHDT] (archived Sept. 4, 2019).

80 *See* Francesco Francioni, *International Human Rights in an Environmental Horizon*, 21 EUR. J. INT'L L. 41, 44–45 (2010) (advocating for a human rights approach to environmental crises).

81 *See* HANNUM, *supra* note 8.

rights and IHRL can, of course, be resisted on the grounds that they take the branch outside of its intended bounds. Dudai presents this as a tension between "remaining relevant and aligned with the agendas of contemporary social movements" and avoiding engaging in a "superficial manner" and "creating more and more 'new' human rights," as this can contribute to "diluting the human rights label."[82]

However, concerns about instrumentalism, which can be addressed, should not be overstated as it is critical for the future of IHRL that it is agile and adaptable enough to be able to address new global challenges. It is also critical that concerns about expansion do not become a way in which to create obstacles or act as a gatekeeper to the recognition of rights-claims by particular groups or in particular contexts. In this regard, the application of IHRL to a particular issue does not reflect an attempt to change IHRL radically; use IHRL to fully "solve" the underlying social or political issue on its own; apply IHRL to contexts which do not involve risk to human rights; or redefine human rights in order to apply to the context. As Bielefeldt points out, human rights "have a *limited scope* and do not cover the entire spectrum of what makes up decent behavior and good and meaningful life . . . human rights are not an all-encompassing ethical code or quasi-religious comprehensive doctrine" and attempts to frame them in this way would "not only be politically stupid; it would also amount to overstating the claims of human rights."[83] Indeed, for IHRL such a reading would clearly set it up to fail as it—like all law—will never be in the position to singularly resolve complex social, political, and global challenges as they require multidisciplinary approaches.

Rather, where IHRL is called upon to articulate how it applies to a particular group or context, it is typically because human rights are at risk, and it is therefore within the scope of IHRL to respond. The form this response takes should align to the IHRL framework and its particular methodology.[84] In circumstances where human rights as defined under IHRL are at risk, it would seem perverse to argue that IHRL could not be applied because human rights are set within a wider social or political context; in reality, they always are. To find otherwise could result in gaps in the coverage of IHRL simply because a new context, such as artificial intelligence, emerges that was not envisaged at the time of the adoption of the Universal Declaration of Human Rights. Thus, the question is not whether IHRL applies to particular groups or in particular contexts. Rather, the question is whether it is sufficient to apply IHRL on a case-by-case basis using the existing law and mechanisms or whether a dedicated initiative is required to set standards, even if only declaratory, in order to provide guidance on how IHRL applies in particular circumstances to enhance compliance and

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82 Dudai, *supra* note 67, at 18.

83 *See* HANNUM *supra* note 8, at 8–9.

84 *See* Lorna McGregor, Daragh Murray & Vivian Ng, *International Human Rights Law as a Framework for Algorithmic Accountability*, 68 INT'L & COMP. L.Q. 309, 324–35 (2019) (arguing that IRHL offers an appropriate framework).

implementation. In this regard, if IHRL is to develop in an effective and resilient manner, much greater attention and space is needed to provide guidance on how IHRL applies to particular groups whose rights are at risk and to new contexts.

Such an exercise would entail an interpretation and articulation of how the existing set of legally defined and internationally agreed human rights, with developed tests to interpret when they have been infringed, apply to a particular group or in a particular context.[85] It would also involve an interpretation and articulation of how the existing obligations of states and responsibilities of businesses to prevent human rights being put at risk in the first place; the establishment of monitoring, oversight, and accountability processes to identify and act where risks arise; and access to justice, where allegations are made of human rights violations.[86] The exercise would therefore not be about changing the nature of IHRL but rather using its particular, but not exclusive, methodology for the promotion and protection of human rights, where rights are at risk.

Indeed, this is the point that Alston makes in his lecture when arguing that the international human rights system has not given sufficient priority to economic and social rights as a particular contribution to dealing with poverty.[87] He is clear that his point is not "moving the focus [of the international human rights system] to the blight of poverty, or to denials of dignity, or even to the need for more resources for development," but to use the power of the system to address and contribute to the promotion and protection of economic and social rights through what he calls "recognition, institutionalization and accountability."[88] He is thus making the case that as rights are impacted, the international human rights system has a role to play. However, he is locating this role within a wider set of solutions rather than claiming that the international human rights system, or IHRL, is sufficient or should change or widen beyond its established way of working.

As with the cautionary approach to new law and the focus on implementation, by reframing claims of expansion as application, articulation, and mainstreaming of existing IHRL to existing rights holders and duty bearers, the claim of overexpansion becomes harder to sustain on the scale often presented.[89] This characterization much more closely reflects the practice in which there are very few attempts to create new rights but rather the focus is often on clarification of the normative scope and contours of a right and whether this evolves over time. For example, much of the focus of the guidelines on prison standards and detention, such as the recently updated UN Standard Minimum Rules on the Treatment of Prisoners (renamed the Mandela

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85 *See id.* at 324–35.

86 *See id.*

87 *See* Alston, *supra* note 36.

88 *See id.*

89 *See generally* ALISON BRYSK, THE FUTURE OF HUMAN RIGHTS (2018).

