

What is International Human Rights Law?
Three Applications of a Distributive Account

Patrick Macklem

The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Thursday Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While Members are drawn from specific disciplines of the social sciences—anthropology, economics, sociology and political science—as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how, and under what conditions, the concepts that order experience in different cultures and societies are produced, and how they change.

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The theme seminar is working on "pressure on the rule of law." The pressure comes from the "war on terrorism" (and other wars) and from the claim that military and political emergencies require the expansion of executive power and the violation of conventional moral norms. How does the rule of law work to protect ordinary citizens? What is the role of judges and courts in maintaining the rule of law? When do the "needs of the hour" override constitutional limits? What does "necessity" mean in politics and war, and who decides when it comes into play? This Occasional Paper takes up the question of international human rights law.

What is International Human Rights Law? Three Applications of a Distributive Account

International human rights law emerged as a distinct field of international law in the aftermath of the Second World War. The standard account of the field is that its overarching mission is to protect essential and universal features of what it means to be a human being from the exercise of sovereign power.¹ This universal mission has its critics, who argue that at least some standards are relative to specific cultural and historical contexts and that there are no universal means of judging the merits of culturally specific ways of life. Cultural relativists argue that universalism masks the imposition of culturally specific beliefs on communities that possess different inner logics, whereas universalists charge that relativists authorize violations of human rights in the name of cultural difference.²

The debate between universalism and relativism has long dominated theoretical inquiries into the nature of international human rights law.³ And so it should – assuming, as it does, that the mission of the field is to protect universal features of what it means to be a human being. But the significance of this debate turns precisely on the validity of this assumption. If the nature of the field is not what the standard account valorizes or what the relativists criticize, then its traditional supporters and detractors are locked in a debate that does not appear to be resolvable in either the near or distant future – and that has little to do with the actual object of their attention. The drawback is not simply a loose grasp of the law. The true cost is a shrinking of the field's capacity to engage fundamental questions relating to the justice of the international legal order.

In this article, I advance an alternative account of international human rights law, one that comprehends its mission in terms of the distributional consequences of how international law brings legal order to international political reality. On this distributive account, human rights possess international legal significance not because they correspond to abstract conceptions of what it means to be human but because they operate as mechanisms that promote a just international legal order. This account both draws on and departs from cosmopolitan conceptions of distributive justice in contemporary international political theory that suggest that a person's rights and obligations should be determined from a global perspective. It sheds light on why some human rights merit international legal protection despite the fact that they might lack some of the properties required by a universal account of the field.

I illustrate these claims by reference to existing and emergent international legal commitments to indigenous rights, minority rights, and rights to international cooperation and assistance. Indigenous and minority rights relate primarily to differences between individuals and collectivities rather than to features we all share by virtue of our common humanity. Rights to international cooperation and assistance, often referred to more generally as elements of a broader right to development, generate duties on developed states and their citizens to reduce global economic inequality – duties that the traditional account has difficulty comprehending in universal terms. On a distributive account, however, these

three categories of rights possess international legal significance because they seek to mitigate injustices associated with how international law distributes sovereign power among a variety of legal actors it recognizes as states and how it entitles them to rule people and territory.

A distributive account of international human rights law is not indifferent to the ongoing debate between universalism and relativism. International law authorizes states to exercise sovereign power and thus invites normative inquiry into the limits of such authority. But by comprehending the mission of the field in terms that embrace rights and impose obligations that speak to differences between people as well as to features we all share, a distributive account redefines the debate between universalism and relativism as a debate within – as opposed to about – international human rights law. How a given state exercises sovereign power in specific instances, in other words, is but a small part of the real terrain of international human rights law, namely, the distributive justice of the structure and operation of the international legal order itself.

I.

Devoted to the protection and promotion of human rights deemed to possess international legal significance, international human rights law comprises a variety of sources and instruments, including the United Nations Universal Declaration of Human Rights, various international and regional treaties, principles of customary international law, and general principles of international law. Adopted and proclaimed by the General Assembly of the United Nations in 1948, the Universal Declaration, as its title suggests, is universal in tone and aspiration, declaring that “all members of the human family,” by virtue of their equal worth and dignity, share certain fundamental human rights.⁴ These include rights to property, life, liberty and security of the person, equal protection of the law; freedom of thought, opinion, expression, religion, assembly and association; rights to social security, education, work, and an adequate standard of living; and rights of cultural membership and political participation. Although the Universal Declaration technically is not legally binding on states, its adoption marked the formal genesis of a profound structural transformation of the international legal order. What was previously a legal system almost exclusively devoted to providing legal form to relations between and among sovereign states, international law began to lay claim to the power to regulate relations between states and individuals.

This project assumed momentum when the UN Commission on Human Rights produced two treaties that eventually came into force in 1976: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁵ Whereas the ICCPR commits states to respect the right to life, the right to vote, freedom of conscience, freedom of speech, freedom of religion, freedom of association, equal protection, and other civil and political freedoms, the ICESCR enshrines rights to food, education, health, and shelter, as well as a host of other social, economic and cultural rights. These were followed by the adoption of additional, more specialized human rights treaties addressing specific categories of human rights, namely, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Torture and Other, Cruel, Inhumane or Degrading Treatment or Punishment*, the *Convention on the Rights of the Child*, and

the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.⁶

Each of these treaties establishes a monitoring body charged with overseeing state compliance.⁷ These treaty bodies provide specific comments on state reports, general comments on the legal nature and scope of relevant treaty provisions; they also coordinate their responsibilities among each other and with other institutions such as the High Commissioner for Human Rights. Some, like the Human Rights Committee (“HRC”), possess the authority to hear complaints brought by individuals alleging that their rights have been violated.⁸ Some are empowered to hear complaints by one state that another state is in violation of its treaty obligations.⁹ Some, like the Committee Against Torture, may, on their own initiative, initiate inquiries in response to reliable information received about serious human rights violations.¹⁰

Paralleling the international proliferation of human rights instruments and institutions are similar developments at the regional level, with the adoption of both general and specific human rights treaties in Europe, Africa, and the Americas, and the establishment of institutions responsible for treaty oversight, elaboration and enforcement.¹¹ Adding further complexity to the field is the participation of judicial institutions of national legal systems in which international and regional human rights commitments possess domestic legal significance. Judges around the world are borrowing relatively freely and with increasing regularity from international, regional, and foreign sources to assist in their interpretive tasks.¹² The relation between the domestic and international legal spheres increasingly involves “not merely the transmittal of the international, but a process of translation from international to national” that possesses the capacity to “produce new meanings.”¹³

Despite the multiplicity of its constituent legal sources and instruments, the dominant approach to the normative foundations of international human rights law regards human rights as moral entitlements that all human beings possess by virtue of our common humanity.¹⁴ What constitutes a human right, according to this account, is not determined by a positive legal instrument or institution. Human rights are prior to and independent of positive international human rights law. Just because the field declares something to be a human right does not make it so. Conversely, the fact that a human right does not receive international legal protection does not mean that it is not a human right. The existence or non-existence of a human right rests on abstract features of what it means to be human and the obligations to which these features give rise. The mission of the field is to secure international legal protection of universal features of what it means to be a human being.

On this universal account, human rights protect essential characteristics or features that all of us share despite the innumerable historical, geographical, cultural, communal, and other contingencies that shape our lives and our relations with others in unique ways. They give rise to duties that we owe each other in ethical recognition of what it means to be human. This is not to say that rights and obligations cannot also arise from the bonds of history, community, religion, culture, or nation. But if such rights relate simply to contingent features of human existence, they do not constitute human rights and do not merit a place on the international legal register. And if we owe each other duties for reasons other than our common humanity – say, because of friendship, kinship, or citizenship – then these duties do not correspond to human rights and do not possess international legal significance.

