

**THE APOLOGY OF UTOPIA
SOME THOUGHTS ON KOSKENNIEMIAN THEMES, WITH
PARTICULAR EMPHASIS ON MASSIVELY
INSTITUTIONALIZED INTERNATIONAL
HUMAN RIGHTS LAW**

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I. INTRODUCTION

The study of human rights occupies a distinctive, albeit relatively secondary, place in the corpus of Martti Koskenniemi's work. I have always thought of Koskenniemi as, by temperament and inclination, first and foremost an international lawyer, for whom human rights are of occasional interest but are clearly a distraction from the broader body of public international norms which has presided over the international system's destiny for the last four centuries. For example, his magnum opus, *From Apology to Utopia*, deliberately sidelines human rights (among others) as not central to the conventional account of international law that interests him;¹ and although other forms of utopia that have some evident connections to human rights are studied in detail, human rights as such were hardly featured at all.² His other principal monograph, *The Gentle Civilizer of Nations*,³ is clearly about the discipline of international law, with the possible exception of how the ever-central Hersch Lauterpacht's work on human rights relates to international law more generally. This is something that Koskenniemi shares with many in the discipline, although less as a sort of knee-jerk desire to protect international law's doctrinal sanctity or an old fashioned realism, than in all likelihood based on reservations about the project of human rights legalization (even domestically) and theoretical prevention vis-à-vis efforts by human rights to colonize international law. Moreover, if anything, Koskenniemi has been mostly interested in the broader idea of a *humanitarian* sensitivity in international law, one which arguably encompasses human rights but which is also in tension with it and that most

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1. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 13–14 (Cambridge Univ. Press 2005) (1989) [hereinafter KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*] (emphasizing that the judicial function is to apply international law, not subjective preferences, and not mentioning human rights).

2. As far as I could tell, there is not a single mention of human rights in the entire 600 pages of the book, except for three references in the extensive bibliography. See *id.*

3. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2002) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*].

contemporary international human rights lawyers might not recognize as theirs.⁴

Yet, whether nudged by the publications of others,⁵ the opportunities afforded by edited collections,⁶ the overwhelming need to respond to popular trends,⁷ or particular *causes célèbres*,⁸ his work on human rights, relatively marginal as it is to his own corpus, arguably constitutes one of the most distinctive contributions on the issue in our era. In fact, one might even argue that Koskenniemi's work on international law is haunted by the possibility/impossibility of human rights, or at least, the sort of virtue's fall from grace that led to modern international law. His writings on rights are characteristically nuanced, yet the tone is invariably one of strong skepticism when it comes to human rights law. Essentially, human rights law is seen as an anti-politics, one that allows people to make claims about certain things being inherently true without any of the dirty work of political confrontation. Human rights too easily play into grand technocratic designs and are suspected of being involved in hegemonic enterprises. In that, Koskenniemi's position echoes other familiar contemporary critiques of rights as articulated most notably by David Kennedy,⁹ Costas Douzinas,¹⁰ Philip Allott,¹¹ Marie-Bénédicte Dembour,¹² and Stephen Hopgood¹³ to name but a few.

Curiously, however, with a few notable exceptions, what one might expect to be the specificity of Koskenniemi's work on the issue—namely an overall critique

4. See *id.* at 516–17 (stating that international law should articulate a commitment to social transformation in “the language of rights and duties” in order to give voice to communities who have been excluded from dominant authorities, without describing the particular use of international human rights law in accomplishing this).

5. See generally Martti Koskenniemi, Book Review, 94 AM. J. INT'L L. 198, 198 (2000) [hereinafter Koskenniemi, Book Review of L'UTILISATION DU “RAISONNABLE”] (reviewing OLIVIER CORTEN, L'UTILISATION DU “RAISONNABLE” PAR LE JUGE INTERNATIONAL: DISCOURS JURIDIQUE, RAISON ET CONTRADICTIONS (1997)); Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1947 (1990) [hereinafter Koskenniemi, *The Pull of the Mainstream*] (reviewing THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989)).

6. See generally Martti Koskenniemi, *The Effect of Rights on Political Culture*, in THE EU AND HUMAN RIGHTS 99, 99 (Philip Alston et al. eds., 1999) [hereinafter Koskenniemi, *The Effect of Rights on Political Culture*].

7. See generally Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B.U.N.L. 1 (2002); Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY: INT'L. J. HUM. RTS. HUMANITARIANISM & DEV. 47 (2010) [hereinafter Koskenniemi, *Human Rights Mainstreaming*].

8. See generally Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 160–61 (2002) [hereinafter Koskenniemi, *The Lady Doth Protest Too Much*].

9. See generally David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

10. See generally COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY 296 (2000).

11. See generally PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 343 (1990).

12. See generally MARIE-BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS?: REFLECTIONS ON THE EUROPEAN CONVENTION (2006).

13. STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS (2013).

of the mixing of international law and human rights—has not fully emerged. The critiques of international law and human rights remain relatively separate, almost distinct genres in Koskenniemi's work. There is not much of a sense, moreover, that Koskenniemi's critiques of human rights ideology generally and of international human rights law specifically are that different. If anything, Koskenniemi has been more interested in issues such as the "mainstreaming of international human rights" and the attendant dangers of a technocratization¹⁴ than with what appears to be the proverbial "elephant in the room," namely normalized adjudication of human rights in highly legalized form by international courts. Koskenniemi has thus not produced a very focused critique of the attempts to institutionally fuse human rights and public international law in international or regional human rights bodies, even though these attempts raise some of the most fascinating questions about the nature of both projects. It may be that his theoretical and political skepticism about this design prevented him from taking it entirely seriously, dismissing it as superficial, wrongheaded, or fraudulent—at any rate disconnected from where the real battles lie. Within Koskenniemi's fragmentation writings, for example, human rights is treated as one branch among many, with no particular pride of place, in ways that may minimize some of the hegemonic claims it makes on international law.¹⁵

The risk is that the particular ascendancy that human rights has at times taken on the discipline will be neglected or dismissed too lightly, despite its potential significance for the politics of international law. In this article, I want to argue that much can be gained by more thoroughly connecting these two strands of Koskenniemi's work. I propose to do so through an examination of the structure of international human rights legal argumentation with a view to highlighting, as the case may be, its specificity or its lack of it. The starting point is in a sense very similar to Koskenniemi's in *From Apology to Utopia*, namely a frustration with what is presented as the nature of international human rights adjudication compared to the very uncertain and tentative nature of its praxis, as well as a desire to better make sense of what practitioners of international human rights law do, whether activists, advocates, or judges.

This article will focus mostly on what I refer to in the title as "massively institutionalized international human rights law." By this I mean the particular form of practicing human rights that espouses both a highly legal and highly institutional international form. It should be evident that this is only one of the ways in which one might think about the potential of human rights, but also that it is a particularly influential one in this current age. As a prime example of this massive institutionalization, I will be particularly interested in the fate and role of the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR), which is most frequently heralded as the model towards

14. E.g., Koskenniemi, Book Review of L'UTILISATION DU "RAISONNABLE", *supra* note 5; Koskenniemi, *The Pull of the Mainstream*, *supra* note 5.

15. See generally Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 560 (2002).

which others should converge, that has been emulated by other regional systems, and may yet provide the blueprint for a universal human rights system (in the form, for example, of the increasingly discussed project for an international human rights court). What the focus on the ECtHR foregrounds is the importance of adjudication in processes of international human rights law development. In that respect, although I have been heavily influenced by David Kennedy's striking critique of the "human rights movement",¹⁶ I am less interested in the movement as a loose transnational disciplinary coalition than with formal international human rights institutions as part of the super-structure of international law.

The article's central thesis is that whereas international human rights law is often presented as a way of transcending the value-agnosticism of the classical liberal international order, it is in fact fundamentally prone to becoming a part of that very order. Rather than a resolution of liberal contradictions by reaching for a horizon of common values, international human rights law in its dominant form represents their very apotheosis, uniquely combining the indeterminacy of the domestic and international variants of liberal concepts of law. The human rights-ization of international law typically ends up benefitting international law more than human rights, and is much more in continuity with international law than typically seen. In this context, I argue that the move towards a highly technical, positivist practice of international human rights law characteristic of its massive institutionalized variant also comes at considerable cost to the project, leaving it vulnerable to ossification, conservatism, and enterprises of domination. The article is framed less as a critique of *From Apology to Utopia* than as a modest elaboration of its central arguments as they might play out in the context of international human rights. However, it will end up emphasizing elements of a critique of international human rights law that are not necessarily those that are foremost in Koskenniemi's work. In the process, I will make the case that Koskenniemi's work provides a formidable way to think about international human rights law, even though I will suggest that leaving human rights outside the law is not altogether a morally or politically unproblematic proposition.

II. FROM APOLOGY TO UTOPIA. . . AND BACK?

The central question that the growth of human rights raises internationally relates to the very possibility of change in international law. By change, I mean the sort of paradigmatic change that would truly modify the center of gravity of the international legal order and not merely represent a modest appendix to it. International human rights law must amount to some change or amount to nothing. I begin by outlining how the concept of international law expounded in *From Apology to Utopia* makes it difficult to think about the conditions of change in the international legal order and sets a very tall challenge for any contender for change. I then sketch how international human rights lawyers have been called upon to up the ante in terms of the rhetorical and doctrinal claims made about that

16. See Kennedy, *supra* note 9, at 107.

branch's distinctness.