Rules), do not reflect efforts to create new rights but to rewrite certain rules in order to ensure that they reflect current international law.[90] Similarly, the UN Special Rapporteur on Torture produced reports aimed at understanding the definition of solitary confinement in order to articulate when the practice amounts to a violation of the prohibition of torture.[91]

Moreover, where debates are explicitly referred to as entailing new rights, questions still arise as to whether this is the appropriate presentation or whether the issue is actually one of norm articulation. This is a particularly live debate with regard to artificial intelligence, with some actors arguing that new rights need to be created, such as a right to encryption or human decision-making, whereas other actors suggest that these issues can be dealt with by using the existing human rights framework. For example, the argument is made that, at least given current technological capabilities, due process would require a human decision maker because algorithms cannot make individualized decisions but rely on group-based correlations, therefore there is no need for a new right to human decision-making.[92] Similarly, the Vatican recently criticized a report by the UN Special Rapporteur on Freedom of Religion or Belief on the grounds that he has created a new human right to freedom from religion through conscientious objection.[93] However, the Special Rapporteur argued that while not expressly stated, a right to conscientious objection constitutes a logical deduction from the right to freedom of religion, on the basis of noncoercion, and therefore cannot be considered mission creep.[94]

This recasting is important as it enables arguments to create new rights to be seen in a more exceptional light. This allows for an assessment of whether enduring and emerging challenges to human rights reveal particular gaps within IHRL and whether they need to be filled. In this regard, Gillian MacNaughton, for example, argues in favor of a right to equality.[95] She critiques the international human rights community as addressing horizontal inequalities but not vertical inequalities of "income, wealth and social outcome either between or within countries."[96] She quotes Philip Alston in his position as Special

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90 U.N. Office on Drugs & Crime, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/C.3/70/L.3 (Sept. 29, 2015), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf [https://perma.cc/HM4A-K4NP] (archived Sept. 17, 2019).

91 U.N. Secretary-General, *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 19, 30, U.N. Doc. A/HRC/66/268 (Aug. 5, 2011).

92 Eyal Benvenisti, 'Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?' 29 *European Journal of International Law* 9 (2018).

93 U.N. Secretary-General, *Interim Rep. of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 15, U.N. Doc. A/HRC/40/58 (Aug. 5, 2011).

94 *Id.*

95 *See generally* MacNaughton, *supra* note 112.

96 *Id.* at 1054.

Rapporteur as arguing that "a human rights framework that does not address extreme inequality as one of the drivers of extreme poverty and as one of the reasons why over one quarter of humanity cannot properly enjoy human rights is doomed to fail."[97] However, she critiques him for treating "vertical inequalities as merely instrumentally related to human rights."[98] She suggests that "[i]n the absence of a recognised right to equality, that is economic and social equality, human rights scholars and practitioners rely upon other international human rights standards that could indirectly reduce vertical inequalities."[99] This is both a substantive and, as discussed below, a methodological question about what the content of IHRL should be, and how human rights actors understand and work on the conditions in which the (non)realization of rights are set.[100]

While the current trend tends to be against the creation of new instruments, for a range of principled and practical reasons, gaps of different types will still open up. IHRL continues to be a work in progress and one that has to evolve with the context in which it applies, which includes new forms of challenges in which human rights are put at risk, and new power bases beyond the original state focus. In this regard, IHRL needs to be open to the possibility of gaps emerging that may need to be filled rather than assume a static position. This is easier to do in contexts in which IHRL is not presented as engaged in endless expansion but rather in articulation and application of existing law to contexts in which human rights are at risk.

IV. THE FUTURE OF IHRL III: OPERATIONALIZATION AND REVALUING LAW AND THE COURTS

Parts II and III of this Article have emphasized the importance of IHRL effectively responding to the challenges and threats to human rights as part of a wider, multidisciplinary approach to the promotion and protection of human rights. While this may sometimes entail new substantive or procedural law, where specific gaps in IHRL are identified, the priority for IHRL—and the international human rights system—remains implementation, particularly with regard to operationalization of IHRL, and adaptation to new contexts where rights are at risk as a means to increase its effectiveness. This final Part of the Article turns to the methods and approaches needed to achieve this objective.

Some scholars continue to argue that the international human rights movement over-relies on law and (quasi-)judicial bodies.[101] As

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97 *Id.*

98 *Id.*

99 *Id.*

100 *See infra* Part IV.

101 *See* Tasioulas, *supra* note 7 (identifying the flaws of the current international human rights movement).

already argued in this Article, in the earlier stages of the modern international human rights system, a greater emphasis may have been placed on standard setting and legal accountability in order to ensure that individuals could claim their rights.[102] However, as suggested throughout this Article, following the achievement of legalization and judicialization, there has been a shift towards implementation and adaptation as well as prevention, which necessarily requires a plurality of methods.[103] This Part will propose ways in which to further develop approaches to the implementation of human rights, particularly in terms of operationalization, including ways to address enduring and emerging challenges to human rights. In doing so, this Article suggests that through a focus on operationalization, the role of courts and (quasi-)judicial bodies can also be revalued as part of a pluralistic approach to human rights and IHRL.