What characteristics of human existence possess universal value, and whether they can and should be comprehended in the form of rights, are thus questions that have fueled intense debates about the nature and scope of the field. Since its inception, many state and non-state actors tend to privilege interests that underlie international civil and political rights at the expense of those underlying social, economic and cultural rights, notwithstanding assertions of a principle of interdependence that holds all human rights to be interdependent and of equal value.¹⁵ This privileging of the civil and political over the social, economic and cultural is in no small measure due to the fact that most of the field's foundational instruments and institutions came into existence in the wake of wartime atrocities, and were consciously designed to protect interests associated with civil and political freedom from the raw exercise of collective state power.

But this privileging is also a function of the influence of universalism in normative debates about the nature of this field of law. If human rights correspond to only those duties that we owe each other directly in moral recognition of what it means to be human, then they may well obligate individuals not to interfere with the liberty or autonomy of others. But whether they also impose positive obligations to assist others in need, especially others who belong to different political communities or other communities of value, is a matter of deep controversy from the perspective of a universal account. As a result, human rights that require positive state action to secure their protection, especially those that impose duties on individuals and collectivities in political communities other than where the bearers of rights are located, fit awkwardly within the universal picture.

So too do initiatives that extend legal protection to certain individuals and groups but not others. Several states have entered into bilateral treaties protecting the rights of minorities living outside the state in which they share a historical affiliation.¹⁶ Some multilateral treaties also extend rights protection to various minority communities.¹⁷ Although worded in universal terms, numerous international civil and political rights can be and have been interpreted to protect the interests of religious, ethnic, and cultural communities.¹⁸ In addition, recent developments at the regional and international levels signal a renewed commitment to rights that protect indigenous territories, cultures, and forms of governance from assimilative forces emanating from states in which indigenous peoples are located.¹⁹

International human rights law thus protects rights that relate to features we all share as human beings, but it also protects rights that attach to certain individuals and not others, rights that create positive as well as negative obligations, and rights that require us to attend to the needs of strangers both at home and abroad. An account of the normative architecture of the field should not conflate fact and norm by equating legal validity with normative legitimacy, but nor should it lose sight of the legal facts which it seeks to vest with normative meaning. In contrast to the universal account, understanding international human rights law in distributive terms provides normative shape to the diverse international legal entitlements that actually comprise it. What these diverse legal entitlements share is a concern with the structure and operation of the international legal order itself.

Specifically, a distributive account of human rights law ties the field more closely to the existing international legal order. It begins with the premise that international law, not moral or political philosophy, determines the international legal status of a human right. There exists an international human right to food, for example, because the *International Covenant*

on *Economic, Social and Cultural Rights* enshrines such a right. Its international legal status as a human right derives from the fact that international law, according to the principle *pacta sunt servanda*, provides that a treaty in force between two or more sovereign states is binding upon the parties to it and must be performed by them in good faith.²⁰ The international legal validity of a norm – what makes it part of international law – rests on whether its enactment, promulgation, or specification is in accordance with more general rules that international law lays down for the creation of specific legal rights and obligations.

On the distributive account offered here, the fact that one or more international human rights instruments stipulates that a human right constitutes a valid legal norm does not end normative inquiry into its international legal status. But, unlike the universal account, which determines the legitimacy of a human right by reference to criteria external to positive international law, a distributive account ascribes its legitimacy to a role that is internal to international law.²¹ On this account, the legitimacy of international human rights lies in their capacity to serve as mechanisms or instruments that mitigate some of the adverse consequences of how international law organizes global politics into an international legal system.

This distinction between universal and distributive approaches to international human rights law is similar to the distinction between orthodox and practical views of human rights suggested by Charles Beitz. According to Beitz, the distinguishing feature of an orthodox conception of human rights is “the idea that human rights have an existence in the moral order that is independent of their expression in international doctrine.”²² A practical conception, in contrast, regards the “functional role of human rights in international discourse and practice ... as definitive of the idea of a human right,” and seeks to provide the best interpretation of international doctrine in light of this functional role.²³ Beitz argues that international human rights function as grounds for interfering in the internal affairs of a state and assisting in their realization. In his view, “[t]o say that something is a human right,” according to a practical conception, “is to say that social institutions that fail to protect the right are defective – they fall short of meeting conditions that anyone would reasonably expect them to satisfy – and that international efforts to aid or promote reform are legitimate and in some cases may be morally required.”²⁴

Beitz develops a practical conception of human rights as part of a larger cosmopolitan theory of the demands of international distributive justice. He and others advocate evaluation of the justice of global institutional arrangements in light of dramatic economic inequality in the world.²⁵ The distributive account offered here draws on this strand of cosmopolitan theory but, because of its specifically legal focus, it operates with a more modest conception of international distributive justice, one that does not question the legitimacy of the basic structure of international law as much as it seeks to mitigate some of its adverse legal consequences. Whereas Beitz focuses on the functional role that human rights play in “international political discourse,”²⁶ this account focuses on the functional role that they play as legal entitlements in international law.²⁷ The role of human rights in international law, in other words, is not co-extensive with their role in international political discourse. In the international legal sphere, human rights seek to do justice to how international law organizes international political reality by attending to the distributional consequences of its various modes of conceptualizing political power as legal authority.

Understanding international human rights law this way doesn't eliminate deep political disagreement over what distributive justice in international law might mean and how it might be promoted. Nor does it relegate human rights law to a functional role in international political discourse. It comprehends human rights as legal sites of political contestation over fundamental questions about international distributive justice, but it casts these debates in distinctively legal terms. It focuses on how international law distinguishes between legal and illegal claims of power, including sovereign power, and how international human rights possess the potential to monitor the constitution and exercise of international legal authority. In doing so, this account shapes legal judgment on more precise legal questions that punctuate the field – such as what constitutes the scope and content of specific human rights, what interests various human rights protect, and what duties they generate – by directing these questions toward the effects of the structure and operation of international law itself.

The next section of this article characterizes international law as an enterprise that distributes sovereign power among a variety of legal actors. It focuses on what sovereignty means in international law and how its distribution brings legal order to international political reality. Subsequent sections describe indigenous rights, minority rights, and rights to international cooperation and assistance, respectively, as legal instruments that offset some of the adverse distributional consequences of this mode of legally organizing the international arena.

II.

If a distributive account of international human rights law relates to injustices associated with the structure and operation of the international legal order, what then is the structure of international law and how does it operate? How does it organize international political reality into an international legal order? One central feature of the structure and operation of international law is the conception of sovereignty that lies at its heart.

Sovereignty is a concept that means different things, at different times, to different people. It can be imagined as resting in a divine being, an individual, a group of individuals, or an institution or group of institutions. It can be imagined as absolute, limited, or both, as in one of its earliest formulations by Jean Bodin, who defined sovereignty as absolute power limited only by the power of God.²⁸ It can be imagined as inherent in a people, as in Rousseau's account of sovereignty as the general will of a people,²⁹ or contingent on the consent of people, as in the Hobbesian account of the state as the result of a social contract among individuals to escape anarchy.³⁰ It can be indivisible, as in the case of a unitary state, or divisible, as in the case of a federal state. It can be understood in factual terms, as a concept that organizes political reality by the distinctive constellation of power to which it refers; in normative terms, as a constellation of power that vests only in those entities that possess legitimate authority to rule people and territory; and in legal terms, as power that vests in an entity lawfully entitled to its exercise.

