Human Rights and the Empire of (International) Law

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Introduction

The twenty-year period from 1989 to 2009 witnessed a significant increase in the use of international law for the promotion and enforcement of human rights.[1] What was once a contested and political discourse has become the lingua franca of international relations.[2] While it is tempting to argue that the emergence of human rights as a dominant force in international law was made possible by the triumph of liberalism internationally since 1989, this alone was not enough to create the conditions for the established legalism today.

This Article will argue that a fundamental shift occurred in international law during the 1980s. This shift was crucial to the development of human rights law but is largely overlooked in literature that assesses the move from standard setting to enforcement post-1989. Whereas traditionally international law relied on a rigid "sources" doctrine rooted in state consent for its normativity, this was increasingly challenged during the 1980s by those who advocated a more abstract justification of the "good" or the "just" as a basis for legal decision making.[3] The increasing purchase of these arguments amongst academics, judges, and nongovernmental organizations (NGOs) quietly laid the foundations for a much more holistic system of interpretation of international

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1. Consider, for example, the rise of international criminal law, as shown by the establishment of the ad hoc tribunals in the former Yugoslavia and Rwanda in 1993 and 1994 and the International Criminal Court in 1998. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 334–43 (2003).

2. *See* Henry J. Steiner, *Human Rights: The Deepening Footprint*, 20 HARV. HUM. RTS. J. 7, 12 (2007) ("[T]he stunning achievement of the movement since its inception, but particularly of the last decades[,] has been the deep institutionalization of a new discourse for much of the world.").

3. *See* David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1, 20–22 (1987).

law, particularly in the field of human rights. This shift was central to the success of human rights as it extended the boundaries of legal normativity to encompass the protection of human rights per se as an international objective, and allowed advantage to be taken of the changed political context post-1989.[4] What made this shift possible?

Prior to 1948, human rights had not been a matter for international law.[5] Before their international codification in the Universal Declaration of Human Rights (Declaration or UDHR), the idea of rights had been a matter of exclusively domestic jurisdiction.[6] Indeed, having enjoyed a brief period in the sun following the American and French Revolutions, by the end of the nineteenth century and the early years of the twentieth century, the idea had largely fallen out of favor.[7] This division between domestic and international jurisdiction was highlighted in the Covenant of the League of Nations, which expressly excluded

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4. *See, e.g.*, Vienna Declaration and Programme of Action as adopted by the World Conference on Human Rights A/CONF.57/123 (July 12, 1993).

5. Prior to the early twentieth century, rights had largely been confined to domestic law. *See* Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 HUM. RTS. Q. 547, 550–51. The exceptions to this rule were the slave trade and minority rights, which had been regulated to a certain extent by international law. *See* MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 158–59 (2004); A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 107 (2001). The protection of rights in this era occurred primarily in the context of diplomatic relations between states by way of first bilateral and later multilateral peace agreements. *See* Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, *in* 178 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1982-V, at 328–29 (Hague Acad. of Int'l Law ed., 1985); SIMPSON, *supra* at 108–17. This concern with rights, therefore, should not be read as arising from an inherent concern for the rights of individuals. *See* LOUIS HENKIN, THE RIGHTS OF MAN TODAY 92 (1978).

6. Thus, while there is a long history of rights, whether they were believed to emanate from natural law or from positive or religious law, the protection of rights had never come within the scope of the rigidly statist system of international law, rooted in state sovereignty. *See* Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L L. 540, 540–41 (1995). For an overview of the history and origins of rights, see ISHAY, *supra* note 5; Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 HUM. RTS. Q. 201 (1998).

7. Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 459–60 (1992). Rights in this period came under attack from both the political right in the guise of legal positivism and the left under Marxism. Struggles over social and economic equality were not framed in the language of rights but rather as competing conceptions of the state. For an excellent commentary on these challenges, see NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN (Jeremy Waldron ed., 1987).

international jurisdiction in cases deemed to be "solely within the domestic jurisdiction of [a state] party."[8] It was not until after the Second World War that rights appeared on the international agenda. At that time a number of factors combined to create the conditions for a brief resurgence of the idea of human rights. These included worldwide reaction against the ideology of National Socialism and the horrors of the Holocaust,[9] as well as the role of intellectuals and NGOs in adopting the language of rights to frame particular narratives in support of both the war aims and the inclusion of rights in the new world order.[10] The events of the Second World War, it could be argued, brought about a radical reshaping of the international legal landscape and brought human rights squarely within the parameters of international law.[11] This is evidenced in the language of the United Nations Charter (U.N. Charter) which speaks of the role of the United Nations (U.N.) in promoting and encouraging respect for human rights.[12] Indeed the immediate postwar era is often regarded as one of great hope in terms of the development of human rights.[13] The trials of German officials and officers at Nuremberg had brought justice to those responsible for the newly conceived category of "crimes against humanity," the U.N. was created and given a role in the *international* protection of human rights, and the UDHR was adopted by the U.N. General Assembly in 1948.[14] Human rights were to be the cornerstone of the new world order,[15] with the U.N. Charter "usher[ing] in new international *law* of human rights."[16] Nevertheless, the exceptional

8. League of Nations Covenant art. 15, para. 8.

9. *See* Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 357–58 (1993).

10. For an examination of the role of intellectuals and NGOs, see Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, *in* HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 1, 6–8 (David Kretzmer & Eckhart Klein eds., 2002); Burgers, *supra* note 7, at 450–54, 464–68; Sohn, *supra* note 6, at 540–43 (1995).

11. *See* Steiner, *supra* note 2, at 8 ("The few but salient human rights provisions of the U.N. Charter started it all with a vision of international order ultimately secured 'from above.'").

12. *See* U.N. Charter pmbl.; art. 1, para. 3 (declaring a normative intent in respect of human rights, which distinguishes it from its predecessor, the League of Nations Covenant).

13. *See* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 74 (2003).

14. *See* ISHAY, *supra* note 5, at 215–18.

15. HENKIN, *supra* note 5, at 93.

16. *Id.* at 94 (emphasis added); *see also* NORBERTO BOBBIO, THE AGE OF RIGHTS 16–17 (1996) (stating that the Declaration was significant as the first universal and positive expression of human rights); ROSALYN HIGGINS, THE

nature of the circumstances which had given rise to these developments meant that, although significant, their effect in international law was limited. The precedent set at Nuremberg was effectively frozen in its own historical moment as a result of increasing Cold War tensions,[17] not to re-emerge until decades later.[18] Similarly, international tensions prevented any unified narrative of human rights from taking hold in the years immediately following the adoption of the Declaration.[19] Rather than the great new hope for international order, human rights became tools of political manipulation—a contentious political discourse exemplifying the divisions of the new world order.[20] This Article aims to chart the development of the idea of rights in the period from 1948 to 1989, examining the key milestones in the remarkable journey of human rights from contentious political discourse to lingua franca of international relations.

The Article is divided into four Parts. Part I will provide a brief overview of the positivization of human rights in international law in the period beginning with the adoption of the Declaration in 1948, looking at the limitations imposed by the rigid sources doctrine in international law and the challenges posed by the Cold War political context. Part II will consider in more detail the emergence of an international *law* of human rights and the mechanisms by which the legalization of human rights was achieved. Part III will then examine the emerging arguments in favor of a more holistic system of protection of human rights and the increasing use of soft law to make claims in international law. It will illustrate how the boundaries between hard and soft law became blurred to expand the scope of legal normativity in relation to human rights, and how this resulted in the emergence of human rights as a general principle of law. Finally, Part IV will discuss the manner in which these developments have facilitated the emergence of new regimes of international law which have as their underlying purpose the protection of human rights.

DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 118–130 (1963) (describing the General Assembly's jurisdiction over matters involving human rights).