A. *Implementation of Human Rights*

This Article suggests that the future of the international human rights system, of which IHRL is a part, lies with assessments of how it can most effectively contribute to the enduring and emerging challenges to human rights. This may seem an obvious point, but in practice is a complex task, particularly given the level of current threats to human rights. As with all law, IHRL offers a means and a contribution to addressing threats to human rights. However, the contribution of other disciplines is also critical, particularly where risks to human rights emanate from and take place within changes in scope and structural conditions in society or within the context of major enduring and emerging global challenges, such as inequality, poverty, climate change, and artificial intelligence.[104] While multidisciplinary and interdisciplinary approaches to human rights (and social and political challenges and global problems) are often promoted, in practice, effective interdisciplinarity is still at an early stage of development.[105] More research and analysis are therefore needed to determine when and how interdisciplinarity is effectively achieved, both in terms of dealing with human rights issues in general and as part of wider social, political, and global problems.

Beyond interdisciplinarity, the effectiveness and implementation of human rights also relies on the operationalization of IHRL within the wider strategies, policies, and agendas of key actors that have the

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102 *See id.*

103 *See id.*

104 *See* Rodriguez-Garavito, *supra* note 12.

105 *See* Lisa L. Martin, *Against Compliance*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTRENATIONAL LAW & INTERNATIONAL RELATIONS: THE STATE OF THE ART 591, 606 (Jeffrey L. Dunoff et al. eds., 2013) (emphasizing the "risks associated with celebrating interdisciplinarity," which implicates a range of disciplines and professions including "interest groups, social groups and 'epistemic communities'").

power and ability to effect change.[106] Operationalization as an approach is particularly important as it can result in the integration of IHRL within the strategic and operational approaches of such actors and thus avoids IHRL becoming siloed or seen as an "add-on."[107] It also helps provide greater attention to prevention rather than ex post-*facto* accountability, which while critical, is insufficient to bring about significant change.[108]

The state remains the central duty bearer within IHRL, a point that can often be missed in discourse on human rights.[109] This is particularly the case when analyzing approaches to dealing with global challenges, such as artificial intelligence, where actors can focus on the role of major technology companies while overlooking that states continue to have obligations with regard to human rights, despite the power of businesses.[110] In this regard, the scholarship on and the practice of IHRL are increasingly recognizing that the state is not a monolith and for its obligations under IHRL to be effectively realized, attention needs to be paid to all levels of the state and their interrelationship.[111] As Paul Hunt has emphasized, this includes ministries beyond the foreign office and ministry of justice.[112] Thus, when states receive concluding observations from UN treaty bodies and recommendations through the Universal Periodic Review process, the relevant ministries responsible for the portfolios to which the recommendations relate need to take the lead on their implementation in coordination with other ministries.[113] While this may seem a straightforward point, ministries outside of the foreign office responsible for negotiating international law and representing the state in international human rights forums do not always have a strong record of integrating IHRL into their policies and practices, even where the state has ratified treaties that directly connect to their portfolios.[114] Moreover, states have only recently started to establish

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106 *See* Hunt, *supra* note 3, at 497 (noting that legal implementation is a necessary "but not sufficient" part of the "implementation spectrum." Additional dimensions are required for the "operationalization" of human rights).

107 McGregor, Murray & Ng, *supra* note 84, at 325 (discussing how international human rights law imposes specific obligations and expectations on States to protect human rights and operationalize that responsibility).

108 *See id.*

109 *See id.* at 311 (identifying the requirements international human rights law imposes on States for the prevention of human rights violations, including monitoring and oversight safeguards, accountability responsibilities, and provision of remedies for those impacted by violations).

110 *See id.* at 332.

111 *See id.*

112 *See* Hunt, *supra* note 3, at 505–06 (emphasizing that the Universal Periodic Review process engages a wide range of those responsible for civil and political rights and their implementation).

113 *See id.*

114 *See* Lorna McGregor, *Should Commitments to Implementation Factor into Elections to the Human Rights Council?*, EJIL TALK! (Nov. 8, 2016),

national implementation and follow-up mechanisms to coordinate the implementation of recommendations from international and regional human rights bodies.[115]

Operationalization of IHRL within states is not only a horizontal question but also relates to local and municipal governmental authorities. While this has been a central part of literature on the globalization of human rights and is recognized in practice,[116] it has only recently begun to receive attention in mainstream IHRL literature.[117] This is because local governments take many decisions that affect economic and social rights, such as education, housing, and social care. Economic and social rights are beginning to be prioritized, even in states such as the United Kingdom that have not incorporated the International Covenant on Economic, Social and Cultural Rights into domestic law.[118] In a recent resolution, the UN Human Rights Council underscored the importance of local government as a human rights actor, noting that, "given its proximity to people and being at the grass-roots level, one of the important functions of local government is to provide public services that address local needs and priorities related to the realization of human rights at the local level."[119] Oomen and Baumgartel also observe that "local authorities hold the potential to reinforce the legitimacy and effectiveness of international law."[120]

The importance of local and municipal governments as human rights actors is also becoming increasingly apparent in response to central global challenges, such as climate change and artificial intelligence. For example, employment of big data and new technologies by state agencies and the emergence of smart cities, pose significant risks to human rights.[121] Smart cities have been promoted as transformative to the administration of cities, particularly from an efficiency perspective.[122] However, as they rely on big data analytics and machine learning, they raise inherent threats to the right to privacy and can result in discrimination.[123] Depending on the decisions

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https://www.ejiltalk.org/should-commitments-to-implementation-factor-into-elections-to-the-human-rights-council/ [https://perma.cc/UP2J-HFAK] (archived Sept. 17, 2019).