For the purposes of understanding how international human rights law engages sovereign power, however, the relevant question is not which of sovereignty's multiple characterizations best conceptualizes its true nature. Instead, the relevant inquiry is into sovereignty's meaning in international law. In international law, sovereignty refers to the

legal power of a state to rule people and territory. In J.L. Brierly's elusive definition, sovereignty is "an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states."³¹ But international law does not accept as given what states claim as sovereign right, no matter how habitually such claims might occur. In a dizzying array of contexts, much of international law regulates the exercise of sovereign power by identifying its constituent elements and managing its limits: Does sovereignty entitle a state to divert its natural water supply in a way that affects the water supply of a neighboring state? Does sovereignty authorize a state to wage war against another state? Does it entitle a state to abuse the human rights of its citizens? Does it immunize state officials from criminal prosecution in another state? Yet international law does more than regulate the exercise of sovereign power. It determines who possesses sovereignty. It establishes, in other words, sovereignty's international legal existence.

Claims of sovereign power possess legal validity in international law only under certain conditions and in certain circumstances. International law provides that a state whose government represents the whole of its population within its territory consistent with principles of equality, nondiscrimination, and self-determination is entitled to maintain its territorial integrity under international law and to have its territorial integrity respected by other states.³² The field also entitles a collectivity to form a state and wield sovereign power if it constitutes a "people" and has experienced severe and ongoing injustices such as colonial rule or alien subjugation, domination or exploitation.³³ Finally, international law also confers legal validity on a claim of sovereignty by a collectivity if a sufficient number of states recognize its sovereign status as an empirical fact.³⁴

These avenues of obtaining and maintaining sovereign statehood are the means by which the international legal order distinguishes between legal and illegal claims of sovereign power. By legally validating some claims of sovereign power and refusing to validate others, international law organizes international political reality into a legal order in which certain collectivities possess legal authority to rule people and territory. Sovereignty, in international law, is a legal entitlement to rule people and territory that the field confers on the multitude of legal actors that it recognizes as states. International legal rules determine which collectivities are entitled to exercise sovereign authority and which territory and people such authority governs. In doing so, international law effectively performs an ongoing distribution of sovereignty among certain collectivities throughout the world.

That international law distributes sovereign power doesn't mean that a national legal order construes sovereignty in the same terms. We could imagine a national legal order wedded to the proposition that the legal source of its sovereign power lies in international law. According to Hans Kelsen, this is the way we should imagine the relationship between national and international law. For Kelsen, the legality of domestic law ultimately rests on international legal norms that validate claims by states of sovereign authority over persons and territory.³⁵ Regardless of the merits of Kelsen's theoretical claim, most national legal orders do not in fact or law ground their sovereignty in the international legal order; they locate it elsewhere. In liberal democratic states, sovereignty is typically said to flow from the will of the people, from the bottom up, so to speak. But international law comprehends sovereignty in a radically different way. Sovereignty, in the international legal imagination, comes from above, from international law itself.

That international law distributes sovereign power also doesn't mean that international law doesn't come from sovereign states. Much of international law – including what it says about what sovereign states are entitled to do and not do with their sovereignty – is the product of treaties among states or of the customary practice of states. International rules governing the distribution of sovereignty themselves are the product of treaty and custom, including those that require respect for the territorial integrity of existing states, as well as those that redistribute sovereign power by right or recognition. Saying that international law distributes sovereignty means that international legal norms shape an international political reality into an international legal order by determining the legality of multiple claims of sovereign power. That states participate in the production of these norms doesn't strip these norms of their distributional consequences, which include the fact that some collectivities possess international legal authority to rule territory and people and others don't.

A more formidable challenge to the concept of sovereignty in international law rests on a skeptical understanding of international law as the repository of delegated national authority, and therefore subordinate to the sovereign power of states. On this view, to the extent that sovereignty is an international legal entitlement, it is a proxy for, and does not ultimately limit, the authority of a state to rule people and territory. This is not the same as claiming that sovereignty assumes a different meaning in domestic legal orders than in international law, nor is it the same as claiming that states participate in the establishment of international legal norms. It is an account of international law as delegated domestic legal authority, legally binding on states only to the extent that they consent to be bound by its terms. It claims that international law is really only domestic law with international legal consequences, and sovereignty in international law is really only a projection of its domestic legal meaning. If this is the case, then it makes little sense to speak of international law as a legal order that regulates national legal orders, let alone seek to determine its relation to international distributive justice.³⁶

But whether this is the case rests on the merits of characterizing international law by means of a particular definition of sovereignty, one that international law must necessarily eschew if it is to organize international political reality into an international legal order. Comprehending sovereignty in international law as delegated national authority assumes what it purports to prove, namely, that there is no law in international law other than domestic law and therefore that international law is not law. There are many reasons to question the empirical validity of this assumption, but the relevant question ultimately is not empirical but theoretical. What definition of sovereignty best enables the conceptual organization of international political reality into an international legal order? Defining sovereignty in terms that preclude an understanding of international law as constituting an international legal order may yield a measure of internal legal coherence to the domestic political reality of a given state. It may also provide domestic legal justification for coercive action in the international political arena. But it does so by conceptually denying international law the very means it must rely on to bring legal order to the international political reality that states produce through their mutual interaction.

Martti Koskenniemi has advanced a more nuanced claim, that international law comprehends sovereignty simultaneously as authority delegated to states by international law and as authority delegated to international law by states. As a result, for Koskenniemi, international law is shot through with legal indeterminacy and is thus a thoroughly political

enterprise.³⁷ Koskenniemi is not alone in pointing out that the legal boundary between the national and international is much more porous than traditional understandings of either field of law.³⁸ But it is one thing to claim that domestic law influences international legal outcomes and vice versa. It is another to claim that domestic law constitutes international law. Koskenniemi's characterization ultimately suffers from the same flaw as its more skeptical cousin, albeit in gradated form. The more the international is constituted by the national, the less sense it makes to speak of international law as a legal order relatively distinct from national legal orders. That international law aims to regulate national legal orders does not necessarily mean that national legal orders accept how they are conceptualized in international law, but it does require conceptualizing sovereignty as an international legal entitlement that international law distributes and regulates. To the extent that this conception's opposite – sovereignty as delegated national authority – finds expression in international legal argument, this is a reflection of the capacity of national legal orders to dominate international law and impair its capacity to independently organize international political reality into a distinct legal order.

The remainder of this article focuses on three consequences of the role that sovereignty plays in the structure and operation of the international legal order. First, certain collectivities – those which international law regards as states – possess sovereign power, and other collectivities do not. Second, by virtue of recalibrations in the distribution of sovereignty that occur when international law validates the transfer of sovereignty over territory and people from one sovereign actor to another, some individuals and groups can find themselves subject to the sovereign authority of a state to which they bear little or no historical affiliation. Third, not all sovereign states acquire their sovereignty under international law at the same time or under the same conditions. On a distributive account, part of the challenge for international human rights law is to mitigate harms associated with these consequences by its commitments, respectively, to indigenous rights, minority rights, and rights to international cooperation and assistance.

III.

What injustices does international law produce by conceptualizing the power to rule people and territory as a legal entitlement to be distributed among certain geographically concentrated collectivities in the various regions of the world? The inclusion of certain collectivities and the exclusion of others in the distribution of sovereignty do not, in themselves, produce an unfair or unjust distribution. Fairness or justice in this context turns in part on the strength of the reasons that international law provides for the principles it lays down for the legal acquisition of sovereign power and their relationship to the nature of the entitlement – sovereignty – that forms the subject of the distribution and the nature of the legal actors – states – in which the entitlement vests.³⁹

As described previously, international law provides that existing states, except under exceptional circumstances, are entitled to have their territorial integrity respected by other states. It also vests the right of self-determination in peoples, which, again in exceptional circumstances, may entitle a people to sovereign statehood. And it confers legal validity on a claim of sovereignty by a collectivity if a sufficient number of states recognize its sovereign status. The first of these three legal stances validates the status quo distribution of sovereignty.

The second and third permitted and continue to permit recalibration of the existing distribution in exceptional circumstances.