17. Teitel, *supra* note 13, at 73.

18. *Id.*

19. *See infra* notes 39–45 and accompanying text.

20. *See infra* notes 46–56 and accompanying text.

I. From Natural Law to Positive Law—Standard Setting in International Law

Despite the lofty aspirations contained in the U.N. Charter, divisions soon emerged over the definition and priority to be afforded to rights.[21] While at the time of drafting there had been pressure from some states and from many NGOs for an international bill of rights to be included in the Charter itself, this was ultimately rejected and attention was focused on the drafting of a separate human rights document.[22] While the proposed bill of rights was to provide a mechanism for the protection of the most fundamental human rights, reaching a consensus on the nature and substance of this protection was a challenge.[23]

The U.N. Charter had mandated the Economic and Social Council (ECOSOC) to promote human rights.[24] This mandate included the power to draft conventions[25] and establish commissions for the promotion of human rights.[26] It was under these auspices that the U.N. Commission on Human Rights (Commission) was formed, its first task being the drafting of an international bill of rights.[27] Despite the "generally activist—and perhaps even interventionist—international atmosphere" at the time,[28] members of the drafting committee could not agree on the legal status of the document.[29] Initially, many countries involved in the drafting process were hopeful that the document produced would be a covenant containing obligations that were binding on all states, large and small.[30] However, this was rejected by the United States and the Union of Soviet Socialist Republics, who "insisted that all the Council had meant was for them to draw up a declaration or manifesto of principles without any machinery of implementation attached to it."[31] Ultimately, the risk that East-West divisions

21. ANTHONY WOODIWISS, MAKING HUMAN RIGHTS WORK GLOBALLY 24–26 (2003).

22. SIMPSON, *supra* note 5, at 261–62.

23. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 53–98 (2001).

24. U.N. Charter, *supra* note 12, at art. 62.

25. *Id.* at art. 62, para. 3.

26. *Id.* at art. 68.

27. GLENDON, *supra* note 23, at 32.

28. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 13 (1999).

29. GLENDON, *supra* note 23, at 59.

30. MORSINK, *supra* note 28, at 15.

31. *Id.* at 13; *see also* SIMPSON, *supra* note 5, at 262–63. It has been suggested that, at the time of drafting, the superpowers were careful to avoid the suggestion that rights would be legally enforceable as they were viewed primarily as a means

would prevent the completion of any document, let alone a covenant, provided the impetus for the drafters to agree to prioritize a declaration,[32] which was duly adopted by the General Assembly in December 1948.[33] The degree of consensus surrounding the Declaration—voted for by the vast majority of member states at the time[34]—meant that age-old controversies surrounding the nature and origin of rights could be set aside in favor of a positivist approach. The Declaration was to be regarded as a foundational document, representing a "common standard of achievement for all peoples and all nations."[35] This did not mean, however, that all controversy surrounding the idea of rights had been extinguished. The fact that the rights contained in the Declaration were intended to be merely aspirational rather than to embody specific legally enforceable entitlements meant that the "normative framework [of the postwar human rights regime] was intentionally abstract."[36] Thus, while the drafting of the Declaration was a significant step towards the implementation of universal positive rights in international law,[37] it was "only the initial step."[38]

The early years of the human rights movement were characterized by struggles over the meaning of rights and their protection, and in particular over the distinction between civil and political rights on one hand and economic, social, and cultural rights on the other.[39] This antagonism played out in such a way

of making political gains for themselves against their rivals. Rights were viewed as primarily for export, and as entailing little change for states such as the United States or Great Britain. *See* Anthony Woodiwiss, *The Law Cannot Be Enough: Human Rights and the Limits of Legalism*, *in* THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW 32, 32 (Saladin Meckled-García & Başak Çalı eds., 2006).

32. MORSINK, *supra* note 28, at 19.

33. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948) [hereinafter Declaration].

34. Forty-eight member states voted in favor, zero voted against, and eight abstained. MORSINK, *supra* note 28, at 12.

35. Declaration, *supra* note 33, at pmbl. A report published by UNESCO [the United Nations Educational, Scientific and Cultural Organization] at the time suggested that the role of an international bill of rights was to "achieve agreement concerning rights and also concerning action in the realization and defense of rights, which may be justified on highly divergent doctrinal grounds." MORSINK, *supra* note 28, at 301.

36. David Chandler, *Universal Ethics and Elite Politics: The Limits of Normative Human Rights Theory*, 5 INT'L J. HUM. RTS. 72, 74 (2001).

37. *See* Mutua, *supra* note 5, at 554 (describing the Declaration as the "normative foundation of the human rights movement").

38. BOBBIO, *supra* note 16, at 18.

39. *Cf.* Mutua, *supra* note 5, at 557 ("[I]t can be plausibly argued that the process of standard setting in human rights is a struggle over the meaning of language and its implications on the conduct of states.").

that a covenant of universal scope such as the Declaration was beyond reach in treaty terms.[40] This dynamic simply reflects the Cold War politics of the time that prevented an agreed or universal narrative of human rights from emerging.[41] While progress was being made at a regional level,[42] it was to be many years before agreement could be reached at the U.N. that would allow a legally binding human rights treaty to emerge.[43]

Throughout this period politics played a significant role in defining the content of human rights norms. From the East-West rivalry to the struggles of the Third World for self-determination, these events and the political claims being made informed the development of the corpus of international human rights law and provided the motivation for states to engage in human rights promotion, for better or worse.[44] The deepening antagonism of the Cold War made reaching consensus on the scope of such a treaty a next to impossible task, but compromise did eventually emerge, allowing human rights to take legal form internationally.[45]

II. The Emergence of Legal Form

At the time of drafting of the Declaration, several members of the Commission supported the idea of working on a parallel covenant, which they intended to have an operative legal status and include mechanisms for implementation.[46] The division among the drafters outlined above meant that this covenant did not come into force at the same time as the Declaration.[47] The difficulty in reaching an agreed and legally binding human rights treaty that encompassed the rights contained in the Declaration is evidenced in the compromise that saw the Commission eventually

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40. *See* Elsa Stamatopolou, *The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights*, 55 WASH. & LEE L. REV. 687, 688 (1998).

41. *See* Samuel Moyn, *Human Rights in History*, THE NATION, Aug. 31–Sept. 6, 2010, at 31, 34; Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 915 (2008).

42. *See infra* note 62 and accompanying text.

43. *See infra* Part II.

44. *See* Schachter, *supra* note 5, at 342 (remarking that human rights law is an especially political field of international law); *see also* von Bernstorff, *supra* note 41, at 912 (noting that the movement for decolonization coincided with a growing desire to complete the Declaration).

45. For a concise overview of the creation of the Declaration, see von Bernstorff, *supra* note 41, at 910–14.

46. *Id.* at 909.

47. *Id.* at 913–14.

split this draft into two separate covenants,[48] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[49] and the International Covenant on Civil and Political Rights (ICCPR).[50] Signed in 1966, these two documents did not enter into force until 1976, by which time the attitude toward human rights had started to shift.[51]

The difficulty in reaching international consensus on the nature and scope of human rights in the early years of the Cold War meant that the immediate postwar era has come to be regarded as a period of standard setting.[52] Consequently, international bodies such as the Commission elaborated human rights standards through their work drafting the treaties, but these remained unenforced as a matter of international law.[53] Human rights were most often used as ideological weapons between states on opposing sides of the Cold War.[54] As the early years of the international human rights regime demonstrate, where sharp political divisions exist, setting standards that are broad in their appeal and ambition is a means of placing particular issues on an agenda, which might not be possible were the stakes raised to legal enforceability.[55] By the time the ICCPR and the ICESCR came into force there had been a gradual increase in the willingness of states to sign treaties and (at least formally) submit to monitoring procedures.[56] The quest for legal institutionalization

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48. *Id.* at 914.

49. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4 [hereinafter ICESCR].

50. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

51. *See* Jack Donnelly, *The Virtues of Legalization, in* THE LEGALIZATION OF HUMAN RIGHTS, *supra* note 31, at 67, 68 ("Standard practices and justifications of socialist, developmentalist, and nationalist regimes in the 1970s cannot even pass the laugh test today, either at home or abroad.").

52. *See* Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?, in* THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING 15, 17 (Philip Alston & James Crawford eds., 2000) (considering how the Human Rights Committee might address individual claims against states in the context of an international system of state-to-state relationships).

53. As Makau Mutua suggests, "the process and exercise of the creation of expectations and obligations in human rights can be referred to as standard setting, an expression that covers both binding and non-binding rules . . . ." Mutua, *supra* note 5, at 558.

54. *Id.* at 566.

55. *Id.*

56. It should be noted, however, that at this time fewer than two-thirds of the U.N. member states were parties to the International Covenants. The willingness of states to embrace the international protection of human rights in this period should not therefore be overestimated. *See* Bruno Simma & Philip Alston, *The*

had reached its primary objective—legally binding international human rights law.[57]

The ICCPR and the ICESCR, together with the 1965 U.N. Convention on the Elimination of All Forms of Racial Discrimination (CERD),[58] the content of which was defined in large part by the struggles of those still subject to colonial rule,[59] marked the beginning of the sustained use of legal language and form in relation to human rights in a truly international setting.[60] These treaties, and the monitoring mechanisms that they incorporated, laid the foundations for the evolution of the human rights movement. While legal form had been used in earlier domestic declarations and constitutions,[61] and notably in a regional context with the European Convention on Human Rights,[62] political division had prevented it from taking root in the U.N. system. With the gradually growing acceptance of human rights promotion, however, came a greater push towards the elaboration of new standards and their casting in treaty form.[63]

Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 AUSTRALIAN Y.B. INT'L L. 82, 87 (1988–89) (discussing the development of treaty law and other sources of international law).

57. Von Bernstorff, *supra* note 41, at 915.

58. *See* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

59. Mutua states that "popular mass struggles by marginalized groups and colonized peoples were no less important in giving content to the post-war human rights movement." *See* Mutua, *supra* note 5, at 552; *see also* Paul Gordon Lauren, *"To Preserve and Build on its Achievements and to Redress its Shortcomings": The Journey from the Commission on Human Rights to the Human Rights Council*, 29 HUM. RTS. Q. 307, 319 (2007) (considering the development of the U.N. Commission on Human Rights, discussing criticisms it has faced, and looking forward to the Human Rights Council).

60. This period marked the beginning of the interest of international law in individual rights. Earlier international conventions regulated aspects of international law that had humanitarian aims, but these, it could be argued, were concerned with state behavior rather than the specific protection of individual rights. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (acknowledging that genocide is a crime under international law and providing that the parties to the convention will strive to prevent such crimes); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (providing for a policy of non-discrimination against refugees and outlining measures to be taken to protect their rights).

61. *See* ISHAY, *supra* note 5; Shestack, *supra* note 6.

62. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (providing that members of the Council of Europe will seek to protect human rights and fundamental freedoms outlined therein).

63. *See* Philip Alston, *Appraising the United Nations Human Rights Regime*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 1–21 (Philip Alston ed., 1992) (discussing the perceived eras of the development of the human rights movement and the extent of overlap of these activities, achieved not least

A. Adjudication—the Implications of Legal Form

Once human rights had begun to be recognized as a valid concern of international law, it was only natural that attention would turn to the enforceability of the newly established rights. Internationally there were two distinct streams of progress in terms of human rights adjudication in this period. The first came with the supervisory mechanisms provided for by the treaties themselves.[64] The second was the establishment and gradual acceptance of the special procedures of the Commission.[65]

Turning first to the treaty bodies, when the ICCPR was drafted it contained provisions establishing a Committee to be charged with monitoring state compliance with the obligations of the ICCPR.[66] While this monitoring was limited by the fact that it relied on state reporting of such compliance, it nevertheless broke new ground in terms of human rights adjudication. Whereas the Commission had expressly been made up of government representatives, the ICCPR Committee was comprised of independent experts[67] who would act as impartial judges of a state's compliance with its treaty obligations, based on review of reports submitted by states, outlining their compliance with the terms of the treaty.[68] This mechanism was subsequently included in all the major human rights treaties signed in the late 1970s and early 1980s.[69]

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through the activities of NGOs who were particularly active at this time in campaigning for international treaty protection for human rights); Donnelly, *supra* note 51, at 76; Bronwyn Leebaw, *The Politics of Impartial Activism: Humanitarianism and Human Rights*, 5 PERSP. ON POL. 223 (2007) (considering the development of impartial activism, which focuses on humanitarian intervention and transitional justice).

64. *E.g.*, ICCPR, *supra* note 50, at Part IV (outlining the establishment of and reporting duties of the committee created by the ICCPR).

65. *See, e.g.*, Jeroen Gutter, *Special Procedures and the Human Rights Council: Achievements and Challenges Ahead*, 7 HUM. RTS. L. REV. 93, 95 (2007).

66. ICCPR, *supra* note 50, at Part IV.

67. *See id.*

68. *See id.* at art. 40 ("The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . . [w]ithin one year of the entry into force of the present Covenant . . . .").

69. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women, art. 17, Dec. 18, 1979, 1249 U.N.T.S. 14, 21 (establishing the Committee on the Elimination of Discrimination Against Women) [hereinafter CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, Dec. 10, 1984, 1465 U.N.T.S. 113, 116 (establishing the Committee Against Torture) [hereinafter CAT]; *see also* Convention on the Rights of the Child, art. 43, Nov. 20, 1989, 1577 U.N.T.S. 44, 58 (establishing the Committee on the Rights of the Child) [hereinafter CRC]. The exception to this trend was the ICESCR. At the original time of signing, no provision was made for a monitoring committee within the terms of the treaty

The mandate of the Treaty Committees was originally intended to cover only the review of state reports.[70] The Treaty Committees, however, began to expand their activities to include making General Comments on particular areas of concern where a pattern was seen to be emerging.[71] This tendency, which had initially emerged from the Human Rights Committee, put the committees in a position to influence the interpretation and content of international law by making General Comments on issues of the interpretation and proper implementation of human rights.[72] These committees "became ever more confidently judicial in their reasoning and the tone of their comments and views."[73] This also served to establish the precedent that internationally constituted bodies were competent independent arbiters of disputes over the meaning and application of human rights.[74]

The role of international monitoring was further strengthened by the increasing use, from the 1970s onwards, of thematic and country-specific reporting under the Resolution 1235[75] and 1503[76] Procedures. Regarded as the most significant achievement of the Commission, and maintained and expanded as a function of the new Human Rights Council,[77] special procedures allowed for investigation into allegations of widespread human rights violations on both a country-specific and thematic basis.[78] This in-

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itself. *See* ICESCR, *supra* note 49. The Committee on Economic, Social and Cultural Rights was later established by the Economic and Social Council in 1985. *See* ECOSOC Res. 1985/17, U.N. Doc. E/RES/1985/17 (May 28, 1985).

70. Stamatopolou, *supra* note 40, at 689.

71. *Id.*

72. *Id.*

73. ANTHONY WOODIWISS, HUMAN RIGHTS 108 (2005).

74. For an excellent discussion of the development of the role of Treaty Committees, see Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment* (Ctr. for Human Rights & Global Justice, Working Paper No. 17, 2008).