A. *On the Possibility of Change (Let Alone Progress) in International Law*

To answer questions about the possibility of fundamental change in international law is to try to understand at a deeper level the degree of constraint that the theory of liberalism exercises on the discipline of international law and why it is controlling. Is there indeed a sort of "liberal curse" that gives international law a profoundly homeostatic nature, so that every attempt to transcend merely reinscribes it, or is that curse merely a figment of the liberal imagination? Are the "words" so conditioned by the "grammar" that even changing words entirely will always bring us back to our point of departure, or is international human rights law perhaps part of the formation of a new grammar of international law? And should we be concerned that international human rights law is either transcending or reproducing the international legal discourse from which it so vehemently tries to distinguish itself?

At its core, Koskenniemi's theory of international law's indeterminacy is a critique of international law's embeddedness in a perpetually unresolved liberal political discourse. Because international legal argument must always be both apologetic and utopian, it is always weakening even as it reinforces itself. But there is something of a disconnect between pointing out indeterminacy and a deeper critique of international law. At a certain level, indeterminacy is just that, a property of the system that is perhaps only a problem to the extent it is denied in the face of the obvious. To be sure, much of legal discourse does just that, but one senses that indeterminacy need not be a problem at all, merely something that international lawyers must—and probably do—live with on a daily basis. True to Koskenniemi's intuition, one might say that indeterminacy as a function of oscillation between apology and utopia might of course be a good thing—allowing flexibility, sophistication—or a bad thing—sidelining political conversations, allowing for stealth enterprises of domination. It is, at any rate, what it is, and one senses that the problem is less with indeterminacy than with its denial or misunderstanding.

In that respect, the ambition of *From Apology to Utopia* was arguably more phenomenological than radical, and Koskenniemi himself repeatedly pointed out that he simply set out to provide a better theory of what the practice of international law, based on his own experience, entails.¹⁷ What is missing, it seems, is a theory to connect the critique of international law's epistemology with a critique of international law's politics. But here one may wonder about one apparent paradox of *From Apology to Utopia*—does liberal international law have a politics? If international law is indeterminate, then that might be the last word on

17. In *From Apology to Utopia*, Koskenniemi explains that his focus is more on the method of practicing international law rather than on "metaphysical doctrines," and that he "defer[s] the more 'radical' consequences . . . in order to remain as close as possible to the style and *problématique* which international lawyers will recognize as theirs." See KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 1, at xvii–xviii.

the matter of its politics, since it might yield any range of outcomes determined by something external to the law itself. Certainly Koskenniemi seems to be enjoining us to make the most of that indeterminacy, to cherish it as an open window on an international legal practice that is more aware of the range of available possibilities open to it. There is not much to critique substantively, only a form that lends itself to a range of manipulations.

I am not sure *From Apology to Utopia* would be that interesting if that were all it was saying. The liberal framework does impose constraints in at least some ways, even though it may be compatible with a range of politics within certain boundaries. One of them is of course that one must speak the language of international law as it is, namely as an inherited authoritative discourse involving recognized binaries. It may be that international law's indeterminacy, its very inability to lastingly distinguish itself from the twin discourses of morality and politics, is the very condition of its politics. More intriguingly, *From Apology to Utopia*'s analysis of the peculiar slipperiness of international legal discourse might suggest that international law naturally veers towards the mid-stream. A position that lies somewhere between apology and utopia may not in the end be logically sustainable within the liberal canon (it will still be too apologetic and too utopian at the same time), but it will at least appear to navigate these waters in a way that is more savvy and sustainable for it will be less prone to being immediately undermined as having radically ignored one prong of the equation. Outcomes that are too quixotically apologetic or utopian will probably not survive long.

In the end, Koskenniemi's own inclinations may come close to sanctifying this sort of perpetual *via media*. For if *From Apology to Utopia* is mostly concerned with descriptive theory, it does appear at times to be charmed by the way in which international law at least acts as a sort of natural system of checks and balances as it were on others and even on itself. Its grounding in sovereignty at least saves international law from hegemony by safeguarding its pluralism, whilst its aspiration to normativity saves it from nihilism. In the process, Koskenniemi also reveals his own inclination, one that leans towards the pluralistic end of the international equation, and is wary of "morality" or "legitimacy" as vehicles of imposition; but one that is also wary of the risk of eviscerating international law of all content if its pluralist impulse is taken so far as to merely become an apology of power politics.

But *From Apology to Utopia* also ends up being a very deeply homeostatic theory, one that is not much of a theory of change in international law precisely because it is so skeptical of change. Permanence below the apparent variety of outcomes is ultimately the defining characteristic of the discipline given its "deep structure," and Koskenniemi points out in the second edition how for all the apparent changes

the basic doctrines, approaches and—above all—tensions and contradictions that have structured the field since the late nineteenth century have not changed markedly. In the language of what follows, although it has become possible to say new things in the law, the grammar which one uses to say those things has remained largely

unchanged.¹⁸

The theme of eternal return beneath a veneer of reinvention is present throughout much of Koskenniemi's work, one in which the international legal profession is endlessly navigating the discursive waves of its own discourse, which inevitably brings it back to the same shores from which it proceeded. As a result, the theory does little to explain why international law evolves towards particular substantive outcomes and, over time, in a particular broad direction or indeed whether it can ever change direction.

Yet, something does seem to be missing from this homeostatic view of international law. One can speculate about whether international law has always been and should always be embedded in liberalism, and whether there are not ways in which its implicit ceiling can be broken. What is the true nature of that "liberal curse?" What might be international law's *hors-libéralisme*? Although excessively apologetic or utopian positions do not seem theoretically sustainable from within the liberal canon without undermining themselves, it is also quite clear that these positions are occasionally held in uncorrupted form quite consistently, as if liberalism's constraint were blithely ignored. What are the costs of doing so? What rude awakening awaits the dreamers or what sense of being in the wrong discipline will strike the realists? More importantly, it may also be argued that the overall arc of international law can be said to historically veer towards one end or the other of that spectrum. There are "epochs" of international law reflecting particular world configurations. What is the connection between *From Apology to Utopia*'s critique of international law as a mode of knowing and the social reality of international law in any given time and age?

B. The Rhetorical Promise of International Human Rights Law

International human rights law must be understood as a very specific project, which must be distinguished from proximate yet quite distinct ones. International human rights law is, strictly speaking, the project of (i) foregrounding human rights, (ii) internationalizing human rights, and (iii) legalizing human rights. It therefore inevitably bears some affinity with, but is nonetheless clearly distinct from (i) the mere ideology of human rights, (ii) the project of domestic legalization of human rights, and (iii) the project of internationalizing human rights as an ideology but without particular recourse to the law. All dimensions—human rights-ization, internationalization, and legalization—contain their own separate complexities; combined, these complexities are potentially greater.

The emphasis on human rights is of course the focus of many old critiques, whether conservative or radical. Even proceeding from the horizon of someone who is broadly sympathetic to the ideal of human rights, neither internationalization nor legalization is a matter of course. To this day, for example, there are arguments—which are typically not arguments made by *enemies* of

18. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, *supra* note 1, at 563.

human rights—that most and perhaps all of the work of human rights should occur domestically, and that not much is gained and quite a bit is lost by universalizing rights; so too is there an argument that legalization is unhelpful to the human rights cause, essentially empowering lawyers or a technocratic elite at the expense of revolutions, social movements, etc.

The strategy of international legalization of human rights is relatively new—it began in the late 1940s—and it typically lies at the intersection of both human rights and international legal aspirations. From a human rights point of view, international human rights law is the continuation of domestic projects of constitutionalizing rights (e.g. the “International Bill of Rights”) and, thus, considers that rights need to transcend their “natural” or “declaratory” state to become international *law*. Time and time again, resolutions are transformed into declarations, and declarations transformed into conventions. Moreover, internationalization more closely aligns human rights with its claim to universalism, and thus appears as part of the project’s natural destiny. If human rights’ universal validity cannot be demonstrated philosophically, at least universal adherence to them through international law can be extolled.

Simultaneously, the international legal project has reasons of its own for welcoming human rights. As a system for the coexistence of states, it has shown its striking limitations, failing in what it was supposed to best achieve—the avoidance of war and the actual protection of states—whilst in the process exacting a steep price in the form of providing a sovereign cover for human rights violations. Defending human rights internationally might even be recast as a way of maximizing some of international law’s more traditional goals—such as international peace and security, for example. Moreover, human rights, by providing the sort of thick telos that international law has traditionally lacked, might just provide a basis to assess competing international law claims from something of an external reference point. Finally, for a movement that must always keep moving if it is to convincingly make the case that it is making progress, human rights also promises to significantly upgrade the utopian promise of international law, by reformulating the nineteenth century humanitarian-charitable ambition in a more principled fashion that better accords with contemporary sensitivities.