115 *See id.*

116 *See* Human Rights Council, *Rep. of the Special Rapporteur in the Field of Cultural Rights*, ¶ 9–10, U.N. Doc. A/HRC/37/55 (Jan. 4, 2018).

117 *See* Barbara Oomen & Moritz Baumgärtel, *Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law*, 29 EUR. J. INT'L L. 607, 608 (2018).

118 *See* First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a New Human Rights Framework to Improve People's Lives* 46 (Dec. 10, 2018), https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf [https://perma.cc/5WGW-HLA6] (archived Sept. 17, 2019).

119 *See* Human Rights Council Res. 39/7, U.N. Doc. A/HRC/39/L.8 (Sept. 21, 2018).

120 *See* Oomen & Baumgärtel, *supra* note 117, at 625.

121 See Rob Kitchin, *The Realtimeness of Smart Cities*, 8 TECNOSCIENZA: ITALIAN J. SCI. & TECH. STUD. 19, 32–33 (2017).

122 *See id.* at 34.

123 *See* McGregor, Murray & Ng, *supra* note 84, at 316.

municipal actors make using the data collected, they potentially raise risks to other human rights, including access to housing and education.[124] These risks could be aggravated depending on how the technology and data are integrated. The types of technologies used in smart cities and how the data is amalgamated, shared, and accessed all vary. However, at its extreme, it could mean that an array of technology used in smart cities, from home sensors, to automated traffic lights, to live facial recognition technologies in public spaces, may then use and produce data that is fed into a central database, which itself may consist of integrated public and private sets, such as health, law enforcement, and education data.[125] Such scenarios raise questions of a "surveillance society" and the extent to which the insights gleaned from the smart city are shared with other parts of government or other actors, such as companies and other states.[126] The human rights impact of smart cities, the models for their governance and regulation, and the technology and data upon which they rely are only beginning to be researched and analyzed. These potential developments further emphasize the increasing centrality of municipal governments to human rights and the importance, therefore, of operationalizing IHRL within their agendas.

Indeed, the critical role of local government has recently been underscored in relation to the use and live testing of facial recognition technology in the United States. This technology connects to databases on individuals suspected of having committed crimes. However, it has been documented to be inaccurate, particularly in relation to nonwhite nonmales, as well as heightening the possibilities for human rights violations and changing the way in which agencies, such as the police, work with wider implications for democracy.[127] The American Civil Liberties Union and other human rights organizations have therefore challenged its use and live testing.[128] Local governments and city administrations have emerged as central human rights actors in this regard, with some US cities already introducing a moratorium on the use of facial recognition technology until the technical and human rights risks can be attended to.[129]

Accordingly, significant work still needs to be done on building capacity and institutional mechanisms to ensure that IHRL is operationalized across governments. This is not a small task in that

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124 *See id.* at 310.

125 *See* Kitchin, *supra* note 121, at 25.

126 *See* McGregor, Murray & Ng, *supra* note 84, at 331–32.

127 *See* Press Release, American Civil Liberties Union, Civil Rights Coalition Opposed Facial Recognition Technology in Letter to Detroit Board of Police Commissioners (Aug. 1, 2019) (on file with author) (stating that "facial recognition technology is racially biased and poses a grave threat to privacy").

128 *See id.*

129 *See* Kate Conger, Richard Fausset & Serge Kovaleski, *San Francisco Bans Facial Recognition Technology*, N.Y. TIMES, May 14, 2019, https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html [https://perma.cc/W77S-MDN4] (archived Sept. 17, 2019).

mainstreaming human rights creates significant demands on the promotion of norm literacy and clarification, if these new actors are to be able to navigate the intersections, tensions, and synergies among competing rights—and other—claims.

Beyond the state, a key priority continues to be the embedding of human rights within businesses in line with the UN Guiding Principles on Business and Human Rights and the proposed treaty.[130] The recent incidents involving large technology companies, such as the data access by Cambridge Analytica from Facebook and the role of Facebook in Myanmar, highlight the potential for major technology companies to impact human rights.[131] However, they also raise questions on the adequacy of the current IHRL framework where it does not impose direct obligations, but responsibilities on businesses.[132] Within this context, operationalizing human rights within the strategies and operations of businesses becomes even more important in order to ensure that risks to human rights are identified, and oversight and monitoring mechanisms are in place.[133] In this regard, while certain tools such as human rights impact assessments and social auditing of businesses to certify if they are "human rights compliant" have been developed, much more work needs to be done to fully develop the content and nature of businesses' responsibilities to respect human rights. Moreover, a particularly neglected issue in this regard relates to the right to an effective remedy for business-related harm to human rights. This is both in relation to the procedural obligation to provide access to a remedy as well as the substantive reparation required to repair harm. This is therefore an area that requires prioritization.[134]