But the legality of the existing distribution of sovereign power was not produced simply by the operation of these three organizing principles. International law began to validate claims of sovereign power, and thereby began to constitute international political reality into a legal order, when European states launched ambitious plans of imperial expansion and began to establish overseas colonies. Each colonizing power viewed itself and others as entitled to claim sovereignty to territory if it could establish a valid claim according to doctrines that governed European imperial practice at the time. Some of these doctrines, such as cession, were antecedents of contemporary international legal principles that regulate the acquisition of sovereignty, but others, such as the doctrines of discovery and conquest, no longer form part of contemporary international law.⁴⁰

According to the doctrine of discovery, sovereignty could be acquired over unoccupied territory by discovery. If the territory in question was occupied, then conquest or cession was necessary to transfer sovereign power from its inhabitants to an imperial power. European imperial practice deemed territory occupied by indigenous peoples to be unoccupied, or *terra nullius*, for the purposes of acquiring sovereign power. Because indigenous territory was deemed vacant, neither conquest nor cession was necessary to acquire the sovereign power to rule indigenous people and territory. International law declared indigenous territory to be *terra nullius* because European powers viewed indigenous people to be insufficiently Christian or civilized to merit recognizing them as sovereign powers.⁴¹ In the words of Chief Justice John Marshall of the United States Supreme Court, “the character and religion of [North America’s] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.”⁴²

International law thus excluded indigenous peoples from the international distribution of sovereignty and included them under imperial sovereign power by constructing them as inferior peoples. This process of indigenous exclusion and inclusion vested states with international legal authority to assume sovereign power over indigenous peoples and territory. The ensuing consequences, which included genocide, forced relocation, and territorial dispossession, are well known and need not be catalogued here. The important point is that this process of sovereign exclusion and inclusion was not a one-shot affair, occurring some time in the distant past when international law accepted the proposition that indigenous territory constituted *terra nullius*. It is an ongoing process of exclusion and inclusion because of how international law validates and restricts legal challenges to the status quo distribution of sovereign power except in exceptional circumstances.

The morally suspect foundations of these baseline legal entitlements are why indigenous rights merit recognition on the international legal register. In recent years, international human rights law has begun to recognize the international legal significance of indigenous cultures, territorial commitments, and forms of governance in the face of sovereign power that threatens these interests. The most visible manifestation of this development is illustrated by the UN *Declaration on the Rights of Indigenous Peoples*, recently passed by the General Assembly, which recognizes differences, partly denied and partly produced by the

international distribution of territorial sovereignty initiated by colonization, that exist between indigenous and non-indigenous peoples.⁴³ A similar development is occurring in the Organization of American States. The OAS *Proposed American Declaration on the Rights of Indigenous Peoples*, prepared by the Inter-American Commission on Human Rights and made public in 1995, has since gone through a number of modifications.⁴⁴ It enshrines rights of non-discrimination and affirmative action; rights of autonomy and self-government; rights of political participation; rights to lands, territories and resources; rights relating to cultural integrity; and treaty rights.

Indigenous peoples can also avail themselves of other international legal protections that differentiate between indigenous and non-indigenous people. Convention 107 of the International Labour Organization, adopted in 1957, while advocating the “integration” of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development. The ILO more recently adopted a revision of Convention 107, known as Convention 169.⁴⁵ Article 1(1)(b) of Convention 169 states that indigenous peoples are defined by their “descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries.” It recognizes “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the frameworks of the States in which they live.” Other provisions list a wide range of additional indigenous rights and corresponding state obligations.

International indigenous rights are capable of being normatively understood in universal terms, as concrete expressions of more abstract rights that inhere in all individuals. Debates within the ILO during the drafting of Convention 107, and its text, for example, manifest a commitment to indigenous rights in instrumental terms – as mechanisms that would enable indigenous people to benefit “fully from the rights and advantages enjoyed by other elements of the population.”⁴⁶ Convention 169 and the UN *Declaration on the Rights of Indigenous Peoples* can also be construed as concrete expressions of a more general right of self-determination that inheres in all people.⁴⁷

But these characterizations miss much of the international legal significance of indigenous rights. Indigenous rights in international law are differentiated rights that recognize differences, partly denied and partly produced by the international distribution of territorial sovereignty initiated by colonization, that exist between indigenous and non-indigenous peoples.⁴⁸ They speak to the consequences of organizing international political reality, including indigenous political reality, into a legal system that vests sovereign power in certain collectivities and not others. Not only does this mode of legal organization exclude indigenous peoples from participating in the distribution of sovereign power that it performs, it authorizes legal actors to whom it distributes sovereign power – states – to exercise such power over indigenous peoples and territory to their detriment.

International law, absent exceptional circumstances, does not stipulate that the right of self-determination authorizes an indigenous people to assert sovereign independence from a state in which it is located. Nor does it authorize indigenous people to challenge the legal validity of the sovereign power to which they are subject on the basis of its morally suspect origins.⁴⁹ But international indigenous rights can mitigate some of the adverse consequences

of how international law validated morally suspect colonization projects that participated in the production of the existing distribution of sovereign power. Indigenous rights speak to injustices produced by the way in which the international legal order conceives of sovereignty as a legal entitlement that it distributes among collectivities it recognizes as states. They call on states to take appropriate domestic measures to vest their contemporary claims of sovereign authority over indigenous peoples and territory with a modicum of normative legitimacy.

IV.

At the end of the First World War, after the Armistice was signed on 11 November 1918, leaders of over fifty states participated in the Paris Peace Conference. Lasting approximately one year, negotiations were dominated by the United States, Britain, France, Italy and Japan, the five major powers responsible for defeating Austria-Hungary, the German Empire, Bulgaria, and the Ottoman Empire. The conference yielded five treaties that imposed military restrictions and financial liabilities and determined the post-war boundaries of Bulgaria, Turkey, Austria, Hungary, and Germany, and their neighboring states.

These treaties reassigned sovereign power over people and territory from defeated to victorious states, dramatically redrawing the territorial map of Europe. The Treaty of Trianon, for example, signed under protest by the Hungarian delegation at the Trianon Palace at Versailles, reduced the size and population of Hungary by about two-thirds, divesting it of virtually all areas that were not purely Magyar. Romania received Transylvania, part of the adjoining plain, and part of the Banat, including Timisoara.⁵⁰ Czechoslovakia received Slovakia and Ruthenia. Austria was awarded the Burgenland, but the city of Sopron and its vicinity were returned to Hungary after a plebiscite in 1921. Yugoslavia (then the Kingdom of the Serbs, Croats, and Slovenes) obtained Slavonia, the western section of the Banat, and Croatia, depriving Hungary of access to the Mediterranean Sea.

Treaties, like the Treaty of Trianon, possess the capacity to modify the distribution of sovereign power by transferring sovereignty over territory and people from one sovereign actor to another. In so doing, they create national minorities, such as Hungarians living in Ruthenia, Slovakia, and Transylvania, communities located outside the territorial sovereignty of the state with which they bear historical affiliation.⁵¹ The major powers in the post-war period attempted to address some of the consequences of the realignment of sovereign power in Europe by a web of multilateral and bilateral treaties, monitored by the League of Nations, that guaranteed national minorities in Central and Eastern Europe protection of their ethnic, religious and linguistic identities, including the right to officially use their mother tongue, to have their own schools, and to practice their religion. This system of minority protection was not a universal one, as it governed only certain states within Europe. Its shortcomings were but one of the complex variables that led to the demise of the League of Nations and the onset of the Second World War.

After 1945, minority rights assumed a different form in international human rights law. The field comprehends minority rights in primarily individualistic terms, vesting in individuals who belong to ethnic, religious or linguistic minorities. According to article 27 of the *International Covenant on Civil and Political Rights*, such “persons ... shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to

profess and practice their own religion, or to use their own language.” The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* further specifies that minorities possess rights to enjoy their own culture, to practice their own religion, and to use their own language; to participate in cultural, religious, social, economic and public life; to participate in decisions on the national and, where appropriate, regional level; and to associate with other members of their group and with persons belonging to other minorities.