As can be seen, a degree of historical opportunism was and continues to be involved on both sides. Human rights needs international law as a vehicle for expansion; international law needs human rights to lay claim to renewal. But can international human rights’ promise of overhaul occur without human rights succumbing to international law and merely, under the guise of reforming it, becoming an appendix to it? One of the drawbacks of a strategy of international legalization is of course that human rights must find a niche within the dominant edifice of international law, even if only to eventually better reform it from within. Needless to say, the Westphalian compromise preceded the earliest rights revolutions—isolated and precarious as they were domestically and internationally—by a good 150 years, and the attempt to forge a system of global human rights law by almost another 150 years.

As such, I posit that international human rights law must, at a minimum, be able to make certain rhetorical claims that distinguish it from its “international other” and minimally ground its claims to actual change. To be specific, the theoretical postulates from which international human rights laws spring are: (i) that international law can be reformed to become a far more humane legal order, one that manifests a form of legal cosmopolitanism based on something as lofty as protection of the individual, and (ii) that in doing so human rights can strike consistently utopian postures without falling prey to the gravitational pull of apology, essentially founding international law anew on the basis of commonly shared values. From that perspective, there is no doubt that international human rights law is often presented as radically different, and in fact in almost perfect opposition to the tenets of a hypothesized “sovereignist” international law of coexistence. It is also seen as the branch that could become the trunk (not that it is the only one—other contenders include international trade law and, less evidently, international environmental law—but it is one of the most forceful). There is much about human rights that is potentially revolutionary for the classic international law of coexistence, not least the fact that human rights might be “precisely the sort of discussions which the body of [international] law tries to refer away from itself.”¹⁹

Indeed, the extent to which international human rights law must claim to be something other than what precedes it is striking. International human rights law doctrine abounds with claims about its “special character,” the extent to which it functions as a constitutional project that borrows its defining features from the “best” of domestic orders.²⁰ International human rights law claims not only to herald a change of substantive rule, but also to provide a potentially radical way of thinking about international law’s authority, bindingness, sources, interpretation, domestic law status, or enforcement. In many ways, international human rights law’s “special character” constructs itself in direct opposition to the tried and tested methods of international law—where international law is voluntaristic, human rights law is immanent; where international law is based on reciprocity, human rights law is strongly deontological; where international law is procedural, human rights law is substantive.

To claim anything other than this would be to relinquish the claim that human rights law functions differently than public international law (the international law of peaceful coexistence), leaving it to be absorbed on the altar of good inter-sovereign relations. International human rights law must be in at least some ways consistently utopian to prove its point. The question is whether such a metamorphosis is achievable within its premises and, if it is achievable, what its essence is normatively. Clearly human rights resurrects the idea that there are certain values that should be absolutely defended even in an otherwise disenchanting world skeptical of ultimate truths. In that respect at least, human rights is a significant corrective to the agnosticism of classical liberalism, as it suggests that certain universal values can be rescued from the onslaught of

19. *Id.* at 15.

20. *See id.* at 609.

modernity and post-modernity. It proposes to put the international legal system on an entirely new footing, one that is much more geared towards the pursuit of a broad vision of justice and is no longer content with the cautious management of coexistence. By reversing some of the tragic foundations of international law, it promises to do away with the endless need for some apologetic grounding and, perhaps, provide the key to a form of legal determinacy, one inspired by a reasonably comprehensive vision of the minimum conditions of the good life globally.

III. THE PECULIAR INDETERMINACY OF INTERNATIONAL HUMAN RIGHTS LAW

As was emphasized in the introduction, there is something of a disconnect in the work of Koskenniemi between his study of international legal discourse and of human rights. In particular, there is not a clear difference in Koskenniemi's work between what might be a critique of human rights legalization generally—for example domestically—and a critique of international human rights law as the specific, post-Second World War and post-Cold War project of giving human rights norms legal status internationally. In other words, Koskenniemi's work lacks a sustained interest in international human rights law as a specific object distinct, yet complementary to, both liberal (domestic) human rights and liberal international law. In this section, I evaluate the particular sort of indeterminacy that results from the attempted merger of human rights and international law. I begin by highlighting the indeterminacy of human rights and international law on their own grounds, before turning to the indeterminacy of international human rights law to argue that, if anything, it is a magnified version of the indeterminacy of each of its components.

A. International and Human Rights Law Indeterminacy Compared

Indeterminacy is a frequently misunderstood term in Koskenniemi's work and so it bears stressing what Koskenniemi does *not* claim. The Koskenniemi critique is not a trite point about the open-ended character of language, one that might put human rights "principles" significantly on the defensive compared to "precisely worded" domestic or international "rules." Some assumptions about the indeterminate character of language do appear in *From Apology to Utopia*, but they are really only an entry point for the deeper work of uncovering the ideological tensions at work in the concept of law. Nor is the critique a denial that there is in fact much that is predictable and patterned about the way legal thought operates; rather that what is predictable does not flow *from legal reasoning itself* (I leave for later what it may therefore flow from).

In the Koskenniemi critique, both international and human rights legal thought suffer from some form of radical indeterminacy. Although that indeterminacy is not necessarily exactly of the same nature *a priori*, the family resemblance between the two is overwhelming. Indeed for Koskenniemi, the idea that international human rights law is a likely contender for a fundamental mutation of international law is presumably utterly unconvincing. It is certainly

true that international law and human rights law seem at first glance to be ideologically irreducible, and this is very much how they have been presented traditionally. Their subjects differ—where human rights seek to advance a “just” or even a “good” society, international law has a much more minimal ambition, one more focused on the idea of an international rule of law; where human rights emphasize “democracy,” international law hopes, at best, for a “society;” where human rights imagine a Lockean natural sociability, international law fears a Hobbesian war of all against all; where human rights rely on substantive rules, international law foregrounds largely procedural ones; and where human rights seem to make grand claims about the universality of human nature that set very little limits on their natural hegemony, international law seems to erect salutary barriers on cosmopolitanism’s path.

Yet, precisely in their systemic opposition lies the suspicion that each sustains the other as, essentially, two parts of the same project. For one thing, human rights and international law’s common origin in liberal thought is more than a detail; it suggests, in fact, that the two are two sides of the same coin, less opposed than mutually constituted. As Koskeniemi points out in *From Apology to Utopia*, many of the riddles of international law are merely a projection of some of the dilemmas of liberal politics as they relate to the individual within domestic orders.²¹ For example, states are understood to be equal, self-determining subjects, just as individuals are; one might speak of states’ rights as one would of human rights. More importantly, the subjectivity of value is the central plank of the Westphalian system, just as it is to ideas of human rights. The rejection of a comprehensive view of the good society, in fact, arguably leads both to the emergence of rights doctrines domestically in some countries and to the Westphalian system internationally. Whilst the wars of religion pleaded for edicts of tolerance granted by the sovereign, they also militated for a separation of sovereigns internationally along the lines of the *cujus regio ejus religio* principle. International law and human rights are anti-political, at least in that they believe in the necessity of regulation by abstract principles that do not betray some contingent political preference that could translate into a tyrannical/imperial bias.

The domestic, international, and cosmopolitan variants of liberalism, then, all begin from the same distinctly liberal premises: the incommensurability of ends, and thus, the inevitability of some form of pluralism; the prioritization of the individual; the emphasis on self-determination and freedom. They are joined at the hip. Where they differ, at best, is in their assessment of the political consequences of these philosophical premises, and such issues as the relative place of individuals; the relative value of certain forms of communal life; and the ultimate community of reference (the sovereign or humanity). The emphasis on the opposition between a pluralist and a cosmopolitan liberalism in the traditional narrative, then, serves to obscure their fundamental commonality. Where some make much of these differences in liberalism, Koskeniemi’s own stance might be to see them not only as variations on the same theme, but as projecting a

21. *See id.* at 89.

semblance of dialectics where there is only reproduction. Liberal family squabbles can hardly augur much in terms of thinking beyond international law's limitations.

What does appear to be initially at least quite different between international law and human rights indeterminacy is that human rights is not necessarily a legal project and may thus aspire to operate at a naturally more utopian level than international law, where international law is typically more about the law as such, and therefore has always had to ground itself. Moreover, human rights starts with a utopian aspiration, where international law starts with an idea of being socially anchored as law. Human rights is based on the idea that a few values concerning the good life can be procedurally rescued from the onslaught of doubt unleashed by liberalism itself, where international law is ready to retreat to an entirely agnostic ideal of coexistence between organized collectives. Human rights, therefore, may raise with more acuity the question of fundamental values that international law is more willing to assume do not exist.