Given that human rights issues arise within social and political contexts as well as in relation to global challenges, operationalization of human rights also needs to be thought of in relation to the social and political movements that work on these contexts and challenges. This connects with the concept of "orchestration," whereby an international organization "enlists and supports intermediary actors to address target actors [such as states] in pursuit of IGO governance goals."[135] While states and businesses are often the focus of operationalization

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130 *See* John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, ¶ 1–16, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

131 *See* Human Rights Council, Rep. of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc A/HRC/39/64, at 13–14 (Sept. 12, 2018); Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES, Mar. 19, 2018, https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html [https://perma.cc/CL42-A7YM] (archived Sept. 17, 2019).

132 *See* Rodriguez-Garavito, *supra* note 12.

133 *See* McGregor, Murray & Ng, *supra* note 84.

134 *See* G.A. Res 38/13, U.N. Doc. A/38/13 (July 6, 2018).

135 *See* Pegram, *supra* note 65.

due to their position as duty bearers, social movements as a third category for operationalization have rarely received attention in mainstream human rights scholarship, particularly legal scholarship, although their critical role in the orchestration of human rights has been the subject of scholarly attention.[136] Their role has two dimensions. First, it relates to conveying the relevance of IHRL to such contexts and challenges.[137] This is not a new point. Human rights scholars have long pointed to the importance and increased effectiveness of human rights and IHRL, particularly judicial decisions, when embedded within the agendas of wider social or political movements.[138] This was a key point made by James Cavallaro and Stephanie Brewer in their article on the implementation of decisions by the Inter-American Court of Human Rights.[139] Karima Bennoune also points out the "reality on the ground" that "[h]uman rights advocates in many places *are* working with, supporting and building social movements, and working to mobilize broader constituencies, sometimes at risk of their very lives."[140]

However, in the Global North, the issue has come to the forefront more recently in light of a number of popular movements that either do not appear to have considered human rights or have been hostile to them.[141] Dudai reflects that a,

> key factor in re-energizing human rights is to reconnect human rights with social movements struggles on the ground. Human rights—as slogans, values, methods, laws, and institutional machinery—are most effectively deployed not in the abstract but in conjunction with and in support of specific campaigns, and their role and function should be to assist in such concrete struggles.[142]

A shift, therefore, may be needed, not only in articulating the role that human rights and IHRL can play within social movements but also for human rights institutions and the human rights community to engage with a wider set of disciplines and in partnership develop integrated approaches to addressing these challenges. This may seem an obvious point, but IHRL and actors that primarily work on IHRL

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136 *See* BOUAVENTURA DE SOUSA & CESAR RODRIGUEZ-GARAVITO, LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Cambridge Univ. Press 2005).

137 *See* Langford, *supra* note 5, at 79; Rodriguez-Garavito, *supra* note 12, at 505.

138 *See id.*

139 *See* James Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770, 788 (2008).

140 *See* Bennoune, *supra* note 10.

141 *See* Douzinas, *supra* note 53, at 51 (noting that even in an era of human rights popularity, there has never been a more significant discrepancy between the global north and south in terms of life expectancy, wealth, and human rights violations).

142 Dudai, *supra* note 67, at 18.

have not always had a history of integrating into wider approaches.[143] It returns to the issue of scope conditions discussed in the first Part of this Article in that human rights issues are integrally connected with context and can be put at risk due to other social issues. However, they are unlikely to be resolved through IHRL alone, and thus the effective promotion and protection of human rights is also conditional on addressing wider scope conditions.

As already discussed, how this is done is not by claiming that human rights or IHRL offer the exclusive solution to a particular social issue or that IHRL should widen beyond what it can offer. Rather, the operationalization agenda focuses on embedding and demonstrating the particular role, methodology, and value of IHRL and a human rights–based approach more broadly as contributions to addressing wider social agendas. As Dudai suggests, "the lesson from this should perhaps be acceptance of the limitations of human rights in providing a full mobilizing vision, and recognition of a more modest role for human rights in serving as one component in other social/political visions."[144]

Second, existing literature often discusses the barriers to the international human rights movement for nonlawyers due to the dominance of lawyers in the field.[145] However, this issue is not uni-directional. The embedding of human rights and IHRL within social agendas requires the sensitization of legal actors as well as human rights actors (that often focus on the documentation of human rights violations and the employment of legal strategies to combat them) to the wider contexts in which human rights issues arise. This requires a recognition of how the approaches they undertake fit within a wider and multidisciplinary approach to human rights and to the social and political contexts concerned. This can require a significant shift in the methodology and approach of human rights organizations. In 2004, Kenneth Roth of Human Rights Watch reflected on the challenges for human rights organizations in addressing economic, social, and cultural rights.[146] His article was not normatively opposed to addressing these rights, but he reflected on how well the methodology of his organization, at the time "shaming and the generation of public pressure," fit with such rights.[147] This is an interesting reflection on methodology and the extent to which it shapes the ability to work on particular rights' issues or locate them within broader movements. More recently, in the wake of the Grenfell Tower fire in London, Andrew Fagan argued that a number of human rights organizations made calls for legal accountability but failed to call for the examination

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143 *See* Rodriguez-Garavito, *supra* note 12, at 501 (discussing the dominance of lawyers within the international human rights system).