75. ECOSOC Res. 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1), at 17, U.N. Doc. E/4393 (1967) (acknowledging and incorporating procedures of the Commission on Human Rights). Resolution 1235 Procedures consist of an annual public debate held by the Commission to discuss gross human rights violations within a given state. *Id.*

76. ECOSOC Res. 1503 (XLVIII), 48 U.N. ESCOR (No. 1A), at 8, U.N. Doc. E/4832/Add.1 (1970) (providing a procedure for handling communications related to violations of internationally protected human rights and freedoms). Resolution 1503 rocedures give authority to the Commission to confidentially evaluate and respond to reports of human rights violations. *Id.*

77. *See* Lauren, *supra* note 59 (providing a comprehensive discussion on the transition from the Commission and development of the Human Rights Council).

78. *See* Stamatopolou, *supra* note 40. These procedures were not themselves free from the charge of political motivation and selectivity. *See* Gutter, *supra* note 65, at 107.

vestigation was undertaken by independent rapporteurs who would report back to the relevant U.N. body, who could in turn pass resolutions on the basis of the information contained in the reports.[79] While these procedures were politically contentious at the time, they quickly became an established practice of the Commission.[80] This contributed to a body of "soft" law[81] which helped to develop and give legal content to the idea of human rights during the period from the 1960s to the 1980s.[82]

B. Enforcement—the Limitations of Legal Form

Once tensions began to ease and breakthroughs had been achieved at the U.N. in the form of the two international covenants, there was a significant increase in the number of international conventions incorporating monitoring or adjudicative mechanisms.[83] There was a proliferation of legal texts purporting to address rights issues, from the rights of women[84] to the prohibition of torture.[85] Each of the new conventions made provisions for monitoring by a Committee, whose role was to provide authoritative interpretations of the content of specific treaty provisions. Implementation, however, remained essentially a matter of domestic jurisdiction, with states unwilling to cede too much power to international bodies.[86] The period from the mid-1970s onward can thus be seen as the next step in the development of the movement. The movement began to build on the earlier success of the standard-setting activities toward a more active promotion of human rights[87] alongside the continuing elaboration of standards in the newly ratified treaties.[88]

Once treaties had been signed and ratified, the importance of legal form lay in its perceived ability to reduce the conceptual antagonism between the differing approaches to rights.[89] The division of civil and political rights from social and economic rights

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79. Gutter, *supra* note 65, at 99.

80. *Id.*

81. *See infra* Part III.B.

82. *See, e.g.*, Jean D'Aspremont, *Softness in International Law: A Self Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075 (2008).

83. *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, July 18, 1976, 1015 U.N.T.S. 244; CEDAW, *supra* note 69; CAT, *supra* note 69; CRC, *supra* note 69.

84. *See, e.g.*, CEDAW, *supra* note 69.

85. *See* CAT, *supra* note 69.

86. Donnelly, *supra* note 51, at 70.

87. Steiner, *supra* note 2, at 9–10.

88. Donnelly, *supra* note 51, at 78.

89. WOODIWISS, *supra* note 21, at 28–29.

allowed states to sign human rights treaties without becoming embroiled in further conflict over the meaning of "rights." Once a state accepted the obligations contained in that particular treaty, compliance was no longer a matter of political controversy, rather a question of legal obligation.

Since the 1970s, "law has been central to most national and international efforts to define and to implement human rights."[90] This increasing legalization can be seen in the formulation of human rights claims as treaty obligations and the corresponding development of judicially based enforcement mechanisms as an integral part of the treaty regime.[91] This, in turn, has encouraged human rights activists to represent human rights as legal claims and pursue human rights objectives through legal mechanisms.[92] This trend has been noted more recently with the commendation of the legal characteristics of the Human Rights Committee. The characteristics include commitment to the ideal of the rule of law, the use of impartial and independent members, and limited discretion and norm-to-fact decision making.[93] The advantage of legal form is clearly to be viewed in terms of impartiality and procedural regularity that law brings to bear on difficult situations.[94] This apparent benefit of legal discourse in mediating political antagonism has resulted in legal concepts gradually replacing political concepts in the U.N.'s handling of human rights issues.[95] Legal modes of reasoning and principles became the chief strategic resource defining the future direction of the human rights project.[96]

Despite the initial avoidance of law in the Declaration, the treaty quickly became the favored method of human rights promotion.[97] The treaty, as a means of law making, had the advantage of creating norms among states. This was relevant to

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90. Donnelly, *supra* note 51, at 67.

91. *Cf.* Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008).

92. Donnelly, *supra* note 51, at 69; Moyn, *supra* note 41, at 35–36.

93. Steiner, *supra* note 52, at 49. For a good overview of the role of the treaty monitoring committees and the importance of legal procedure to their work, see Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905 (2009).

94. Steiner, *supra* note 52, at 49; *see also* Dencho Georgiev, *Politics and the Rule of Law: Deconstruction and Legitimacy in International Law*, 4 EUR. J. INT'L L. 1, 4 (1993); Leebaw, *supra* note 63, at 226.

95. WOODIWISS, *supra* note 21, at 29.

96. *Id.*

97. *Cf.* Alston, *supra* note 63, at 10 (discussing unprecedented growth of the treaty-based system since 1970).

those concerned with the effective promotion and protection of human rights internationally. In this regard treaties came to be known as the most effective tool for the development of these norms.[98] At this stage the legalization of rights, beyond simply adding moral authority to the claims of those who sought to rely on them, was seen as the most effective means of ensuring that adequate enforcement mechanisms could be put in place internationally to protect the enumerated rights. Beyond the moral victory of having one's claims recognized as a right, the legalization of rights was further driven by the perception that to have rights enshrined in treaty—in legally binding form—would ensure their effective implementation and monitoring. This gave human rights *law* its perceived added value.[99]

While the new monitoring mechanisms contributed to the elaboration and promotion of human rights norms, the primary means of establishing norms in this period remained the treaty, upon which the new monitoring mechanisms were based and from which their authority derived.[100] The limitation of this system, however, is that a treaty is effectively a contractual mechanism for creating obligations in international law. This system can create obligations between contracting parties, but cannot, prima facie, create norms of general application. In particular it cannot create norms binding upon those who have not chosen to be bound.[101] While each new human rights treaty sought to add to the protection of rights internationally, treaty law alone would be insufficient to achieve the holistic promotion of rights desired. Human rights needed to become more than the sum of its parts, and, in particular, it needed to shake off any remaining suspicion of political partiality. Here again, appeals to universalism and legality lent strength to the movement, buttressing it against the Cold War ideological struggle.[102]

III. Law and Normativity

This expansion in the scope of international human rights law and the use of legal form in adjudication from the 1970s must be seen in the context of developments in international law more

98. Mutua, *supra* note 5, at 569.

99. *Id.*

100. See *supra* note 69 and accompanying text; *see also, e.g.*, ICCPR, *supra* note 50, at Part IV.

101. Simma & Alston, *supra* note 56, at 82 (arguing that this constraint makes treaty law on its own an unsatisfactory basis on which to ground the efforts of international institutions whose reach is universal).

102. *See* Leebaw, *supra* note 63, at 226.

generally. It is in this period that we see a reshaping of international normativity that would lay the foundations for the post-1989 world order. This can be divided into two main categories: the emergence of the idea of obligations *erga omnes* and the concept of an "international community," and the increasing purchase given to the idea of "soft" law in international law.