For the rest, however, and this comes across quite clearly in Koskenniemi's work even though it is not systematically spelled out, the indeterminacy of both is predictably a result of not being able to prescribe substantive outcomes in the way that the dominant legal account of them suggests they should. The starting point is perhaps that neither international legal rules nor, perhaps more surprisingly, human rights principles are ever absolutes. In a system of sovereign coexistence, it is almost axiomatic that no rule can be absolute without ending up undermining some of the very goals that rules are supposed to promote, so that in practice almost every rule has to be weighed against the goal it was supposed to pursue. Perhaps more surprisingly, rights are at best claims for certain things being "taken seriously," to use Dworkin's language,²² even as they are riddled with exceptions and limitations. Whilst that may be an improvement on untrammelled instrumentalism and may at least make the theoretical point that the human person should have a particular pride of place within a legal system, rights are little more than this initial presumptive claim whose scope has to be addressed against a range of other competing social priorities or public goods, such as law and public order, morality, or the protection of the rights of others. This is evident in the case law of a jurisdiction such as the ECtHR, which is in a sense all about the proper limitations of rights.

This then opens up perpetual interpretative conundrums for the law. Should the rule or right be interpreted literally or according to its object and purpose? And what are its object and purpose? In order to settle controversies about interpretation, one must then resort to a particular concept of the law that will itself be grounded in a vision of its ultimate purpose. The problem is that as soon as one departs the illusory clarity of international legal rules or rights as absolutes, "[t]he extent of the availability of such collective goods again is a pure issue of political value; of struggle and compromise between alternative views about what a good society would be like."²³ It is only a matter of time before any international legal or

22. *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

23. Koskenniemi, *The Effect of Rights on Political Culture*, *supra* note 6, at 105.

human rights argument must degenerate into a reexamination of hundreds of years of political and moral philosophizing. In particular, international law and human rights as ideal types crucially both depend on and seek to constrain the state. In international law, the state is both what needs to be constrained and an essential building block in the international order; in human rights, the state is both the potential violator and the model cog in the law's enforcement. The extent to which the state's discretion and sovereignty should be limited or left untrammelled, thus, is a pure normative question that remains beyond the law's reach.

The critique is therefore anchored in the terminal failure of legal argument to cut itself off from the theoretical controversies that gave rise to it through doctrine or some concept of autonomous legal form. More importantly, the theoretical arguments always tend to demand of the person making them that they contradict one of the postulates from which they proceeded. For international law, the claim to be anchored in social reality must, if it is not to be dissolved by that social reality to the point of defeating the point of normativity, be complemented by some utopian dimension, which the system had postulated is no longer an option. To the extent that human rights aspire to become legal, they must sacrifice to apology. This apologetic tendency is evident even domestically, where human rights' legalization—for example, in a constitution—has always entailed an evident grounding in the reality of state power. The problem is that this apology then contradicts the claim that human rights are more than what states have willed. The starting point may be different but the trajectories are eerily similar.

Asking “independent and impartial” judges to pronounce on that content, based on purely formal criteria, is a doomed exercise. Not of course in the sense that judges will not be able to superficially engage in such an interpretation, nor that they may not encounter a certain historical or social success in doing so, but that they can never do so from a perspective that would be determined by international legal/rights language, as opposed to a weird combination of a prior roadmap for the good life and a grounding in the social reality of the system. The development of a technical language rich with references to “necessity” or “proportionality” characteristic of both international and human rights law thus serves, at best, to mislead since what is at stake is an exercise of philosophizing under the guise of legal adjudication, at worst an invitation for the adjudicator to engage in an ultimately formal unconstrained exercise of discretion.²⁴ What emerges, over time, is probably a *particular* concept of the good life, but one that will masquerade as just law/rights. In that respect, both international law and human rights as projects emerge from a liberal rejection of absolute truths that nonetheless and paradoxically must constantly anchor themselves in the affirmation of their own absolute truth.

24. See Koskenniemi, Book Review of L'UTILISATION DU “RAISONNABLE,” *supra* note 5, at 199.

B. International Legal and Human Rights Indeterminacy Combined

What happens next is a bizarre process of human rights and international law subtly throwing each other off balance. Is international human rights legal reasoning primarily international or human rights based, and can it be both? Does it merely take the place of previous utopian schools, or does it change the structure of international legal argument altogether? Fifty years of international human rights legal practice suggests that the two forms of indeterminacy do not cancel out in international human rights legal reasoning, as much as combine each other in potentially explosive ways.

For one thing, human rights law's internationalization hardly frees human rights of their own inherent, utopian indeterminacy. If anything, it amplifies it. Limitations on rights now have to be evaluated in relation to a world that is considerably more diverse, and in which we have even less reason to think that we can agree on what might constitute "morality," "public order," and "the rights of others," or "proportionality," "necessity," and a "democratic society." Where domestic rights projects can at least make do through reference to a constituted community—precarious and polarized as it may be—and the work of democratic deliberative bodies, international human rights constantly find themselves presuming the existence of a community whose existence is anything but obvious. International human rights' theoretical universalism is put to the test of the international system's actual pluralism. International human rights law is not, in fact, a simple victory of universalism over liberal value pluralism, as much as it is a further chapter in their complex relations. For example, internationalization surely reactivates the tension between the idea of human rights as individual rights and human rights as collective rights, particularly self-determination. Such an issue could remain relatively obscured in the domestic context where the existence of a sovereign framework could be taken for granted, allowing for a focus on individual rights. But, internationally, the question of the relative tension between individual and collective rights inevitably arises. Which comes first, individual or collective emancipation? And to what extent is the focus on either not an excuse to implicitly denigrate the other as secondary or subservient?

In addition to the wealth of opinions about rights and the internal contradictions of the movement being exposed by its internationalization, international human rights must also prove, at even greater cost to its coherence, that it is indeed part of *international law*. This means, at least to an extent, to play the rules of the international game. A human rights lawyer who would simply approach states saying that human rights are part of international law because that is "as it should be" would expose himself to ridicule. This is not, incidentally, how the movement was built. In order to be *law* and not just human rights (the ideology), international human rights law must ground itself anew or fall prey to irrelevance—which *From Apology to Utopia* suggests must surely be the price to pay for those who would stray too far from the path of law's basis in sovereign

power.²⁵

In international human rights law, that apologetic grounding manifests itself in the fact that that law's basis now lies in sovereign consent. Constitutions give way to treaties, parliaments to commissions or councils, domestic to international courts, but the ambition remains the same, even though the exercise is one now heavily mediated by diplomats and academics. The adoption of new instruments, the rendering of new decisions favorable to human rights are hailed as major developments because they normalize human rights into international law. The turn to law and the acceptance of international dilemmas, however, inevitably reactivates and even amplifies quandaries that were already perceptible domestically and whose international incidence is even more dramatic. If the source of rights is indeed that they are constitutionalized and legalized, then were they ever really rights before that? And if it is legalization by the sovereign that is the key, then would they not be better described as (world) citizens' rights, even when guaranteed internationally?

Human rights' attempt to anchor themselves in the reality of sovereign life internationally now threaten to show that human rights no more exist in thin air internationally than they did domestically. Indeed, as Koskenniemi noted early on in a review of Theodor Meron's *Human Rights and Humanitarian Norms as Customary Law*, the whole idea that international human rights law depends on sovereign consent seems antithetical to the stringent brand of normativity incarnated by human rights.²⁶ It seems to shatter the illusion that rights are universal by making them appear merely international. Indeed, compromises with sovereignty seem to come at a higher cost for human rights than banal international norms: they fall from higher, as it were, the contrast between their theory of themselves and the reality of the games that they have to play is greater.

For example, what of states that remain outside international human rights treaties, suggesting by their insolence that human rights are merely, in the end, a matter of sovereign choice? What if states make very significant reservations to human rights treaties that seem to allow them to pick and choose between rights? What if the effect of these reservations is either that the relevant treaty does not enter into force at all, or that it does not enter into force between states that have not recognized each others' reservations, as international law would traditionally have it? What if states pull out of human rights treaties because they do not like the amount of scrutiny they are getting? What if newly independent states decide to pick and choose—at the worst of times, often—whether they really ought to be parties to the Genocide Convention or not?

Surely that particular brand of voluntarism, of human rights “à la carte,” goes against the very idea of rights. Sovereigns are welcome to pay their respects to

25. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 1, at 225–26 (“To solve such disputes, doctrine is forced to look beyond any simple description of sovereign power into the norms which convey or delimit such power. But in order to be justifiable, these latter norms will have to be traced back to the sovereigns themselves.”).

26. See Koskenniemi, *The Pull of the Mainstream*, *supra* note 5, at 1946.

human rights once and for all, but human rights utopians envisage this as a necessary *passation de pouvoir*, not an endless transition in which sovereigns retain the upper hand. For it to be otherwise would be an acknowledgement that whilst human rights may be allowed to operate in discreet regimes, they ultimately do so at the discretion of the very subjects they seek to constrain. It would be to concede that, in the end, international human rights law *is more international law than human rights*. This is not to mention that there is something a little disingenuous about relying on sovereigns to make a point about rights universality, when we know that ratification of human rights treaties is often simply part of the “package” and hardly denotes any deeper commitment to the rights project.