144 Dudai, *supra* note 67, at 17.

145 *See* Rodriguez-Garavito, *supra* note 12, at 501.

146 *See* Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63 (2004).

147 *See id.* at 64.

of the wider social and political structures that may have enabled the situation in the first place.[148] This again points to the types of methodologies employed by human rights organizations and whether they are sufficient. Equally, while IHRL and certain legal mechanisms may be ill-suited to examine the structural conditions that led to a human rights violation,[149] greater efforts can be made by certain legally focused human rights actors to understand and situate themselves within wider approaches to addressing social and global challenges and to articulate the nature and limitations of their contribution within a wider matrix.[150] It also emphasizes again that IHRL does not offer all the solutions to the protection of human rights.[151] Thus, other approaches focused on structural conditions and the scope conditions discussed at the beginning of this Article will also be critical to whether human rights are protected, but may not be fully within the remit of IHRL specifically.[152]

However, like the operationalization agenda with states and businesses, challenges remain with demonstrating the relevance and value of human rights, IHRL, and a wider human rights–based approach to social agendas, including the role of international institutions and courts.[153] Significant work and theorizing are therefore required on how IHRL and the broader international human rights system can operate dynamically among the local, national, transnational, and international levels. A part of this challenge relates to demonstrating the particular contributions of human rights and IHRL to wider social movements. This can be challenging as actors involved in such movements may have preconceptions or only partial, narrow understandings of what human rights entail.[154] For example, in the artificial intelligence sector, an actor recently commented to the author of this Article that they had not previously thought of looking at IHRL as part of the strategies employed to address the social impact of artificial intelligence and emerging technologies, as they saw it narrowly as about privacy and data protection rather than about ways of understanding harm more broadly. They commented that now that

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148 *See* Fagan, *supra* note 6, at 303 (noting that the United Kingdom's human rights community, "where it commented at all," called for legal inquiry, but disregarded the political importance of the Grenfell fire).

149 JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS (2d ed. 2007); *see also* Alice Donald & Anne-Katrin Speck, *The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments*, 19 HUM RTS. L. REV. 83, 96 (2019).

150 *See* Fagan, *supra* note 6, at 304 (discussing how most of the human rights actors "made recommendations that merely reinforced the existing institutions and none questioned whether, for example, a right of individual legal remedy or redress might fall far short of addressing the collective, systemic challenges or deprivation, inequality and marginalization in the UK").

151 *See id.*

152 *See supra* Part II.

153 *See* Douzinas, *supra* note 53, at 52 (noting that "the absence of human rights demands in Madrid, Athens, or Occupy Wall Street indicated their limited relevance for the most important movement of our times.").

154 *See supra* Part III.

they were engaging with IHRL, they saw that in some ways they had already been using IHRL concepts without labelling them as such.[155]

Care also has to be taken in how the connections between the human rights movement and social approaches are forged to avoid the impression that human rights actors are "parachuting" into social struggles, which actors have worked on for many years without attention from major national or international bodies. The embedding of human rights and IHRL within social movements therefore has to be approached from a perspective of equality and partnership and not appropriation and instrumentalization.

With all three approaches to operationalizing human rights within the strategies, policies, and agendas of states, businesses, and social movements, opportunities arise for dispelling myths about human rights and IHRL and demonstrating its concrete and practical value and contributions. Equally, by pluralizing the actors responsible for promoting and protecting human rights, the number of interpreters and appliers of rights increases.[156] This risks a plurality of interpretations and a diffusion and divergence of interpretation and meaning of human rights.[157] It also risks the instrumentalization of human rights to fit actors' agendas, which inevitably can lead to a "pick-n-mix approach."[158] For example, this is a critique that has been made within the approaches of technology companies to ethical and human rights–based approaches to artificial intelligence.[159] Where human rights are taken up by social movements, there is also the risk that they become associated with one particular political view and thus alienate other communities, or that concessions are made on aspects of human rights to fit with a wider social agenda.[160] These risks do not, necessarily, warrant the rejection of the operationalization of human rights with such actors, for example, but are factors that will have to be addressed, navigated, and studied from an effectiveness perspective, as the operationalization of IHRL develops and matures.

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155 *See id.*

156 *See* Megret, *supra* note 76, at 495 (defining the "pluralization of human rights" as the increased recognition of needs of specific categories of humans as "worthy of a specific human rights protection").

157 *See id.*

158 Hannah Miller, *From "Rights-Based" to "Rights-Framed" Approaches: A Social Constructionist View of Human Rights Practice,* 14 INT'L J. HUM. RTS. 915, 925 (2010).