Minority protections are also contained in two Council of Europe treaties, the *Framework Convention for the Protection of National Minorities* and the *European Charter for Regional or Minority Languages*, and the OSCE Copenhagen Document of 1990. The latter instrument established the Organization for Security and Cooperation in Europe, which, under the auspices of the Office of the High Commission on National Minorities, monitors the treatment of minorities throughout Europe in the name of regional security and cooperation.⁵²

Although international human rights law provides national minorities with several avenues for challenging the exercise of state power, the field displays deep ambivalence about the legitimacy of providing protection to minorities beyond what accrues to all individuals by virtue of our common humanity. The civil and political freedom of a member of a minority may well be more likely to be interfered with than that of a member of a majority, and therefore the field is attentive to the various forms of discrimination and marginalization that minorities unjustly experience because of their minority status. But beyond this level of protection, minority rights run counter to the aspiration of international human rights law to protect universal, not contingent, features of human identity.

At the level of the political, this ambivalence is simply the collective unwillingness of states to consent to binding international legal norms and institutions that challenge their domestic legal authority. But at the level of the normative, the ambivalence is the product of comprehending the field in terms of an aspiration to identify and protect universal human values. Human rights, according to this aspiration, do not protect ethnic, racial, cultural or national groups; they protect individual freedom in the face of the ethnic, racial, cultural, or national differences that otherwise divide us.

But this ambivalence is another illustration of how the universal account of the field fails to engage fundamental questions relating to the justice of the international legal order. Comprehending minority rights claims in distributive terms, that is, in terms of the role they can play in monitoring the justice of the distribution of sovereign authority, reveals that their normative status rests not on whether they protect universal human values but whether they promote a just distribution of sovereign authority in international law. Minorities exist in relation to majorities, and majorities exist because international law distributes sovereign power over territory and people to certain collectivities and not others. Seen in this light, minority rights serve as instruments to mitigate injustices associated with the kinds of recalibrations of sovereign power embodied in the Treaty of Trianon that international law treats as possessing international legal force.

Viewing international minority rights this way does not end normative inquiry into their legitimacy. Whether the Treaty of Trianon was a just or unjust recalibration of sovereign power is obviously critical to determining the justice of requiring Romania, say, to respect certain differentiated rights of the Hungarian minority under the sway of its sovereign power.

Nor does adopting this perspective necessarily determine the content of the rights due to any given minority. But it does direct normative judgment on these questions to identifiable moments in the legal organization and reorganization of international political reality, and asks whether the legitimacy of an assertion of sovereign power rests on the extent to which the state in question respects the rights of national minorities within its midst.

Focusing on injustices produced by the structure and operation of the international legal order as opposed to abstract conceptions of universal right also yields a more refined approach to minority protection. The standard universal account of the field fails to address the deep diversity of claims by minority communities that they are entitled to a certain measure of autonomy or protection from assimilative tendencies of the broader political community in which they are located. Some of these communities, like indigenous peoples in the Americas and elsewhere, claim ancestral relations to territories that long predate the establishment of states in which they find themselves. Some, like the Hungarians in Romania, share an ethnic kinship with a state other than the one in which they are located. Some simply share common cultural traditions that they regard as defining features of their collective identities. Some define themselves in terms of religious identities not shared by the majority of members of the political community in which they are located. The standard account of the field forces us to inquire into what all of these diverse claims might share, and then determine whether this feature or set of features possesses universal value and therefore merits international protection.⁵³

A distributive account of international human rights law, in contrast, facilitates differentiation among minority claims by locating their international legal significance in relation to the legitimacy of the sovereign power that they challenge, which in turn rests on the way in which international law participates in the formation of minorities by distributing and redistributing sovereign power among states. Indigenous rights and national minority rights claims speak to different distributive injustices caused by how international law organized and continues to organise international political reality. Claims based on religious and cultural difference challenge the limits of sovereign power more than its sources. Differentiation does not resolve the contentious ethical, political, and legal issues associated with international minority rights. But it clarifies why some minority rights and not others might merit international legal protection and locates their legal significance in relation to the structure and operation of the international legal order.

V.

The universal account of the normative mission of international human rights law fails to speak adequately to another set of injustices associated with our international legal order, namely, those that result from the enormous inequalities in wealth and opportunities that exist throughout the world. The account, as noted, treats human rights as corresponding to duties that individuals owe directly to others in ethical recognition of universal features of what it means to be a human being. With the *International Covenant on Social, Economic and Cultural Rights* and other international and regional instruments, the field displays commitments to a broad set of social and economic rights that guarantee individuals access to a set of basic social resources, such as food, shelter, a basic income, health care, and education. But these rights, though framed in universal terms, are typically understood as

generating duties on states to secure access to such resources for its own citizens.⁵⁴ They are not typically construed in terms that mandate international redistributive measures that address global poverty.

More promising are commitments to a right to development and, what are often thought of as two of its constituent elements, rights to international cooperation and assistance. The UN *Declaration on the Right to Development* defines the right to development as an entitlement to “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” The Declaration also imposes a duty on all states to cooperate with each other in ensuring development and eliminating obstacles to development, implying that the right to development can be asserted by a state on behalf of its population against other states and the international community.⁵⁵ But the universal account, focused on conditioning the existence of rights on abstract moral duties we owe others directly, offers little reason to comprehend these commitments to international cooperation and assistance as yielding positive duties on all of us to improve the social and economic condition of impoverished people around the world. The legitimacy of such duties quickly becomes subsumed in a larger debate within classical political theory about the nature of one’s obligations to assist strangers in need.⁵⁶

A focus on the distributive dimensions of international law, however, provides an alternative framework for understanding the relationship between international human rights and global economic inequality. If the legitimacy of international human rights rests on their capacity to mitigate injustices produced by the structure and operation of international law, then the task of international human rights scholarship is to try to identify, first, how the organization of international political reality into a legal order contributes to global economic inequality and, second, how international human rights can be comprehended as mechanisms that mitigate such inequality.

The work of Thomas Pogge illuminates this task.⁵⁷ Pogge argues that human rights, properly conceived, should focus less on “perfect” or abstract duties that we owe others directly and more on what justice requires of the establishment and operation of institutional orders that exercise coercive power. Those responsible for the establishment of international order (for Pogge, this means all of us) confront an array of possible institutional options, and respecting human rights requires certain institutional choices over others when constructing and operating institutions to govern global matters. Pogge argues that justice requires institutional choices that decrease rather than increase world poverty.⁵⁸ He identifies two specific areas of institutional concern: international resource and borrowing privileges, which vest states with unlimited control over natural resources in their territories,⁵⁹ and the structure and operation of international institutions, such as the WTO, which, he argues, enable economically powerful states to secure “the lion’s share of the benefits of global economic growth.”⁶⁰

Pogge is right to zero in on the way that the international legal order contributes to global economic inequality. In this respect, he offers a more compelling moral case for global redistribution than John Rawls, who argues that in the international arena, distributive justice only requires states to assist other states to be able to operate in accordance with a public conception of justice. Rawls refers to this requirement of justice as a duty of assistance,

one that is considerably less demanding than his domestic “difference principle,” which requires of liberal democracies that socioeconomic inequalities be arranged to the greatest benefit of the least advantaged within their jurisdiction.⁶¹ One reason that Rawls offers in support of a thinner conception of distributive justice at the international level is that the wealth of a nation is a function of domestic political variables. In his words, “the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members.”⁶²

But disparities between wealthy and poor states cannot be explained solely by reference to domestic political cultures; even the most industrious of states can only address poverty if they possess sufficient resources to do so, and whether a state is blessed with an abundance of resources is a function of the nature and reach of its sovereign power. The international legal order ultimately determines what belongs to any given state by validating certain claims of power to rule territory and people and invalidating others. International law establishes a basic legal structure that identifies which territory and resources legally belong to which states. International law performs this distribution for a host of reasons that, as we have seen, have little to do with global economic equality and so it is not surprising that there are huge disparities between states in terms of their resources and capacity to generate wealth. This is not to say that international law causes global economic inequality; obviously, there are a host of complex factors that contribute to its presence and persistence. But it is to say that the distribution of sovereignty does participate in the production of economic inequality, and that a just international legal order is one that attends to its own adverse distributional consequences.