Hence the temptation of bypassing the voluntarism that was otherwise so central to international law’s claim to relevance. Utopia must be secured at all costs—even more so than for norms of international coexistence—or human rights law risks appearing as little more than an elaborate international hoax. Various doctrines are deployed to significantly rescue international human rights law’s utopian character whilst retaining some nominal grounding in sovereign will. Certain human rights norms are highlighted as being customary in nature, where custom is understood increasingly as resulting from *opinio juris* rather than practice, or even to be a function of societal needs. If that does not work, rights are presented as having *jus cogens* status, a status that is itself derived from little else than a sense that they ought to be on fundamental axiological grounds; the problem of source is essentially replaced by an invocation of the unchallengeability of status. The “object and purpose” of human rights treaties—with its pedigree in the Vienna Convention—is broadly defined as that of “promoting human rights,” which then becomes incompatible with almost any reservation. The “special character” of rights are emphasized, which entails, for example, that in the absence of a clause allowing withdrawal, withdrawal is presumed to be impossible. Contrary to practice, state succession to human rights treaties is automatic and *de plein droit*.

The problem, of course, is that international human rights law is really pulling itself up by its own bootstraps here. Doctrinal solutions highlighting international human rights law’s special character are sophisticated artifices that are themselves groundless (and do not cease to be merely through repetition), or at least that cannot be grounded in the law itself. They are, in effect, pure doctrinal acts of will that a branch of the law “be treated differently” based on a certain reading of its substance.²⁷ But that substance is not intelligible independent of what lawyers project onto it. Is international human rights law’s telos, for example, *really* to protect human rights or even to give the most human rights oriented reading of any particular provision in a human rights treaty, as at least some human rights lawyers seem keen to assume? What if the whole goal of international human rights law

27. For a very similar analysis in the international criminal law context, see Frédéric Mégret, *In Search of the ‘Vertical’: An Exploration of What Makes International Criminal Tribunals Different (and Why)*, in C. STAHN & L. VAN DEN HERIK, *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* (2010).

was, rather, in a more international and hardly implausible vein, to strike a precarious balance between the demands of sovereignty and those of the domestic treatment of individuals? Surely there are arguments for the importance of collective self-determination that would militate in this direction. And what is the most “human rights oriented” reading of any particular right anyhow? Who is to say if human rights will not be better protected overall as a result of being limited in certain cases?

These two central problems that go to the very existence of international human rights norms—the difficulty of accessing a common global vision for human rights and the need to ground human rights law in some sort of sovereign recognition—combine dynamically in international human rights law’s implementation. What its very existence may owe to a utopian drive at one level, the project, if it is serious about its claim to law, will then try to counterbalance by being apologetic in other ways. At any rate, a one-size-fits-all approach to human rights would stretch the project to the breaking point, maybe even exposing its particularism and subjectivity along the way. Hence, international human rights law seeks to develop a significant tolerance for diversity in the achievement of human rights, to become even more of a flexible standard, maybe not so much a series of substantive prescriptions as a broad injunction to each society to at least think in terms of rights. Different regional groups go their own ways, all under the umbrella of the rights project and with its apparent blessing, some protecting only civil and political rights, others both civil, political, economic and social rights, some sticking to a very individualist reading of rights whilst others emphasize community existence and duties. Moreover, a jurisdiction like the ECHR is inevitably drawn to come up with a notion such as the “margin of appreciation,” the idea being that when it comes to interpreting limitations to rights states have considerable leeway, out of deference to sovereignty or to the idea that local judges are better placed to pronounce on difficult domestic issues. What counts as a human rights violation in some countries may be within the margin of appreciation of others.

As it allows these centrifugal forces to manifest themselves, however, the project is at risk of losing what makes its specific universal normativity. Downgrading the ambition of rights so that they seem to conform to states’ views of them comes at a high cost. If rights are really just an empty vehicle, apt to be filled with culturally specific content or whatever the sovereign decides, then does it make any sense to refer to them as international human rights, long after they have become segmented and provincialized? Moreover, does it make sense for rights to ultimately only emanate from changes in the prejudices of European public opinions? Did we really have to wait until the 1970s to discern that treating legitimate and illegitimate children differently, or practicing corporal punishment, or criminalizing homosexual relations was wrong?

Indeed, it often seems the ECHR will ratify a range of practices, without it ever being clear why the margin of appreciation operates in some cases and not in others, because the fundamental answer to the proper scope of the margin of appreciation lies in riddles about the relative value of individual/community,

society/state, state/international supervision that it can never entirely prejudice. The margin might be justified on the basis of a deference to democracy, but what if democratic practices end up oppressing the minority? And how will we know that the majority is actually oppressing the minority rather than enlightening or protecting it? Surely we cannot just take the minority's word for it, without risking undermining the very democratic arrangements on which human rights rely. The margin of appreciation might also be defended as deference to tradition and culture, but are human rights lawyers not rightly wary of such appeals? Are human rights not precisely meant to free human beings from the shackles of culture and tradition and their many oppressive dimensions? What of cultural rights and the protection of minorities? Human rights seem to be constantly underhandedly undermining what they prop up.

Indeed, the fusion/competition of human rights and international law hardly makes it easier to arbitrate the fundamental controversies that prosper on the fault lines of their coexistence. For example, should one intervene militarily to save human lives? For international law, this has always been a vexed question on its own terms, requiring so many theoretical extrapolations—even ones masquerading as doctrine—as to create the impression of endlessly reinventing the wheel. Humanitarian intervention harks back to an era of imperialism which international law would like to believe it has overcome. Contemporary international law has taken a strict position against any first use of force that is not in self-defense or allowed by the U.N. Security Council. That position is difficult enough to maintain in a system of state coexistence because of the many ways in which one can read exceptions to it, but the intrusion of human rights further increases the element of normative instability by creating or reinforcing yet another potential exception to the *jus contra bellum* (humanitarian intervention). Moreover, because international human rights law can be used to both defend and oppose an intervention, it does not even begin to resolve the dilemmas its emergence has created.

Or take the issue of immunities. At one point a domestic court tells us that former heads of states do not have immunity for torture,²⁸ later on it is a human rights court that tells us that sovereign immunities apply even in cases of torture.²⁹ The International Court of Justice (ICJ) goes on the record on several occasions saying that both current ministers³⁰ and states³¹ have immunity even for

28. See *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Eng.) (denying former Chilean head of state Augusto Pinochet immunity for torture).

29. See *Al-Adsani v. United Kingdom*, App. No. 35763/97 (Eur. Ct. H.R., Nov. 21, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885> (approving England's application of the 1978 State Immunity Act to uphold Kuwait's claim to immunity for torture).

30. See *Case Concerning the Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 71 (Feb. 14) (holding that Belgium's arrest warrant for DRC's then Minister of Foreign Affairs, Abdoulaye Yerodia Ndongbasi, failed to respect criminal immunity for current ministers).

31. See *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), Judgment, ¶

international crimes. Domestic courts go back and forth. Before long, the argument seems to hinge on whether torture is a violation of *jus cogens*, and whether that should trump immunities either because it is not functionally a part of states' duties or because to not provide a remedy would in itself be a violation of a *jus cogens* obligation. In its formalist version, the debate is reduced to which norms sit higher in a hierarchy of norms. But such arguments are inconclusive because one needs to justify why certain norms are *jus cogens* based on a particular understanding of what that notion means; ultimately the debate is about *why* certain norms should trump others.

One senses that the issue is, at any rate, too important to be settled merely based on rule interpretation or precedent. So, Judge Guillaume will tell us that the end-all of international law is to protect relations between sovereigns, perhaps reflecting his bias as a French *énarque* used to the corridors of the *Quai d'Orsay*;³² others will inform us that prohibiting torture has become the ultimate goal of the international community, something that one could be forgiven for having missed given the banality of torture. Ultimately, whether immunities or state sovereignty should prevail appears as little more than a pure "constitutional" or "decisionist" moment depending on one's outlook, that will often look like the tossing of a coin, as evident in the fact that decisions that are dozens of pages long often hinge entirely on a single sentence that seems to say, after an extensive review, "this is what it is, and that is it." There is nothing *in the system itself* that would allow us to decisively conclude either way even if international law was a pure system uncorrupted by human rights, or even if human rights were a pure system uncorrupted by international concerns—but perhaps even less so when both vie for supremacy in global legal fora.

IV. IN SEARCH OF DETERMINACY

As frequently observed by Koskenniemi himself, the Koskenniemian critique of the indeterminacy of legal discourse is not matched by randomness of outcomes in the legal world. There is an evident degree of regularity in the case law of jurisdictions such as the ECHR. Part of this is of course created by the repetition of precedents, so that one at least needs to go back through the chain of cases to understand the creative force of initial decisions. The case law of particular jurisdictions typically betrays a particular direction. If that direction is not given by the broad inclination of the law as such, then it is singularly important to understand what lies behind it. In this section, I first sketch one way in which international human rights law might occasionally have claimed to have a more normative spine than international law generally, namely in that it is at least

139 (Feb. 3, 2012), *available at* <http://www.icj-cij.org/docket/files/143/16883.pdf> (providing Germany immunity from suit for wartime atrocities in Italian courts).

32. *See* Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 30, ¶ 54 ("That immunity [from criminal prosecution] and that inviolability protects the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.").

absolutely deontological about its prohibition of torture. I find however that idea to be quite improbable and, instead, suggest that the regularity of international human rights legal outcomes is much more the result of the development of forms of community and identity.