A. *Obligations* Erga Omnes *and the "International Community"*

In its now famous dictum in the *Barcelona Traction* case,[103] the International Court of Justice (ICJ or Court) addressed, albeit in passing, the limitations of the traditional bilateral legal relationships which underpinned treaty law.[104] Whereas bilateral obligations are enforceable only by the parties to the treaty, and subject to strict rules of *locus standi*, the idea of obligations *erga omnes* recognized the need for a mechanism whereby norms could be translated into a broader set of legal obligations.[105] Thus, the concept of obligations *erga omnes* ("toward all") was born. As Villalpando summarizes:

> These obligations are construed by the Court as being 'the concern of all States', in the sense that 'all States can be held to have a legal interest in their protection' .... The direct consequence is therefore that each and all states would have legal standing to demand the respect of those obligations ....[106]

Obligations falling under this heading, according to the Court, included acts of aggression, genocide, and principles and rules concerning the basic rights of the human person.[107]

While more applicable to some areas of international law than others,[108] this doctrine of obligations *erga omnes* represents

103. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 5).

104. The facts of *Barcelona Traction* have very little to do with the dicta that emerged. The case related to a claim of diplomatic immunity made by the Belgian government on behalf of Belgian shareholders in a company registered in Canada. *Id.* at 6. The Court in this instance was not, therefore, making judgment on a matter of fundamental human rights.

105. Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law,* 21 EUR. J. INT'L L. 387, 400 (2010).

106. *Id.* at 401.

107. In its *Barcelona Traction* judgment, the ICJ singles out obligations *erga omnes* as including those derived "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." *Barcelona Traction*, 1970 I.C.J. ¶ 32.

108. *Id.* Other key areas of concern to humankind were international economic law and international environmental law.

the beginning of the expression of community interest in certain aspects of international law.[109] Obligations *erga omnes* are deemed to be owed to the international community as a whole.[110] This obligation arises as a result of the underlying importance of the norms in question—giving rise to a legal interest in their protection on the part of all states.[111] This view of obligations *erga omnes* was confirmed in a report of the International Law Commission published in 1976, which confirmed that "there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject matter for the international community as a whole are—unlike the others—obligations in whose fulfilment all states have a legal interest."[112] Although it was less than clear at the time whether states would in fact be granted standing to pursue a claim against a violating state,[113] the principle that human rights were a matter of international concern that the international community was entitled to discuss was fast becoming consolidated in both academic and policy circles.[114]

The emergence of the idea of obligations *erga omnes* reflects to a significant extent the changing political context of the time. With increased attention being paid to questions of human rights and fairness more generally, the Court, in making its pronouncement in *Barcelona Traction*, was responding to a clear societal demand in this regard.[115] Four years earlier, in its decision in the South West Africa Cases,[116] the Court had rejected a high profile public interest claim in favor of the application of strict rules of *locus standi*.[117] The public reaction to this case was a disaster for

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109. Villalpando, *supra* note 105, at 395.

110. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 431 (1983).

111. *Id.*

112. *Id.* at 431–32 (citing Rep. of the Int'l Law Comm'n, 28th sess, May 3–July 23, 1976, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Part 2) (1976), at 99).

113. Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 11 (1986).

114. *Id.* at 13.

115. *See* Christian Tams & Antonios Tzanakopoulos, Barcelona Traction *at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. INT'L L. 781 (2010).

116. South West Africa Cases (Liber. v. S. Afr.); (Eth. v. S. Afr.) (Second Phase) (Merits), 1966 I.C.J. 4 (July 18).

117. The case concerned the conduct of South Africa in discharging the function of its mandates. Rather than examining the case on its merits, the Court ruled that Liberia and Ethiopia were not the appropriate parties to bring the case. This was remedied politically with the termination of South Africa's mandate in Namibia by Security Council Resolution 276 in 1970. *See* S.C. Res. 276, (XXV), U.N. Doc. S/RES/276 (Jan. 30, 1970), *available at* http://www.unhcr.org/refworld/docid/3b00f2112b.html. The Resolution was later upheld by the Court. Legal

the Court,[118] which was then left with the task of mitigating the damage, both legally and politically. As Christian Tams and Antonios Tzanakopoulos describe, the Court's pronouncement on obligations *erga omnes* "launched a concept that accommodated a generally felt interest in some form of enforcement action in defence of community interests."[119] Significantly, where obligations were deemed to exist *erga omnes*, their protection would no longer depend on treaty recognition, but could be held to flow from general international law.[120]

This expanded view of the legal effect of international law was coupled with a move toward new forms of expression with respect to the protection of human rights.[121] This was evidenced in the emergence of the idea of "soft" law and its gradual acceptance in legal circles.

B. *Soft Law*

Sources of international law traditionally were restricted to those elaborated in Article 38 of the Statute of the International Court of Justice (ICJ Statute),[122] primary among these treaty and custom. The idea of "soft" law began to emerge in the 1970s amid calls for a new brand of international law capable of bringing about reform within the international system.[123] Soft law could be distinguished from hard law in that it did not contain binding provisions based on the consent of state parties.[124] However, the

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Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 (June 21). *Id.* *See also* Tams & Tzanakopoulos, *supra* note 115, at 792.

118. Tams & Tzanakopoulos, *supra* note 115, at 792.

119. *Id.* at 799.

120. *Id.* at 792.

121. *See* Vázquez, *supra* note 91, at 667–72 (noting that the 1970s saw the beginning of including non-self-executing provisions in human rights treaties).

122. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevans 1179, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

123. This movement was seen particularly in relation to international economic law and the right to development of postcolonial states at the time. *See* Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 853 (1989); *see also* Oscar Schachter, *Recent Trends in International Law Making*, 12 AUSTRALIAN Y.B. INT'L L. 1, 13 (1988–89) (explaining the prevailing suspicion that several resolutions defining "Permanent Sovereignty Over Natural Resources," which were framed in terms of rights and obligations, were an attempt to "create new international law rules and to subvert established principles that protected foreign investment and free enterprise").

124. For a detailed explanation of the nature and characteristics of "soft" law, see D'Aspremont, *supra* note 82.

form and purpose of soft law varied. In some instances it has been described as simply elaborating or giving further definition to existing generally agreed standards. Dinah Shelton offers the example of the Declaration, arguably the most prominent of all soft law instruments, claiming that it serves to define the general references to human rights contained in the U.N. Charter.[125] It was not, however, limited to this function. A "soft" methodology was often the preferred means of addressing important international issues, including the elaboration of new norms that were of interest to the international community.[126] These were adopted by international bodies such as the U.N., in the form of resolutions or declarations from bodies such as the General Assembly or ECOSOC, which lacked legislative capacity in international law.[127] Although not formally legally binding, these resolutions and soft law declarations were regarded as providing useful interpretive guidance on the substance of vaguely elaborated norms.[128] In some instances norms that were deliberately vague or "soft" in their elaboration crystallized over time, through a process of progressive interpretation, into hard norms with the requisite legal content and monitoring provision.[129]

In addition to this capacity to elaborate new norms, soft law materials provided guidance on the interpretation of existing legal standards. This took the form of, for example, General Comments of the various treaty bodies which purported to state a principle of international law,[130] the reports submitted by the ad hoc rapporteurs appointed under the Commission's Resolution 1235 and 1503 Procedures,[131] as well as the judgments of the various human

125. Dinah Shelton, *Commentary and Conclusions*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 450 (Dinah Shelton ed., 2000).

126. *Id.* at 449 (arguing that these instruments were often regarded as precursors to binding international norms).

127. *See* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control,* 78 AM. J. INT'L L. 607 (1984) (outlining the process by which the U.N. considers and adopts new human rights).