Take Pogge’s concern about the international resource and borrowing privileges of states, by which he means “the privileges freely to borrow in the country’s name (international borrowing privilege) and freely to dispose of the country’s natural resources (international resource privilege).”⁶³ International law comprehends these rules as attributes of sovereignty. In the words of the Permanent Court of International Justice, sovereign independence means “a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.”⁶⁴ Pogge argues that these attributes of sovereignty contribute to global poverty because they foster “bad government in the resource-rich developing countries by giving repressive rulers a source of revenues and by providing incentives to try to seize political power by force.”⁶⁵

Whether this is the case, and whether these incentives outweigh any potential positive effects of these rules, are important questions. For present purposes, I want to focus on one small piece of this complex puzzle, which relates to when developing countries acquired these attributes of sovereignty, which in turn relates to international law’s participation in decolonization. The rules to which Pogge refers came to govern developing countries only after they achieved sovereign statehood under international law. Recall that international law vests the right of self-determination in peoples, which, in exceptional circumstances, may entitle a people to sovereign statehood. International legal sources supporting a right of self-determination include the *Charter of the United Nations*, which lists the principle of self-determination as one of the purposes of the United Nations.⁶⁶ The Charter also calls for the

promotion of a number of social and economic goals “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”⁶⁷ Similarly, the *International Covenant on Civil and Political Rights* provides that “all peoples have the right of self-determination [and to] freely determine their political status and freely pursue their economic, social and cultural development.”⁶⁸

Before the First World War, however, “if international law enforced any conception of self-determination, it meant one thing: Established states had a right to be left alone by other states.”⁶⁹ The field traditionally understood self-determination as vesting in the entire population of an existing state. It only began to comprehend it as a right vesting in a collectivity that does not necessarily constitute the whole of a state’s population after the Second World War, as a means of managing and legitimating the legal transformation of colonial territories in Africa and elsewhere into sovereign states. Developing countries only acquired the incidents of sovereignty when they acquired sovereignty itself. Before they achieved sovereign recognition, control over natural resources vested in their colonial masters, as did all other incidents of international sovereign power.

Thus, when international law extended its distribution of sovereignty to include colonies that had achieved sovereign independence, it vested ex-colonies with the attributes of sovereignty only at the moment of their independence. States acquire “the sole right of decision in all matters economic, political, financial or other” only when they become states. Whether a developing country is resource-rich or resource-poor, in other words, turns in part on what resources were left by colonial authorities when international law vested it with sovereign power.

As Antony Anghie and others have pointed out, additional international legal doctrines also shaped the extent of resources available to third world states at the moment of their inclusion in the international distribution of sovereign power. The doctrine of state succession holds that rights granted by a sovereign power to a private entity are to be respected by the successor sovereign. In the context of decolonization, the predecessor sovereigns were, of course, colonial powers. Some colonial powers also entered into agreements with their colonies shortly before sovereign independence in which the colony undertook to protect all territorial rights acquired by achieving independence.⁷⁰ Before colonies participated in the distribution of sovereignty, international law vested the legal power to dispose of their natural resources in colonial powers, and when colonies became subjects in the distribution, international law vested them with power only over those resources that remained at the date on which they achieved sovereign statehood. This temporal dimension to the acquisition of sovereignty in international law has the effect of privileging states with a history of colonizing others over states with a history of being colonized, thereby contributing to the disparity of resources that exists between developed and developing states.

The right to development, on a distributive account, thus constitutes a legal means of addressing adverse distributional consequences caused by the way in which international law incorporated collectivities subject to colonial rule into its distribution of sovereign power. The extent to which it mandates redistribution turns on how much of this disparity we attribute to the operation of the international legal order and how much can be attributed to other factors, such as the failure of poorer states to take advantage of the resources over

which they exercise sovereign power. But this question of attribution is a normative matter, not a matter of financial accounting. Conceiving of the right to development in distributive terms yields normative reasons for international human rights law to interpret it as mandating global wealth redistribution. The obligations corresponding to this interpretation of the right to development do not necessarily correspond to abstract duties that we owe each other by virtue of our common humanity. Instead, these obligations lend legitimacy to an international distribution of sovereign power tainted by the ways in which developing states were legally disadvantaged in the process of their incorporation in the international legal order.

This distributive account of rights to international cooperation and assistance and, more generally, the right to development both draws on and departs from cosmopolitan conceptions of distributive justice in contemporary international political theory. Cosmopolitan justice, at least in some of its strong forms, holds that the global distribution of wealth and resources should be decided independently of the boundaries of the state because state boundaries are essentially arbitrary. Beitz and Pogge, for example, both argue that international distributive justice requires that global socioeconomic inequalities be arranged to the greatest benefit of the least advantaged.⁷¹ Simon Caney defends a similar egalitarian distributive vision, one that includes “subsistence rights, a principle of global equality of opportunity, rules of fair play, and a commitment to prioritizing the least advantaged.”⁷² Hillel Steiner goes further, arguing that all persons have a right to an equal portion of the world’s natural resources.⁷³

The principal challenge confronting such cosmopolitan conceptions of distributive justice, in the words of Kok-Chor Tan, “is to show how the aspiration for justice without borders can be reconciled with what seems to be a basic moral fact that people may, and are indeed obliged to, give special concern to their compatriots.”⁷⁴ The distributive account offered here adopts a narrower focus than such cosmopolitan conceptions by attending to the effects of how international law distinguishes between valid and invalid claims of sovereign power. It works with the existing international legal order, including its commitment to sovereignty. It treats sovereignty as a good that international law distributes among a variety of legal actors for reasons that relate to the nature of sovereignty itself, including the fact that it protects associative relationships in political communities. In doing so, the distributive account seeks to do justice in an international legal order that protects a plurality of political communities and the multiple associative ties and obligations that they engender.

VI.

What remains of the traditional account of international human rights law once we understand it as dedicated to the promotion of distributive justice in the international legal order? First, it doesn’t rule out comprehending the field as also concerned with the justice of how states exercise sovereign power. International law authorizes states to exercise sovereign power, and international human rights law places limits on how states exercise this power. But international law also distributes sovereign power to states, and international human rights law requires that it do so in a just manner. It conditions the legitimacy of sovereignty itself on the extent to which its exercise mitigates injustices associated with its distribution. Second, it also doesn’t rule out comprehending the field as concerned with essential features

of what it means to be a human being. Determining whether something constitutes an injustice will inevitably involve questions of this sort, whether it occurs in the distribution or exercise of sovereign power.

There is also much more to the structure and operation of the international legal order than the way it distributes sovereignty among states. A comprehensive account of international human rights law along these lines would require a more complete picture of the distributive dimensions of international law itself, including how it gives institutional voice and legal effect to increasingly dense and integrated economic relations typically associated with processes of economic globalization between and among state and non-state actors. It would also require a richer examination not only of indigenous rights, minority rights, and rights to international cooperation and assistance, but of the broader set of human rights that comprises the field as a whole.⁷⁵ But I hope that the three applications offered here illustrate how, on a distributive account, universalism takes a back seat to distributive justice in international law.