A. The Desperate Search for Absolutes and the Torturing of the Innocent³³

As has been seen, international human rights constantly flirt with absolutes, but most of these are make-believe absolutes. Even the right to life is certainly not an absolute, limited as it can be by the needs of police work, the ever present possibility of capital punishment, and the laws of war, not to mention abortion and euthanasia. Some rights are non-derogable, but because they already incorporate limitations and these limitations need to be appreciated in light of evolving circumstances, this hardly suffices to sanctify them. As such, the structure of international human rights legal argument begins to look strangely like that of international legal argument, one involving weights and balances, ascertaining competing priorities, and that is ready-made for dubious forms of managerialism.

By contrast, the human rights world is regularly traversed by claims that certain things should always—or never—be done. For example, one should *always* prosecute international crimes. Such rigidity can be almost unbecoming. Surely one will have second thoughts if to prosecute someone in position of power means that he is, as he has announced, going to exercise reprisals against his population, thus defeating some of the very goals of prosecutions in the first place. The same might be true if justice is paid by too high a price in terms of peace. But what if at least some rights were to really operate like trumps, what if some at least were truly absolutes? Could that anchor a claim to determinacy of legal language and help us move beyond a managerial or hegemonic style in international human rights law? Might being absolutist about even a single right be international human rights law's saving grace, its ultimate distinguishing factor from international law as a system of coexistence in which nothing is sacred?

One right has certainly acquired such a special place within the human rights edifice as to become a likely candidate—that of being free from torture. Where all the other stars seem to be constantly orbiting around each other (and sometimes around the dark star of sovereignty), this one is supposed to shine brightly and steadily in the firmament. The prohibition against torture is, in effect, the closest thing that international human rights has to a rigid deontological rule. For example, many international human rights lawyers would consider torture to be prohibited even if international law were to tell us tomorrow that it was not, because too many states actually practiced it for a customary rule to have taken hold. The prohibition of torture has its own international treaty reflecting the particular esteem in which it is held internationally. The whole of international human rights law might thus

33. The title of this section is loosely based on an article by Koskenniemi. See Martti Koskenniemi, *Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 LEIDEN J. INT'L L. 137 (1997) [hereinafter Koskenniemi, *Faith, Identity, and the Killing of the Innocent*].

be re-arranged along more modest lines not as that which follows necessarily and fluidly from liberal assumptions, but that which “religiously” protects us from torture.

Yet, this absoluteness requires some prodding to understand how it would function and indeed whether it can function at all and at what cost. As Koskeniemi has noted in the context of nuclear weapons, “absolute rules . . . are always both over determining and under determining: they will encompass situations you did not intend to be covered and exclude cases that you wished to cover.”³⁴ First, I note in passing the relative improbability of founding the entire international human rights project on something as narrow as the prohibition of torture. Even if the prohibition of torture is indeed an absolute, it is unclear how it can be related to the larger body of human rights and whether it could redeem the whole project. One might argue that all other rights have value insofar as they ultimately protect individuals from torture—for example, by guaranteeing a free society based on the rule of law in which torture is less likely to be committed—but that would be denying the sort of autonomous worth that is typically ascribed to rights. Moreover, it is conceivable that there would be societies in which other rights were respected but torture was committed. The argument, then, may be less about human rights generally than about the prohibition of torture specifically.

More importantly, the claim about the absoluteness of the prohibition of torture or inhumane treatment, rigid as it may appear to be, in practice hides a definite fluidity about the definition of torture. And there is reason to think that much bias hides behind the particular definition of torture that at any time is sanctified by international human rights law. For example, should chronic hunger—when such hunger could easily be remedied by the state—be considered torture? Should sado-masochistic practices count as torture? Should solitary confinement be torture? Is it torture if imposed by a non-state actor? Is rape a form of torture? One quickly runs into the paradox that something is absolutely prohibited and condemned, but that its definition itself is much less absolute. Historically, the definition of torture, even in well-defined regional systems, has significantly evolved and will continue to do so over time. Torture then looks very much like these empty vessels that international lawyers have no doubt exist but are forever at pains to define—sovereignty, aggression, terrorism, self-determination, etc.

What constitutes torture may, in fact, also be elastic to the pull of states’ legitimate priorities, characteristic of other rights. For example, handcuffing a prisoner during arrest, transfer, or interrogation is not considered torture because it is seen as “justified” for the purposes of protecting the police, but can become torture or inhumane treatment if it is used arbitrarily. Of course, the handcuffing has to be “reasonable” and “proportional,” but there is no mistaking the fact that what makes some things torture or not is the extent to which they are necessary for a legitimate purpose. This in turn invokes a particular theory of the state and

34. *Id.* at 145.

security which human rights cannot entirely “determine” and which will require subtle circumstantial evaluation. The individual’s freedom from pain and general unpleasantness can clearly be legally restricted under human rights law without that individual being able to invoke “torture.”

Of course, one might argue that handcuffing and other similar practices are a special case of practices that become torture as a result of contextual elements. Surely, some practices are intrinsically constitutive of torture. For example, pulling someone’s nails out is always torture, and not redeemable by the circumstances in which it is used. That may well be and obviously human rights law may well have what are, on the basis of prevailing understandings at any given moment, easier cases. Yet, it is worth noting that even when it comes, for example, to the infliction of pain on babies—as in the ongoing debates on female and male genital mutilation—all kinds of implicit ideas about medical benefits, the role and value of religious affiliation, and the place of gender structure our understandings of what counts as torture.

Moreover the international human rights movement also forgets a little too easily how its absolute categories are informed by evolving social practices and perceptions that human rights law ratifies rather than prescribes. Presumably until *Soering v. United Kingdom*,³⁵ the extradition of individuals from ECHR party states to states that imposed the death penalty and where they were at risk of lingering for years in death row did not constitute inhumane treatment; and presumably before *Tyrer v. United Kingdom*,³⁶ corporal punishment of minors was considered to be part of the folklore of some state parties to the ECHR. This suggests that, even in a quite indirect way, the European human rights system was at least implicitly privy to practices that we would today consider to be inhumane treatment or even torture. Of course, one might say that these were simply “bad” decisions by the ECtHR, which it has since corrected. But the point is that whether they are “good” or “bad” is not really ascertainable from an intangible legal standpoint, but has to do with, for example, the Court’s scrutinizing of evolving European attitudes, which are by nature shifting and occasionally retrospectively quite wrong.

This in turn raises interesting questions for the post 9/11 debate, in which much has been staked on the idea that torture is absolutely prohibited under international human rights law. But it is unclear whether international human rights law is actually the best guide to this. For example, it is often suggested that John Yoo, the principal author of the so-called “torture memo,” engaged in “catastrophically poor legal reasoning”³⁷ in narrowing the scope of what constitutes torture. This may well be true in some respects, but one may also

35. See *Soering v. United Kingdom*, App. No. 14038/88 (Eur. Ct. H.R., July 7, 1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619>.

36. *Tyrer v. United Kingdom*, App. No. 5856/72, 26 (Eur. Ct. H.R., Apr. 25, 1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587>.

37. Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32.

wonder if, paradoxically, Yoo's "sin" was not to take human rights law a little too literally. After all, it is the ECtHR itself which, in the 1978 case of *Ireland v. United Kingdom*, finessed about whether "sensory deprivation" techniques—wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink—constituted torture or not, concluding that they were "only" inhumane and degrading treatment.³⁸ John Yoo's mistake, in this context, may not be that he misunderstood how human rights law worked—as, indeed, a relatively contingent sliding scale, open to all kinds of justificatory arguments—but to have proceeded from an arguably fundamentally flawed morality, or perhaps merely miscalculated the *zeitgeist* and how the forces that stand behind international human rights had moved on since *Ireland v. United Kingdom*.

Yet, assuming that we can come to an agreement about the definition of torture, allowing for a core and a penumbra, the possibility of absoluteness as it relates to the injunction not to commit torture remains. Indeed, perhaps the saving grace or the most damning feature of human rights law is that, if one follows its dominant streak, it does take the deontological so seriously that it would prefer, in some extreme circumstances, that the world perish rather than commit a single act of torture. Of course, the fact that it does this only in relation to one particular right is in itself cause for caution, but I want to reflect on the larger role that rights absolutism, however rare it may be, might have in distinguishing international human rights law from public international law. Indeed, the same thing is not true of international law, and the least that can be said of the ICJ Advisory Opinion on Nuclear Weapons is that, when really serious push came to shove, the system would not actually require of states that they disintegrate rather than risk using nuclear weapons.³⁹ As the Court famously put it, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."⁴⁰

Still, if a human rights court were today asked an advisory opinion on "The Legality of the Threat or Use of Torture" valid for all times and circumstances, it would probably hesitate to pronounce a non liquet and would in all likelihood fall on the side of saying that torture is *never* permitted, not even allowing for the life of the nation or any other similar caveat. Now, *that* would be determinacy. Hopefully it would not come to that, but maybe we would actually rather a city, a nation, or humanity disappear than do something that we deemed to be the negation of a human life of dignity. There is no shortage of faiths that have certainly exacted that price from their members. Perhaps the prohibition against torture can inspire that passion too. This is why so much seemed to hang in the balance of the "torture memos" and the human rights community rallied against the

38. *Ireland v. United Kingdom*, App. No. 5310/71 (Eur. Ct. H.R., Jan. 18, 1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506>.

39. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 97 (July 8).

40. *Id.*

apologists. If a court were to engage in a casuistic exercise about when torture might be legitimate—as this article will, in order to show the limits of such casuistry—then the law would be criticized as wrongheaded and perverse. If confronted with a choice, surely human rights law must ultimately be more about human rights than about blind adherence to the rule of law.

But it may also be determinacy paid a little too high a price—a suicidal determinacy perhaps, *or even an immoral determinacy*. The problem with such determinacy to begin with is that it takes its flight into utopia so wholeheartedly that it is not likely to be taken very seriously by states. By refusing to pay its dues to the gods of apology, it may even commit a sin of pride. An unyielding deontological line may end up having the morbid, cultish feel of an absolutist's death wish. In fact, there are cases where the resolve of even the most die-hard human rights absolutists should—and probably would—waver. Let us leave aside banal ticking time bomb scenarios, which allow for plenty of speculation about whether the bomb is really ticking and what might happen if one tortured. And forget about comparing things that are not comparable, like torturing someone to save someone else's life. Let us imagine that a sovereign simply ordered you to torture one person, or otherwise ten persons would be tortured. Of course, you could say that even there nothing is ever sure until it has happened. Surely you should wait until the eleventh hour to see if the threat is put to effect or if some act of God, a Hollywood super hero, or a flying meteorite might interrupt the sequence of events.

Sooner or later, and save that unlikely event, however, the threat will be put into effect. Let us then imagine that the sovereign, in a show of cruelty, decided that he would torture the individuals one by one in order to test your resolve. From then on, for every person who is tortured, the person who refuses to torture will effectively have allowed her deontological purity to take precedence over her responsibility to her fellow human beings; will have refused to chose the lesser of two evils; will have effectively undermined the very rule of prohibition on torture (we assume in addition that there is an easy way of knowing whether the sovereign is serious about his commitment to stop torturing if you take his deal, for example because he has done so before). Here, then, is a classic case of an “absolute rule” that is “unacceptable precisely because of its absoluteness, because its application might . . . bring about precisely the conclusion . . . that it aims to avoid.”⁴¹ Human rights would become not a rule of living together and minimizing pain to others, but a rule of minimizing pain to oneself. The point is not that such a scenario is likely but that the absolute prohibition on torture, defining as it may be, should only be so strong as to allow torture to be minimized. Our desire to see torture not committed is stronger (or should be!) than our desire not to violate the prohibition on torture or be associated with torture personally, unless we actually see the main problem with torture as being that it makes some people's hands dirty—which is not very convincing. Hence, Koskeniemi's deep intuition that every absolute view

41. Koskeniemi, *Faith, Identity, and the Killing of the Innocent*, *supra* note 33, at 148.

is “a relativist view in disguise.”⁴² Torture is not that different from nuclear weapons after all.

All of this of course operates at a relatively abstract theoretical level. I discount purposefully prudential arguments about whether we should be talking about such things at all, or whether there is value in a conspiracy of silence, of leading the world to believe that we are more diehard about these propositions that we would really be in the face of their vigorous self-undermining.

B. Community, Identity and the Search for Direction

Short of absolutes, the dizzying anguish of the indeterminacy of international legal discourse may also be exorcised by another form of absolutism—the attempt to collapse the categories of apology and utopia. As has been seen, international human rights law must come up with both descriptive and normative theories as to why it is law and not simply a particular enterprise of power or subjective moralism. The only way this can be done ultimately is by a convergence of the two—i.e. by a reduction of the “is” and the “ought.” This requires a very peculiar millenarian reading of the history of international law, one in which the contradictions that would otherwise be glaring between rules and values, interests and principles, have been transcended.

Such a reading of the history of international law is very evident in a range of doctrinal constructs that more or less assume that the desirable is the real, or at least maintain a guarded ambiguity about whether they are describing something really going on or a particular way that one ought to look at the evolution of the world. The move “from bilateralism to community interest”⁴³ or the “constitutionalization”⁴⁴ of international law, then, all have this rather ambiguous status, of being sometimes presented as detectable social conditions—be it via a constructivist lens—and sometimes as “the way we ought to morally think about things,” or simply “doctrinal facts” that help do away with the anguish that would inevitably spring from that ambiguity. A very similar process goes on when the argument is made that certain human rights treaties embody universal values because they are universally ratified; ratifications, although necessary to show that the law has some grounding in sovereign reality, are then presented as merely a formal step by which states have recognized the obvious, paid their homage to virtue as it were. Yet another strategy involves arguments that respecting human rights is not only the right thing to do but ultimately in states’ interest, so that there is no fundamental incompatibility between the two—think, for example, of the Blairite justification of the invasion of Iraq as something that made complete sense of both national interest and liberal internationalist obligations to save the Iraqis, or the typical argument that “not only is torture bad, it also does not work.”

42. *Id.* at 146.

43. Bruno Simma & Andreas L. Paulus, *The “International Community”: Facing the Challenge of Globalization*, 9 EUR. J. INT’L L. 266, 268 (1998).

44. Jan Klabbbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 19–31 (Jan Klabbbers, Anne Peters, & Geir Ulfstein eds., 2009).

A particular cosmopolitan understanding of the world is thus retroprojected to validate the international human rights law project, one composed of hypersensitive human beings that shudder at the thought of any human rights violation occurring anywhere in the world, a world in which the notion of crimes against humanity is taken seriously as a crime against all, and in which states routinely act as if *erga omnes* obligations were indeed *erga omnes*. Sovereignty is entirely recast as resulting from a mandate given by international human rights law. The descriptive and normative claims of international law are perfectly aligned, suggesting a sort of eclipse of the tragic. Such claims are then typically reinforced by some superficially plausible, but often sociologically unsophisticated, claim about the world, e.g., a reference to globalization.

Of course there is always the possibility that human rights might one day fundamentally change the rules of the game, by creating a world in their image, the sort of *civitas maxima* that international law typically gives up on except rhetorically. In other words, human rights might one day substantially dissolve some of the system's internationality, or benefit from external events that have had this effect. This has always been the more or less implicit agenda of human rights cosmopolitanism. In fact, for many in the international human rights movement, behaving as if the *civitas maxima* were already here is almost an article of faith, partly I suspect because it is seen as a way of living the categorical imperative to the full and partly because if enough people come to think of it as true then the project might make up through actual popular support what it has long lost in terms of ontological certainty.

Leaving aside the potentially sinister implications of a world state and its ability to prosper under anything else than the *pax imperium*, it does not take much to point out the discrepancies between such an account and the reality of the international system. International human rights law is forever producing theories about how the international system ought to work, notwithstanding that these theories fail spectacularly as descriptive accounts. For example, decades of scholarly and jurisprudential ruminations about the *erga omnes* character of certain international legal obligations boil down to extremely little in precisely the contexts where one might think such considerations should be paramount.⁴⁵ Moreover, even if the account were sociologically plausible, abolishing the sense of irreducible political communities associated with international law would arguably only displace the problem of indeterminacy. The particular oscillation between apology and utopia that characterized the international system might recede, but human rights would simply renew with its own inherent form of indeterminacy in the face of simple human diversity and competing ideas about

45. There have been, for example, very few inter-state complaints concerning rights violations outside the limited case where a state is effectively invoking the protection of its nationals. I have reflected ironically on this and other gaps between the normative and descriptive accounts of international law more generally in Frédéric Mégret & Alexandra Harrington, *The Rise and Fall of Eunomia* 15–21 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1983135.

justice, the good, the ends of means of government, etc. Familiar critiques of domestic human rights adjudication would simply have been globalized, in a world where difference and pluralism would remain even if sovereignty did not.

In some cases, the temptation may be to reach beyond states altogether. International human rights law, so the argument goes, derives perhaps more than any international law from the will of the “international community” or the “global community of mankind.” It at least affirms that this social reality is not merely a figment of imagination. The current move to extend human rights beyond the state—notably to armed groups and multinational corporations—can be seen as part and parcel not only of top down strategies to impose obligations on new actors but also of an attempt to renew human rights’ social grounding. However, it is hard not to see that the mooring such strategies provide is precarious. Not only is “humanity” a very improbable source of norms but, more significantly, even finding a more sympathetic constituency of reference still does not do away with the problem of human rights appearing to be at the mercy rather than imposing norms on social actors (and we certainly have no reason to think that non-state actors will be *a priori* more committed to human rights than states). Moreover, the democratic structures that would allow such a social legitimacy to be made explicit do not exist, and there is every reason to believe that international human rights lawyers would be deeply uncomfortable about putting the International Bill of Rights to a global vote.