128. Shelton, *supra* note 125, at 451.

129. Christine Chinkin, *Normative Development in the International Legal System*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM , *supra* note 125, at 21, 33. Chinkin uses the example of the ICESCR to illustrate this dynamic. *Id.*

130. *See, e.g.*, Simma & Alston, *supra* note 56, at 98 (describing the achievement of "bridgeheads in formerly unfettered domestic jurisdiction of states," including a "literal avalanche of General Assembly resolutions," "decisions of the Commission on Human Rights and its Sub-Commission," "country-oriented or thematic reports," debate generated by the Resolution 1503 Procedure, and the repeated citation of the standards contained in the Declaration as applicable to all states).

131. *See supra* notes 75, 76.

rights courts and commissions.[132] This rich source of interpretive pronouncement had been made possible by the rapid expansion of legal instruments in international human rights law that had occurred since the signing of the ICESCR and the ICCPR.[133]

C. *De Facto Normativity*

However, while soft law had no traditional normative authority in international law, and had not been officially recognized as a new "source" of international law, this is not to say that it had no legal effect. Soft law quickly came to be regarded as having legal effect even in the absence of the explicit consent of states.[134] Jean D'Aspremont identifies some of these possible legal effects as "the internationalization of the subject matter, provid[ing] guidelines for the interpretation of other legal acts, or pav[ing] the way for further subsequent practice which may one day be taken into account for the emergence of customary international norm."[135] Beyond the traditional sources of international law codified in the ICJ Statute, soft law measures,[136] including those in the field of human rights, were increasingly regarded as having normative force regardless of state practice or consensus.[137] On a theoretical level this was justified by a re-reading of the requirements of custom to bring a much wider range of international instruments within the scope of general international law.[138]

This reading of soft law was actively promoted by the ICJ in the *Nicaragua* case,[139] where the Court recognized that *inter alia* General Assembly resolutions may have normative force as a representation of consensus on a particular matter.[140] At this time the boundaries between hard and soft law became blurred as new ways were sought to bring about change in international law.[141]

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132. Simma & Alston, *supra* note 56, at 98. Shelton describes these sources as "secondary soft law." Shelton, *supra* note 125, at 451.

133. Simma & Alston, *supra* note 56, at 98; Shelton, *supra* note 125, at 451.

134. D'Aspremont, *supra* note 82, at 1082–83.

135. *Id.* at 1082 (italics omitted).

136. These include measures such as decisions of the Commission on Human Rights, Thematic Reports, and Reports of the Secretary-General.

137. For an explanation of how this development was achieved see Weil, *supra* note 110, at 433–40.

138. For an overview of these debates see Chinkin, *supra* note 129; Meron, *supra* note 113; Schachter, *supra* note 5; Simma & Alston, *supra* note 56.

139. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

140. *Id.* ¶¶ 188–94, 202–09. Chinkin describes this decision as representing a willingness by the Court to accept the transformation of soft law principles into hard law. Chinkin, *supra* note 129, at 858.

141. Weil, *supra* note 110, at 415.

The benefit of such an approach is that if a norm, even one contained in a treaty, can be defined or regarded as one of general international law it will transcend the limitations of the treaty regime and become an obligation *erga omnes*, binding on all states regardless of consent.[142]

Much of the debate surrounding the normative status of soft law centered around the extent to which soft instruments could be considered declaratory of customary international law.[143] The increasing number of treaties, resolutions, and legal decisions that emerged in this era simply added weight to the claims being made that human rights per se could be held to have achieved the status of customary international law.[144] Following this logic, by the late 1980s bold claims were being made that human rights constituted customary norms, or even *jus cogens*.[145] A norm defined as *jus cogens* in international law is one which has reached the highest status, a "peremptory norm"[146] which permits no derogation and which is binding on all states. Such norms are drawn from the body of customary international law—that which has acquired its authority over time through the combined elements of state practice and *opinio juris*.[147] By claiming human rights law as customary, the limitations of the treaty system can be avoided, allowing for human rights claims to be made against even those who had not willingly submitted to the regime.[148] Had this argument prevailed it would have had dramatic effects on sources doctrine in international law. Whereas in the past state practice

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142. Simma & Alston, *supra* note 56, at 87 (explaining how the existence of a wide range of customary norms of human rights would "mitigate the negative significance" of the fact that in practical terms, very few states were actively participating in the human rights regime); Weil, *supra* note 110, at 422.

143. Chinkin, *supra* note 129; Meron, *supra* note 113; Simma & Alston, *supra* note 56; Weil, *supra* note 110.

144. This significant debate took place in the academic literature of the time. *See, e.g.*, Meron, *supra* note 113; Schachter, *supra* note 5, at 334–35. Claims as to the customary status of human rights were, of course, belied by the fact that "less than two-thirds of the U.N. Member States [were] parties to the two International Human Rights Covenants and participation in most other treaties [was] even more limited." Simma & Alston, *supra* note 56, at 87.

145. Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1988); *see also* Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens*!*, 6 CONN. J. INT'L L. 1 (1990); Simma & Alston, *supra* note 56; Schachter, *supra* note 5.

146. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

147. Simma & Alston, *supra* note 56, at 103–04. *Opinio juris* refers to the sense of legal obligation that must accompany state practice in order to constitute customary international law.

148. *Id.* at 87.

and *opinio juris* had combined over time to create a body of consensus surrounding a particular issue, such as the abolition of the slave trade, or the evil of apartheid, this norm incubation period was increasingly being bypassed in favor of claims of almost instant normativity.[149] However, while human rights falling short of the most "basic rights of the human person"[150] were generally regarded as falling short of the status of *jus cogens*,[151] they nevertheless came to play a significant role in international law.[152]

This development was a significant shift in international legal theory, evidenced most clearly in the newly established regimes of human rights and international economic law.[153] For those who sought to challenge the existing status quo, the rhetoric of soft law was a useful means of getting politically difficult issues onto the international legal agenda.[154] David Kennedy has described arguments made in soft law terms as appeals to an externally validated norm—validated not by consent but by reference to some objective fact of justice that can override traditional rules of consent.[155] Here we see the beginnings of international legal argumentation that relies not on a notion of international law resting on consent, but on a more abstract idea of the "good" or the "just."[156] This allowed for issues to be brought onto the international agenda, often as a compromise measure between those who favored the use of treaty form and those who opposed any form of regulation.[157] However, these concepts were then interpreted as having such legal effect as to have achieved a legal status far beyond what was intended by the drafters[158] on the basis that the norms were of such character that they could be said to be of interest to the international community as a whole—thereby removing them from challenge on the basis of consent.[159]

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149. *See* Alston, *supra* note 127, at 607; Weil, *supra* note 110, at 435.

150. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) 1970 I.C.J. 4, 32 (Feb. 5).

151. Meron, *supra* note 113, at 4; Simma & Alston, *supra* note 56, at 103.

152. Meron, *supra* note 113, at 4.

153. *See, e.g.*, Chinkin, *supra* note 129, at 861 (describing the increasing use of soft law form by specialized bodies); Villalpando, *supra* note 105, at 394–96 (suggesting that new legal concepts such as obligations *erga omnes* emerged in fields such as human rights where bilateralism had been least successful).

154. Chinkin, *supra* note 129; *see also* Mutua, *supra* note 5, at 560–61 (describing the use of soft law principles as a means of producing, in a short time, a normative framework that may not have been possible were a treaty sought).

155. Kennedy, *supra* note 3, at 22.

156. *Id.* at 20.

157. Chinkin, *supra* note 129, at 861.

158. *See, e.g.*, Weil, *supra* note 110, at 414.