ENDNOTES

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- 1 For a classic articulation of this conception of the field, see Jack Donnelly, *Universal Human Rights in Theory and Practice* (2d ed.) (Ithaca: Cornell University Press, 2003).
- 2 See, for example, Adamantia Pollis & Peter Schwab, "Human Rights: A Western Construct with Limited Applicability," in Pollis & Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979).
- 3 For an overview and assessment of the debate, see Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park: Sage Publications, 1990).
- 4 GA Res. 217A(III) (10 December 1948).
- 5 International Covenant on Civil and Political Rights (1966) 999 U.N.T.S. 171 in force 1976; International Covenant on Economic, Social and Cultural Rights (1966) 993 U.N.T.S. 3 in force 1976.
- 6 International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 U.N.T.S. 195, in force 1969; Convention on the Elimination of All Forms of Discrimination Against Women (1979), 1249 U.N.T.S. 14 in force 1981; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, (1984) 1914 U.N.T.S. 519, in force 1987; Convention on the Rights of the Child, (1989)1577 U.N.T.S. 43, in force 1990; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) U.N. Doc. A/45/49 in force 2003.
- 7 For an assessment of the effectiveness of these treaty bodies, see James Crawford, "The UN Human Rights Treaty System: A System in Crisis?" in Philip Alston & James Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).
- 8 The Committee on the Elimination of Racial Discrimination, the Committee Against Torture, and the Committee on the Elimination of Discrimination Against Women also possess the power to hear individual complaints. This procedure applies only to states parties who have made a declaration accepting the competence of the Committee in this regard.
- 9 CAT, CERD, HRC, and the Committee on Migrant Workers possess this authority. CEDAW, CAT and CMW also provide for disputes between states concerning interpretation or application of the Convention to be resolved in the first instance by negotiation or, failing that, by arbitration. One of the states involved may refer the dispute to the International Court of Justice if the parties fail to agree on arbitration terms within six months. States may exclude themselves from this procedure by making a declaration at the time of ratification or accession, in which case, in accordance with the principle of reciprocity, they are barred from bringing cases against other states.

- 10 CERD also possesses this authority. Inquiries may only be undertaken with respect to states parties who have recognized the competence of the relevant Committee in this regard.
- 11 The major general, regional instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 U.N.T.S. 221; the American Convention on Human Rights (1992) OR OEA/Ser.L.V/II.82/Doc.6, rev.1; OAU, and the African Charter on Human and Peoples' Rights (1982) AU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58.
- 12 See generally Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006). See also Christopher McCrudden, "A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights," 20 Oxford J. Leg. Stud. 499, 501 (2000) ("[t]he phenomenon of borrowing and transplantation from the international to national, from the national to international, from national jurisdiction to national jurisdiction, is now commonplace").
- 13 Karen Knop, "Here and There: International Law in Domestic Courts," 32 N.Y.U.J. Int. L. & Pol. 501, 506 (2000).
- 14 See, for example, Donnelly, *supra*, at 10 ("[h]uman rights are, literally, the rights that one has simply because one is a human being"); A. John Simmonds, *Justification and Legitimacy: Essays on Rights and Obligation* (Cambridge: Cambridge University Press, 2001), at 185 ("*Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity*") (emphasis in original).
- 15 See, for example, article 5 of the Vienna Declaration and Programme of Action, UN A/CONF.157/23 (adopted by the World Conference on Human Rights, June 25, 1993) (declaring that "[a]ll human rights are universal, indivisible and interdependent and interrelated").
- 16 Poland has entered into treaties with The Federal Republic of Germany (1991), the Czech and Slovak Republic (1991), the Russian Federation (1992), Belarus (1992) and Lithuania (1994). In the 1990s, Hungary has entered into treaties with Ukraine, Slovenia, Croatia, Slovakia and Romania. In addition to its treaty with Hungary, Romania has entered into treaties with Ukraine and Moldova. Other examples include treaties between Croatia and Hungary and Italy. See generally Arie Bloed & Pieter van Dijk (eds.), *Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe* (The Hague: Kluwer, 1999).
- 17 Article 27 of the International Covenant on Civil and Political Rights, for instance, extends protection to ethnic, religious and linguistic minorities. For a review of the Human Rights Committee's views on Art 27, see Gaetano Pentassuglia, *Minorities in International Law* (Strasbourg: ECMI, 2002).
- 18 See, for example, *Francis Hopu and Tepoaitu Bessert v. France* (Communication no. 549/193) views of the Human Rights Committee, 29 July 1997, UN doc. CCPR/C/60/D/549/1993), at 217-222 (defining art 23 of the ICCPR, which enshrines the right to a family life, by reference to indigenous cultural traditions); *Awasi Tingni v. Republic of Nicaragua*, [2001]

IACHR Petition no 11 577 (defining art 21 of the American Convention on Human Rights, which enshrines the right to property, as protecting indigenous title).

- 19 See text accompanying Part IV, *infra*.
- 20 Article 26, Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, in force 1980.
- 21 Compare John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), at 80 (a human right should receive international as opposed to domestic protection is because it is “intrinsic to the law of peoples”).
- 22 Charles R. Beitz, “Human Rights and the Law of Peoples,” in D.K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004) 193-214, at 196. Rawls also defines the functional role of international human rights in terms of justifying interference in the internal affairs of a state. See *The Law of Peoples*, *supra*, at 79 (human rights restrict “the justifying reasons for war and its conduct” and specify “limits of a regime’s internal autonomy”). But as Beitz points out, Rawls does not also see human rights as justifying external assistance in their realization. Beitz, in contrast, includes external assistance in his definition of the functional role of human rights, which leads him to define the right to an adequate standard of living as mandating global wealth redistribution. Beitz, *ibid*.
- 23 *Ibid.*, at 197.
- 24 *Ibid.*, at 210.
- 25 See text accompanying Part V, *infra*.
- 26 Beitz, *supra*, at 194.
- 27 Allen Buchanan, who offers a comprehensive theory of the moral foundations of international law, appears to split the difference between these two accounts, by holding that “[h]uman rights ... are ascribed to all human beings simply by virtue of their humanity or personhood” but at the same time arguing that “the law provides institutional structures within which ... reasoning [about the nature and value of human rights] can occur, processes for determining who can participate in the reasoning, and constraints on the reasoning that occurs within these structures.” *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), at 120-122.
- 28 Jean Bodin, *Les Six Livres de la République* (Paris: Librairie Générale Française, 1999).
- 29 Jean-Jacques Rousseau, *The Social Contract* (M. Cranston, trans.) (London: Penguin, 1968).
- 30 Thomas Hobbes, in R. Tuck (ed.), *Leviathan* (2d ed.) (Cambridge: Cambridge University Press, 1999).
- 31 J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 4th ed. (Oxford: Clarendon Press, 1949), at 48-9.

- 32 See, for example, UN General Assembly, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (1995), GA Res. 50/6 (the right of self determination “shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind”).
- 33 According to some formulations, international law also entitles a people to form a state and assume sovereign power if it is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. See, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.
- 34 Article 1 of the Montevideo Convention on Rights and Duties of States (1933) 165 L.N.T.S. 19, for example, lists the following criteria of statehood: a permanent population, a defined territory, a system of government, and capacity to enter into relations with other states. But absent recognition by other sovereign states, a political community with a territorial base – say, Québec – will not possess sovereign statehood under international law unless it can successfully assert a right of external self-determination.
- 35 Hans Kelsen, *Pure Theory of Law* (2d ed. trans. Max Knight) (Clark: Lawbook Exchange, 2005).
- 36 Michael Blake stakes out this position, arguing that international law, because it rests on state consent, is not a coercive legal order, and therefore cannot cause legal harms that it should seek to rectify in the name of international distributive justice. See Blake, “Distributive Justice, State Coercion, and Autonomy,” 30(3) *Philosophy and Public Affairs* 257 (2001).
- 37 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2d ed.) (Cambridge: Cambridge University Press, 2006). In more recent work, *The Gentler Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002), at 500, Koskenniemi argues that international law stands to promote formalism, which embodies a “culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.”
- 38 See Karen Knop, “Here and There: International Law in Domestic Courts,” 32 N.Y.U.J. Int. L. & Pol. 501 (2000).
- 39 Compare Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1989), at 6 (“principles of justice are themselves pluralistic in form; different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and ... all these differences derive from different understandings of the social goods themselves”).
- 40 This is not to suggest that international law, or at least the principles governing the acquisition of territory, predated the colonial encounter: see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press,

2004), at 7, for an extended argument that international rules deciding which entities are sovereign, and the powers and limits of sovereignty were “generated by problems relating to colonial order”.