159 Eric Newcomer, *What Google's AI Principles Left Out*, BLOOMBERG (June 8, 2018), https://www.bloomberg.com/news/articles/2018-06-08/what-google-s-ai-principles-left-out [https://perma.cc/WTT8-P7B5] (archived Sept. 17, 2019); *Google: New Guiding Principles on AI show progress but still fall short on human rights protections*, ARTICLE 19 (June 14, 2018), https://www.article19.org/resources/google-new-guiding-principles-on-ai-show-progress-but-still-fall-short-on-human-rights-protections/ [https://perma.cc/L5QG-Y9H3] (archived Sept. 17, 2019).

160 Jutta Joachim, *Framing Issues and Seizing Opportunities: The UN, NGOs, and Women's Rights*, 47 INT'L STUD. Q. 247, 269 (2003) (suggesting that "the political opportunity structure" is most constraining at the beginning of the agenda-setting process, but opportunities for strategic manipulation may emerge with increased influence of human rights actors).

B. *Revaluing Courts*

As already noted, some commentators continue to critique the international human rights system as overly legal and judicialized.[161] This does not reflect a new critique.[162] Yet, as argued in the first Part of this Article, without recognizing the critical role the legalization and judicialization of rights has played in the protection of human rights, many of these critiques of IHRL underplay the transformational achievements of the international human rights system across the globe. Moreover, claims of a dominance of legalization and judicialization are not necessarily an accurate reflection of what happens in practice, particularly in states where legal strategies have formed part of wider campaigns.[163] However, at least in the earlier phases of the international human rights system, (quasi-)judicial bodies were seen as central institutions both to develop IHRL and as a means of accountability, particularly in states with ineffective or unavailable judicial systems. It was in part because those institutions were available and the most concrete means of achieving an outcome for individuals and groups. It was also because other approaches, such as the prevention of human rights violations have, until recently, remained underdeveloped in comparison, although this is now on the agenda of the UN Human Rights Council.[164]

In this regard, some of the critiques of the dominance of courts have emanated from the absence or insufficient attention and investment in other approaches. This has led both to a devaluing of courts and over expectation of what they can achieve. As central institutions within the international human rights landscape, the expectations on such bodies—particularly in the absence of other types of approaches and institutions—have been high.[165] While a different branch of international law, current critiques of the International Criminal Court provide interesting analogies to the critiques of some human rights bodies. Reflecting on these critiques, some commentators have noted that the expectations of what could be achieved through a judicial body set it up for (perceived) failure.[166] For example, Kersten notes that, both the court and its

> most fervent champions . . . insisted that the Court would end impunity for international crimes, put victims front and center in all of its work,

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161 *See* Tasioulas, *supra* note 7; *see also* MOYN, *supra* note 8.

162 *See supra* Part IV.A.

163 See Gathii, *supra* note 15, at 62 (discussing the integration of the East African Court as one strategy of challenging human rights abuses that is part of a broader set of strategies, including raising awareness by human rights groups and business actors, in a variety of venues).

164 *See* Hunt, *supra* note 3, at 520 (discussing the UN's recent focus on prevention of human rights violations through Human Rights up Front).

165 *See* Kersten, *supra* note 34.

166 *See id.*

> transcend global power relations, deter mass atrocities, hold the most powerful to account, promote reconciliation… you name it. It's a laundry list of things that the ICC didn't achieve because it couldn't achieve them.[167]

In taking a fuller approach to the realization of human rights, particularly through an expanded version of operationalization, it becomes possible not only to rebut claims that the international human rights structures over-rely on courts but also to revalue courts within plural methodologies to advance human rights. Relieving the pressure and expectation on courts as the "main" vehicle through which to deliver human rights enables a reimagining of their role within a pluralized landscape.[168] Much of the current discussion on (quasi-) judicial bodies focuses on funding cuts, backlogs, and non-implementation of judgments. This has forced debates and concrete policy changes on whether they should be forums for individual justice or whether they should focus on structural issues and repetitive violations.[169] Seeking more effective plural forms of the implementation of human rights may assist in reframing the narrative around courts and enable them to reclaim their role as part of wider human rights movements and campaigns and also as aspirational institutions.

This is particularly important as the critiques of the dominance of courts overlook the significant contributions courts have made not only in developing the corpus of IHRL but in delivering justice for individuals and groups.[170] In this regard, courts are critical institutions in protecting individuals against majoritarian tendencies.[171] Judicial forums can be ill-suited for diagnosing and addressing the structural causes of human rights violations. Moreover, courts, particularly at the international level, are attuned to the challenges of specificity in reparation orders, given their lack of detailed knowledge of the landscape in each member state.[172] At the same time, courts such as the Inter-American Court of Human Rights have made critical contributions to addressing structural conditions that facilitate human rights violations within their jurisprudence on

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167 *Id.*

168 *Id.*

169 *See* Steven Greer & Faith Wylde, *Has the European Court of Human Rights Become a 'Small Claims Tribunal' & Why, If At All, Does it Matter?*, 2 EUR. HUM. RTS. L. REV. 145 (2017); Dilek Kurban, *Forsaking Individual Justice: the Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUM. RTS. L. REV. 731, 733–35 (2016).