159. *Id.* at 422 (pointing to the move towards an "international community"

IV. The Empire of (International) Law

A. Judicial Interpretation and Legal Form

The cumulative effect of these processes of judicial interpretation of sources doctrine in international law and the increasing use of independent adjudication in respect of human rights compliance was to create a more holistic system of law. Hence, human rights could be interpreted as incorporating certain underlying principles of justice and equity, but rather than invoking principles of natural law, these concepts were to be found within the (soft) law itself.[160] This can be best illustrated by drawing on the work of Ronald Dworkin on law as an interpretive practice.[161] Rather than casting law as a neutral or objective standard of right which exists to be discovered, interpretivism acknowledges the range of values and principles that are inherent to legal adjudication.[162] Thus, aside from the traditional sources of "hard" international law, such as treaties and custom, law also incorporates "policies" and "principles" upon which judges may draw when reaching a decision.[163] This has the effect of bringing a much wider range of "sources" within the scope of a positivist system of international law by recognizing them as existing within law itself rather than as having recourse to external justifications.[164] In this way principles of justice or equity may be taken into consideration in adjudication, an equity *infra legem*,[165] which

capable of defining its own interests).

160. RONALD DWORKIN, LAW'S EMPIRE 18–20 (1986).

161. *Id.*

162. For an explanation of this dynamic in relation to international law see Başak Çalı, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805 (2009).

163. For an explanation of these terms see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1067 (1975).

164. DWORKIN, *supra* note 160, at 266–68; MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 38 (1989).

165. Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTRALIAN Y.B. INT'L. L. 54, 56 (1988-89). Lowe describes a form of equity which constitutes a method of interpretation of the law in force and does not need to rely on external justification such as natural law. Indeed, he argues it is possible there will always be a rule or principle of law which is capable of extension and application to the case in hand, particularly given the possibility of recourse to general principles of law. *Id.* at 61; *see also* Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 292 (2001) ("The fact that general principles are described as 'principles of law' demonstrates that they do not authorise the ICJ to proceed on the basis of non-legal considerations which are thought to be fair and right in all the circumstances.").

shields the decision from positivist challenge[166] and attempts to "reconcile the mainstream, positivist, theory of sources with earlier [natural law] views."[167] The incorporation of such principles into the body of "law," with the resulting legal effect this creates, had the further effect of extending the traditional boundaries of law beyond consent.[168] Indeed the scope of international law has been expanded beyond what would have been recognizable to a jurist in 1945 through "bestowing legal value on intrinsically non-legal instruments."[169] A key mechanism for achieving this has been the purposive interpretation of human rights treaties.[170]

The often generic terms in which human rights treaties are drafted,[171] together with the increasing normativity attributed to "soft" sources of law, demonstrates this process. Thus, for example, in treaty interpretation, a judge, when reaching a decision, may draw not only on the text of the treaty itself and any supporting or conflicting customary law or practice that exists (the rules and standards), but may also make reference to the content of less traditional (soft) sources of international law such as General Comments of the Human Rights Committee or a resolution of the General Assembly (policies and principles) to aid in interpretation.[172] This process of interpretation serves to give meaning to often vague standards.[173] In legal terms, this is referred to as interpreting a treaty in light of its object and purpose and is required by the Vienna Convention.[174] It provides a purportedly objective framework within which a decision can be

166. For an excellent critique of this dynamic, see KOSKENNIEMI, *supra* note 164, at 37–38.

167. Simma & Alston, *supra* note 56, at 104.

168. *Id.* at 87.

169. D'Aspremont, *supra* note 82, at 1088.

170. *See* Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 533–35 (2003) (suggesting that a restrictive interpretation of human rights treaties would be contrary to their object and purpose).

171. Mutua, *supra* note 5, at 558 (describing a "standard" as a "vacuous, empty receptacle into which one can fit almost anything"). In this analysis, interpretation is a necessary element of suffusing the law with meaning.

172. On the role of General Comments as interpretive devices, see Blake, *supra* note 74.

173. The role of treaty bodies in interpreting the requirements of treaties is particularly important in this regard. Vienna Convention on the Law of Treaties, *supra* note 146, at art. 31 (providing that treaties should be interpreted in good faith, having regard to the ordinary meaning of their terms, their context, and their object and purpose); *see* Mechlem, *supra* note 93, at 910–13 (explaining the process of treaty interpretation as required by the Vienna Convention).

174. Vienna Convention on the Law of Treaties, *supra* note 146, at art. 31.

made while limiting the scope of political influence.[175] As soft law principles were recognized as having normative force, they gradually became recognized as having legal effect.[176] While contributing towards the emergence of their subject matter—the protection of human rights—they gained the status of general principle of law.[177] This is significant in that it brings human rights law within the scope of general international law, giving it a basis in positive law, regardless of its formal source.[178] Stephen Hall describes how this method is incorporated into the ICJ Statute via Article 38,[179] which sets out a "rational methodology for technical legal reasoning in international law."[180]

These non-traditional sources of international human rights may also be drawn upon by those campaigning for the recognition of a right in law.[181] This approach to the interpretation of human rights law has led to what one commentator has described as "a complex structure of various interrelated normative instruments, which together form the corpus of international human rights law."[182] This inclusive approach to interpretation further contributes to a rich vein of jurisprudence, which elaborates and refines the substance of the rights contained in international treaties, often beyond what was originally intended by the drafters.[183]

The role of the ICJ in the development of the concept of obligations *erga omnes* serves to demonstrate the profound influence that legal materials not generally recognized as having intrinsic legislative force can have.[184] ICJ materials are used in interpretation and as new sources of legal principle in themselves.[185] The

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175. *See* KOSKENNIEMI, *supra* note 164, at 47.

176. *See* Simma & Alston, *supra* note 56, at 106.

177. *Id.*

178. *Id.*; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.), 1986 I.C.J. 14, ¶ 218 (June 27) (evaluating conduct according to "fundamental general principles of humanitarian law"); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 91 (May 24) (citing the fundamental principles of human rights).

179. Hall, *supra* note 165, at 298.

180. *Id.*

181. *See* Mutua, *supra* note 5, at 597–98 (illustrating the formulation of international standards using the promotion of the rights of indigenous peoples as an example).

182. Blake, *supra* note 74, at 2.

183. Michael Duffy, *Practical Problems of Giving Effect to Treaty Obligations—The Cost of Consent*, 12 AUSTRALIAN Y.B. INT'L L. 16, 19 (1988–89) ("A multilateral treaty often takes on a life of its own. . . . This often leads to calls some years after a treaty has been joined that particular action is required under a treaty that was clearly not originally contemplated."); Weil, *supra* note 110, at 440.

184. Tams & Tzanakopoulos, *supra* note 115, at 792.

185. *Id.* at 800.

ICJ itself does not have any formal law-making function.[186] Nevertheless it has been in a position to influence norm creation and the development of the law through its judgments.[187] In contrast to the more rigidly defined legal processes that result in the creation of customary law or a treaty, the ability of the ICJ to influence the direction of the law is considerable.[188] The decisions made by the Court, drawing on the range of hard and soft materials available to it, can help to give meaning to broad general principles and advance a particular interpretation of an international legal obligation.[189] The effect of this interpretation is then diffused throughout legal circles by, for example, its use by states in formulating claims, or by scholars and policy makers seeking to ground their arguments.[190] The concept of obligations *erga omnes* is simply one of the most high-profile examples of these dynamics to emerge from the case law of the Court.