- 41 See, e.g., John Westlake, *Chapters on Principles of International Law* (Cambridge: Cambridge University Press, 1894), at 136-38, 141-143 (drawing distinction between “civilization and want of it”); William C. Hall, *A Treatise on International Law* (8th ed.) (Oxford: Clarendon Press, 1924), at 47 (international law only governs states that are “inheritors of that civilization”); L. Oppenheim, *International Law* 126 (3d ed. 1920) (law of nations does not apply to “organized wandering tribes”); Charles C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Boston: Little Brown, 1922), at 164 (“native inhabitants possessed no rights of territorial control ... which a European monarch was bound to respect”).
- 42 *Johnson v. M’Intosh*, 21 U.S. 543, 5 L.Ed. 681, 8 Wheat. 543 (1823).
- 43 UN Doc. A/61L.67 (7 September 2007).
- 44 Adopted on 27 February 1997. For the text of the proposed Declaration, see *Annual Report of the Inter-American Commission on Human Rights 1996* (Washington: D.C.: OAS, 1997), at 633-645.
- 45 ILO Convention (no. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989) 72 ILO Official Bulletin 59 in force 1991.
- 46 Convention 107, Recommendation No 104, preamble para 5. For discussion, see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford: Oxford University Press, 2005) 186-199.
- 47 See James S. Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford and New York: Oxford University Press, 2004) at 99 (“self-determination arises within international law’s human rights frame and hence benefits human beings as *human* beings and not sovereign entities as such”).
- 48 See generally Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 6-7 (introducing concept of “group-differentiated rights”).
- 49 *Island of Palmas Case* (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, at 845 (“a juridical fact must be appreciated in the light of the law contemporary with it”). With its doctrine of recognition, international law also validates illegal acquisition of sovereign power. For discussion of how international law looks back on legal and illegal acquisitions of sovereign power over indigenous territories, see David Berry, “Legal Anomalies, Indigenous Peoples and the New World” in B. Saunders & D. Haljan (eds.), *Whither Multiculturalism? A Politics of Dissensus* (Leuven: Leuven University Press, 2003) 235-271, at 249-251.
- 50 The Banat region is primarily an agricultural region, bordered on the east by Transylvania and Walachia, on the west by the Tisza River, on the north by the Mureşul River, and on the south by the Danube.

- 51 Will Kymlicka defines national minorities more broadly, as “groups who formed functioning societies on their historical homelands prior to being incorporated into a larger state.” See Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001), at 54.
- 52 See generally Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon, 1998).
- 53 Contemporary legal and political theory typically identifies cultural difference to be the unifying feature of these kinds of diverse political claims and either defends or critiques its protection. See Courtney Jung, “Why Liberals Should Value ‘Identity Politics’” (2006) 135(4) *Daedalus* 32.
- 54 But see Phillip Alston & Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social, and Cultural Rights,” 9 *Human Rights Quarterly* 156 (1987).
- 55 See Philip Alston, “The Shortcomings of a ‘Garfield the Cat’ Approach to the Right to Development,” 15 *California Western International Law Review* 510 (1985); Anne Orford, “Globalization and the Right to Development,” in P. Alston (ed.), *Peoples’ Rights* (Oxford: Oxford University Press, 2001). Other international instruments that refer to international cooperation and assistance include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Vienna Declaration and Programme of Action (1993), and the UN Millennium Declaration (2000).
- 56 Contemporary political theory on cosmopolitanism and its limits has reinvigorated this debate by asking whether such obligations extend to strangers in other states. For the view that they don’t, see Thomas Nagel, “The Problem of Global Justice,” 33(2) *Philosophy & Public Affairs* 113-47 (2005). For the view that they do, but only to the point where the personal cost of such an obligation is equal to what it would be if everyone assumed similar obligations, see Liam Murphy, *Moral Demands in Nonideal Theory* (New York: Oxford University Press, 2000). See also text accompanying notes xx-xx, *infra*.
- 57 Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).
- 58 This enables Pogge to claim that the obligation to reduce world poverty constitutes a negative duty to not act in ways that exacerbate economic inequality as opposed to a positive obligation to share one’s wealth or resources with strangers in need. The better view, I believe, is that the distinction between negative and positive obligations possesses little currency in a distributive conception of international law, as the normative question in such a conception is not whether to redistribute or not; instead, it assumes that distribution is inevitable in the establishment and operation of an international legal order and asks which order, and which modes of operation, best meet the demands of distributive justice.
- 59 *Ibid.* Pogge proposes a “global resources dividend,” in which a state would be required to share a small part of the value of any resources it decides to use or sell, on the premise that the global poor own an inalienable stake in all limited natural resources.

- 60 *World Poverty and Human Rights*, *supra*, at 20.
- 61 John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
- 62 Rawls, *The Law of Peoples*, *supra*, at 108.
- 63 *World Poverty*, at 113.
- 64 *Advisory Opinion No. 41, Customs Régime Between Germany and Austria*, 1931 PCIL Ser. A/B, No. 41 (5 September). The Permanent Court of International Justice oversaw disputes between members of the League of Nations.
- 65 *World Poverty*, at 22-23.
- 66 UN Charter, *supra* note (“[t]he purposes of the United Nations are ... [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”).
- 67 *Ibid.*, art. 55.
- 68 *International Covenant on Civil and Political Rights*, art. 1. Article 1 of the *International Covenant on Economic, Social and Cultural Rights* contains identical language. In *Namibia*, [1971] I.C.J. 16, at 31, and *Western Sahara*, [1975] I.C.J. 12, at 31, the International Court of Justice held that all peoples possess self-determination as of international right.
- 69 Diane Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims,” 23 *Yale Journal of International Law* 1, 22 (1998).
- 70 Anghie, *supra*, at 214-216; Okon Udokang, *Succession of New States to International Treaties* (New York: Oceana Publications, 1972).
- 71 Beitz, *Political Theory and International Relations* (2d ed.) (Princeton: Princeton University Press, 1999); Pogge, *World Poverty and Human Rights*, *supra*; see also Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), at 60-61 (“a just global distributive scheme would be one that meets [Rawls’] second principle of justice – equality of opportunity and the regulation of global equality by the difference principle” and which “would keep the plight of the worst-off individuals (globally situated) firmly in its sight”).
- 72 Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), at 264.
- 73 Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).
- 74 Kok-Chor Tan, *Justice Without Borders*, *supra*. Tan advances a version of cosmopolitan distributive justice that accommodates but limits patriotic concerns. Compare Samuel Scheffler, *Boundaries and Allegiances* (New York: Oxford University Press, 2001), at 111 (distinguishing between cosmopolitanism as a “doctrine about culture” and cosmopolitanism as a “doctrine about justice”). Scheffler seeks to defend a theory of cosmopolitanism that takes seriously the particular ties and associative relationships that arise in particular communities of value.

75 For a step in this direction, in the context of international labor rights, see Patrick Macklem, “The Right to Bargain Collectively in International Law: Workers’ Right, Human Right, International Right?” in Philip Alston (ed.), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005).