170 *See* Astrid Kjeldgaard-Pedersen, *The Evolution of the Right of Individuals to Seise the European Court of Human Rights*, 12 J. HIST. INT'L L. 267, 273–74 (2010).

171 *See* Gathii, *supra* note 15, at 54 (discussing the "solidified" authority of the Court "among individuals and groups interested in promotion and protection of human rights").

172 *See* Donald & Speck, *supra* note 150, at 96.

reparations, for example.[173] This role is enhanced where the parties in a case address specific reparation orders in their pleadings with supporting evidence which can reduce courts' perceptions that they are ill-equipped or have insufficient information to make specific reparation orders that address wider policies, practices or structural conditions.[174] These reparation orders can then provide advocates and civil society with a concrete tool to pursue in law and policy reform as a means of compliance with the decision.[175] Court decisions that protect the rights of minorities or groups in vulnerable or marginalized positions have also led to change by providing a narrative for governments to reform laws or policies, in the face of resistance by parts of the population. Laurence Helfer and Erik Voeten argue, for example, that international courts can "help overcome domestic opposition to policy change under particular institutional and political circumstances," using the example of the European Court of Human Rights' case law on LGBT rights to illustrate their point.[176] When part of wider approaches to human rights, courts can be important bodies in delivering social change. Courts can therefore be a part of the wider operationalization agenda without being the sole prism through which expectations are made of the international human rights system.

V. CONCLUSION

Unlike some commentators who depict IHRL as an uncritical branch of international law or the international human rights system more generally as unreflective, this Article, has suggested that scholarship and practice on human rights indicates a critical and self-reflective edge, aimed at assessing and improving IHRL in order to effectively address the significant challenges to the enjoyment of human rights around the world. Drawing on this literature and practice, this Article has identified three key priorities for the development of IHRL which are necessary to fulfill if IHRL is to remain relevant and resilient in a changing world. The challenges and pushback IHRL faces cannot be reduced to one source or explanation. Rather, they are multifactorial and shift depending on the actor and point in time. They also cannot be separated from the wider pushback against the international rule of law and international institutions or

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173 *See* Ruth Rubio-Marín & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the* Cotton Field *Judgment*, 33 HUM. RTS. Q. 1062, 1064 (2011) (discussing that reparation should not just return victims of human rights abuses to their original circumstances, but, instead, should "aim to transform or change the pre-existing situation").

174 *See* Donald & Speck, *supra* note 150, at 96.

175 Rubio-Marín & Sandoval, *supra* note 175, at 1091 (stating that reparations "enter the domain of institutional reform and policy-making by requiring states to address structural shortcomings" in human rights protections").

176 Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

from the structural, societal and political changes in society. Effectively addressing this pushback therefore requires equally complex and nuanced approaches. IHRL and its institutions cannot achieve this alone, but they need to be located within and interact with other disciplinary approaches. This Article suggests that this can be more effectively achieved where IHRL embeds within the agendas of key actors that are capable of protecting human rights. These actors include state agencies, which requires a mainstreaming of human rights across state agencies as well as at the level of local government. This is in addition to the deepening of the business and human rights agenda and the integration of human rights principles within the agendas of social movements. Inevitably, the mainstreaming of human rights in this way will introduce new challenges through the pluralization of the actors engaged in the promotion and protection of human rights. However, it is a necessary approach for IHRL to make a meaningful impact where human rights are at risk.

This Article has acknowledged that IHRL and its institutions face significant pushback. However, it has equally argued that this is not a time for retraction or standing still. Rather, space needs to remain for the development of new substantive and procedural law, where an analysis of IHRL in context reveals gaps in the promotion and protection of human rights. However, for the most part, the focus on the evolution of IHRL should be on ensuring its implementation in dealing with enduring and emerging challenges for human rights. Accordingly, this Article has proposed a much clearer distinction between the exceptional circumstances in which the creation of new rights is proposed and situations in which IHRL needs to be interpreted and adapted to fill protection-gaps arising for particular groups who are not enjoying their rights in practice or because of new contexts or global challenges that introduce new rights' issues.

Within this context, human rights scholarship and practice have moved beyond a focus on standard setting and judicialization, although both remain important components, towards complex, multilayered, and multidisciplinary and interdisciplinary approaches to human rights. Scholars have started to develop "thicker" approaches to the development of IHRL, within which this Article aligns and builds upon. These include a four-strand approach.[177] First, on legalization, advocacy, and socialization, what Stephen Hopgood et al. call the "mainstream" approach to date.[178] Second, engaging, bargaining, and negotiating with backlash.[179] Third, framing or translating rights to resonate with local contexts.[180] Fourth, examining synergies with other agendas, like the Sustainable Development Goals.[181] This is a

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177 HUMAN RIGHTS FUTURES, *supra* note 59. The author is also grateful to Dr. Ahmed Shaheed for this reflections on this point.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

significant and ambitious agenda, which will be met with obstacles, challenges, instrumentalization of rights, and dead ends. However, if IHRL is to fully operationalize and result in the realization of human rights for those most affected, it needs to be able to embed within the contexts in which rights are affected and to partner and contribute to wider agendas and strategies that can benefit rights' protection, either directly or through addressing scope and structural conditions.