This proliferation of normative effect in international human rights law reflects the perceived advantage of legal form in the promotion of human rights. Law, both nationally and internationally, is regarded as transcending the subjectivities of politics by providing an objective and technical language for the resolution of conflict.[191] This, in turn, forms the basis for its normativity.[192] The developments in international law generally seen during the 1980s facilitated the emergence of a comprehensive corpus of international human rights law by the end of the decade. This is grounded in a stated commitment on the part of the U.N. to the concept of the rule of law that has emerged in recent decades.[193]

B. The Rule of Law in Context

The emphasis placed on the rule of law in international law since 1989 has been the glue that holds together the various normative regimes that have emerged since then—notably for the purposes of this symposium international criminal law and

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186. *Id.*
187. *Id.*
188. *Id.* at 796–800.
189. *Id.* at 784.
190. *Id.*
191. *See* KOSKENNIEMI, *supra* note 164, at 2–3 (explaining the importance of normativity and concreteness in international law).
192. *See id.*
193. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 24, 2004) (consolidating international policy in this regard).

transitional justice.[194] Without an underlying commitment to the international protection of rights, many of these activities would lack legitimacy or indeed would not be possible. This is clearly evidenced in the development (at times arrested) of the ideas of international criminal justice and transitional justice.[195] By way of illustrating how far we have come, it is worth considering in a little more detail the manner in which historical and political context has influenced the development of these regimes.

Despite the precedent set at Nuremberg, the Cold War years were marked by an absence of international criminal justice.[196] Indeed, it was not until the late 1970s that the question of holding perpetrators accountable for human rights abuses would raise any serious interest.[197] This began to change with the democratic transitions in Latin America.[198] Although Cold War tensions had begun to dissipate at this time, international politics was still dominated by the East-West divide, which played out in so many proxy states, not least in Latin America.[199] Therefore, it is notable that when Latin American states began to call for justice for past human rights abuses, it was done within the framework of national rather than international law, and within the narrower confines of the state.[200] Rather than relying on universal norms and the rule of law, transitional justice needed to respond to particular political contexts and shifting balances of power.[201] The result was a radically different vision of transitional justice that incorporated ideas of truth and reconciliation in place of the emphasis placed on criminal accountability at Nuremberg.[202] The lingering influence of the Cold War and the divided political context is evidenced in the avoidance of law and strict legal doctrine in the development of transitional justice initiatives in the 1980s.[203] It is not until 1990

194. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 21 (1st ed. 2003) ("[T]he imperative requirement that criminal rules be clear and specific . . . results in *the role of national or international courts* being conspicuously crucial.").

195. *See* Teitel, *supra* note 13, at 70–72 (presenting a timeline for the development of transitional justice).

196. CASSESE, *supra* note 194, at 334; *see also* Teitel, *supra* note 13, at 76 (suggesting that although there were no international trials during the Cold War years, international law nevertheless "play[ed] a constructive role, providing an alternative source of rule of law").

197. Teitel, *supra* note 13, at 71.

198. *Id.* at 78–80.

199. *Id.*

200. *Id.* at 75–76.

201. *Id.* at 76.

202. *Id.* at 77.

203. *Id.* at 77–80.

that the bold claim for normativity is made in terms of transitional justice.[204] Whereas initiatives until this point had been politically negotiated, responding to context and national and international political imperatives, the post-1989 view is that there exists a "duty to prosecute" past human rights abuses.[205] This duty, it is claimed, is rooted in international human rights law as set out in treaty and custom.[206] While this claim was not uncontroversial in the early 1990s,[207] it represented the beginning of the evolution of transitional justice from a discipline struggling to balance the conflicting priorities of peace and justice[208] to a discipline confident in its normative pronouncements.[209] Further, transitional justice increasingly combines the principles of human rights law with those of international criminal justice to strengthen its appeal.[210] It also demonstrates a greater confidence in the idea of human rights as universally applicable and as capable of imposing restraints on the more pragmatic calculations of politicians.[211] To this extent it embodies belief in the rule of law, resting as it does on the premise that the rule of law has the ability to mediate political transition and to deliver appropriate responses to violent conflict.[212] This is rooted in the dual function—backward- and forward-looking[213]—of law in responding to past human rights abuses and promoting human rights protection in the future.

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204. *See id.* at 88.

205. For an example of an early 1990s argument for international prosecution, see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540–41 (1991) (arguing that the duty to prosecute arises from multilateral treaties and international law).

206. *Id.*

207. *See* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2619–20 (1991) (arguing that while there may be a general duty to prosecute human rights abuses, it should be curtailed by particular circumstances); *see also* Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 256–58 (1996) (presenting the conflicting goals of peace and criminal justice after war).

208. Anonymous, *supra* note 207, at 256–58; Teitel, *supra* note 13, at 82–84.

209. *See* Teitel, *supra* note 13, at 89–90.

210. *See id.* at 90–91.

211. *See* Orentlicher, *supra* note 205, at 2549–50 (arguing that international law allows new governments to proceed with human rights trials without hindering reconciliation).

212. *See* Christine Bell et al., *Justice Discourses in Transition*, 13 SOC. & LEGAL STUD. 305 (2004) (using Northern Ireland as a case study in discussing the role of law and legal process in transitional societies).

213. This is a phrase borrowed from Ruti Teitel, describing the function of law in transition as both backward- and forward-looking, ambivalent in its directionality. *See* RUTI TEITEL, TRANSITIONAL JUSTICE 8 (2000).

Conclusion

Since the signing of the Declaration, the success of the international human rights project had been limited by residual Cold War tensions, which prevented a unified narrative of human rights from taking hold.[214] Liberalism and socialism challenged each other's conception of rights and how they could best be protected.[215] With the fall of the Berlin Wall in 1989, and the apparent triumph of liberalism as a political philosophy, the developments of the 1980s in terms of the expanded interpretive practice of international law meant that human rights as a discipline was well positioned to take advantage of this new global political context.[216] This was particularly so given the liberal rejection of politics and its purported neutrality, which was to be applied to the task of human rights promotion post-1989. Human rights emerged as the ideology for a post-ideological world. As a matter of international law, human rights law had been established as a normative regime in its own right, with the emphasis in the post-1989 era moving from "promotion" to the even more stringent standard of "protection." The triumph of liberalism allowed human rights to emerge as a regime distinct from the interests of states or from any particular political project. The promotion and implementation of human rights policies during the 1990s was cast as an objective solution to conflict, existing independently of the political aspirations or philosophies of those who propounded it. International policies were premised on establishing the rule of law,[217] and "Human Rights" became the paradigmatic language of the decade.[218] It appeared that the polarity of the Cold War years had at last been transcended, and that the doctrinal study and application of law, particularly human rights law, was sufficient to bring about a major shift in state behavior globally, regardless of philosophical origin.[219]

The development of human rights as a general principle of international law, with the corresponding legitimacy conferred on it, has allowed it to be used as a cornerstone to the development of

214. *See* Moyn, *supra* note 41, at 32.

215. *See id.*

216. *See id.* at 36.

217. *See* United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). From 1992 forward, the emphasis of the U.N. was on the promotion of the rule of law. This fact was reaffirmed in the United Nations Millennium Declaration. *Id.*

218. Moyn, *supra* note 41, at 36.

219. *Id.*

such new and innovative regimes of promotion and protection.[220] The limitations of a more traditional concept of law characterized by bilateralism and a rigid doctrine of consent have been circumvented by the emphasis placed on the need for international law to be used as a vehicle for change.[221] The ending of the Cold War has alleviated the political tensions which for so long prevented human rights–based regimes from taking hold.[222] When politics dissipated, law stepped in.

Of course history did not end in 1989. The past twenty years have brought with them their own problems, and the creeping expansion of the domain of human rights has given rise to new critiques.[223] Nevertheless, the strength of its currency internationally demonstrates the power of an idea to evolve beyond its traditional limitations and give rise to a new framework for action rooted in the idea of justice.

220. *See* Orentlicher, *supra* note 205, at 2612–13.

221. *See id.* at 2549–50.

222. *See* Teitel, *supra* note 13, at 81–82.

223. *See, e.g.*, COSTAS DOUZINAS, THE END OF HUMAN RIGHTS (2000); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies, in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); Brad R. Roth, *Marxian Insights for the Human Rights Project, in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 220 (Susan Marks ed., 2008).