Confronted with the implausibility of this entirely universalist account, the tendency of international human rights law has been, more implicitly, to retreat and reframe the issue as one of social identity rather than the truth of certain claims. Rights are no longer simply universal, they are just “what we do.” I will return in the next section to the politically hegemonic implications of this “we,” but I merely want to examine it here as an attempt to minimize the appearance of arbitrariness. The regionalization of human rights and the margin of appreciation are all devices to bring human rights back closer to “home.” Decisions by the ECtHR will appear less indeterminate and arbitrary within the particular Council of Europe context because they reflect at least particular European understandings of rights. Moreover, they arise in a context where the internationality of the system has arguably been at least regionally eroded. Much of the way in which European human rights law conceives itself, especially through such notions as the margin of appreciation or the “living character” of the Convention, is less as the distillation of eternal truths than as a sort of dialogue between an abstract framework of rights and the supposed evolving values of European society. Human rights are more a product of the constant evolution of society rather than a blanket universal application of norms. What passes for a form of determinacy, then, and is routinely credited to legal discourse, is only really the *déjà vu* of self, the comforting feeling of one’s revealed identity.

However, even that reassessment of what constitutes the project’s ambition must fail. For there is no unproblematic society from which a legal institution can simply claim to emerge. Every drawing of boundaries both excludes outside and inside in ways that further reactivate the dilemmas of apology and utopia. By

excluding from the range of the protection of rights whatever lies beyond its periphery, the project of regionalization seems to challenge the very universality of rights that it needed to draw on. Human rights become European, or inter-American or African rights. Inwardly, the projection of, say, a “European society” can no more hide that it is a fiction, providing a vain form of determinacy. The Council of Europe includes close to a billion people from Dublin to Vladivostok. That some, even a majority, will recognize themselves in the jurisprudence that takes such a society as its implicit reference point is inevitable. They are in all likelihood those who stand to win from certain human rights outcomes, those who will be most tempted to attribute their good fortune to the justice of rights rather than the power of self. But it is also just as inevitable that others will not. It is worth pausing and thinking about all those who, over time, have been turned down by international human rights courts and told that their cause was subsumable neither under rights nor law, and who may be prone to think that human rights are not “their” rights. In fact, we have reason to think even the thorough renationalization of the rights project could not lose its indeterminacy, since even domestically the projection of a society fundamentally in agreement about ends does violence to reality.

So what is left? Human rights law only seems to become relatively more determinate as it becomes relatively more provincial, but the more provincial it is, the less it can lay claim to being international human rights law. After a while, the suspicion will emerge that something more insidious is at work. For example, that which gives international human rights law its evident direction is in fact merely the “invisible college” of international human rights lawyers,⁴⁶ an “epistemic community” of self-proclaimed guardians of rights, a relatively tight-knit caste of experts and technocrats who can “talk the talk,” and stand in for a deeper form of community. Indeed, it seems particularly fruitful to think of international human rights law as a form of disciplinary power with its centers of authority, its leading figures, and its routinized practices. In that context, what is crucial is knowing and understanding who is speaking in whose name and to whom. International human rights lawyers are part of a competition between different actors for supranational governance that involves staking an authoritative claim to a certain mode of knowing that is different from, inter alia, human rights activism, domestic human rights lawyering, or international legal thinking. That strategy of power is a strategy of rendering determinate through one’s will to power, for at least power typically knows what it is doing where the law on its own seems endlessly rudderless.

Choosing to preach only to the (relatively) converted may buy the movement some time and occasionally fool the audience and the actors themselves into thinking that they are witnessing international human rights in the making when they are simply being privy to the social ascendancy of a particular group. But there is evidently an exterior to the movement for whom the language of faith is

46. See Frédéric Mégret, *Practices of Stigmatization*, 76 LAW & CONTEMP. PROBS. (forthcoming 2014) (applying the practice approach to the field of international criminal justice).

likely to be utterly unconvincing, not least those who have been on the losing side of human rights struggles and whose bitterness will have only increased by being told by authorized institutions that their case falls by human rights law's wayside. In that respect, the very fact of a sovereign disagreeing on the character and scope of human rights reminds even the idealistic human rights lawyer that we live in conditions of international pluralism—human rights as one *religio* among others—in which international law will impose itself as the default language, the language of (polite) disagreement. Moreover, there is a strong risk that even within the human rights movement the consensus will quickly shatter to reveal only an endless assortment of individual or field preferences. This is not to mention that cliquish mutual recognition is an extraordinarily unappealing option from the point of view of the human rights ethos as a basis of determinacy.

Before one concludes that “only the lawyers are left” as it were, it is worth noting that the relative determinacy of international human rights law might also be ascribed to a form of praxis that is anterior to formal legal arguments, a sort of craftsmanship about what it means to successfully engage in international human rights reasoning. To begin with, international human rights legal reasoning is the acceptance of a particular style. That style, whatever else it does, must as a rhetorical matter strongly defer to the value and needs of the human person. At its most basic, international legal human rights reasoning is the art of linking a range of particular normative outcomes to some purportedly universalizable understanding of what human beings are. It is, simultaneously, the ability to appear as a “serious” lawyer whose allegiance is above all to the law rather than to human rights, and who would rather sacrifice their conscience than be seen as “inventing” the law. In rendering homage to both the idea of rights and the idea of the rule of law, good international human rights lawyers engage in a fairly sophisticated practice of masking international legal discourse's contradictions. The mix of occasionally lofty pronouncements and dry references to rules, the careful attention to structure, and indeed to “rituals of reasoning”—affirmation of the rights that might be violated; methodical analysis of the limitations that can be brought to those rights; broad affirmation of what is necessary in a “democratic society;” etc.—all concur, through repetition, to produce a particular human rights style. That culture is much more an aesthetic than a science; it is a tone that is simultaneously empathetic and tragic, and whose claim to fame is to appear much more solicitous than public international law.

Perhaps more importantly, the implicit know-how of the discipline involves a particular quality of intuition about, at any one time and place, which arguments are likely to succeed as far as the parties are concerned, and what arguments are likely to seem legitimate as far as the adjudicators are concerned. The judicial encounter plays out in a context of imagined recipients and interlocutors. Indeed, it is important to note that apology and utopia are not simply ideal conceptual parameters of international jurisprudence. They are also often embodied audiences, particularly so in the field of international human rights where states, parliaments, or executives often stand in for apologia, and victims, activists, or civil society stand in for utopia—and occasionally vice versa. In addition to the philosophical

conversation that is going on within the canon of liberalism, therefore, a legal realist perspective on human rights adjudication would also see it as occurring with certain active, lively constituencies. Reading these constituencies and, essentially, knowing “what one can get away with” in terms of adjudication are central skills of international human rights as social engineering.

One way of understanding the relative determinacy of human rights discourse that uses the framework of *From Apology to Utopia*, moreover, is actually to see that argument not so much as a theoretical critique of the indeterminacy of the law than as a rough practical guide to the business of managing the law. The suspicion is that the tension between apology and utopia—devastating as its systematic and deliberate highlighting as a function of liberal discourse may have been to the discipline’s sense of self—has not only always constituted it but also has been a part of the background knowledge that the discipline has about itself. Koskenniemi really only brings to light, almost psychoanalytically, the particular neurosis of international lawyers—indeed, had international lawyers willy-nilly not recognized themselves in his writings, these would never have acquired the aura that they have. The heart of that form of practical knowledge is that international legal reasoning is never so strong as when it navigates adroitly—typically at roughly equal distance—between the twin traps of apology and utopia.

This sense of human rights adjudication as a constant balancing act—nodding to an eager civil society whilst winking at states that one has understood their concerns—does in fact correspond to much of the legal decision making that goes on in places like Strasbourg. It is in this deceptively neutral space between the two extremes that arguments are won, the legitimacy of adjudicatory positions sustained, and careers aggrandized. International human rights lawyers, like international lawyers in general, are artisans of this particular type of compromise which is never either pre-determined or perfect but which is at least the one they are trained to make.

V. LOCATING THE HEGEMONIC IN INTERNATIONAL HUMAN RIGHTS LAW

Once some of the possible sources of the apparent determinacy in international human rights law have been established, the work of understanding what politics are made possible by it begins. What is needed is an understanding of both the nature of human rights power that evolves from its practice and what politics international human rights law make possible internationally.

A. *The Nature of Human Rights “Power”*

What is the nature of the power of international human rights law? It is, much more than the ability to speak justice to power—as it is typically conceived—the power to arbitrate between different concepts of the just society internationally from an apparently neutral standpoint. The historical conditions in which that power was built could occupy considerably more space here than I have, and have

at any rate been amply covered by others.⁴⁷ However, it should at least be clear that this power is linked to historical struggles about who can “speak in the name of rights.” Who was in the room when major international human rights instruments or strategies were adopted, the rhetorical construction of the “victim” and the ability to speak for her, or the implicit construction of a particular vision of “humanity” have all been crucial to the movement’s accumulation of power. That accumulation can be understood as a series of rhetorical strategies that foreground international human rights law’s particular expertise. Indeed, more recently, there is a sense that Koskeniemi’s work has taken a more sociological turn, opening up a new space between the critique of theoretical superstructures and the narration of micro-individual trajectories for which he is mostly known. For example, Koskeniemi has emphasized how mainstreaming human rights is a “project of seizing institutional power,”⁴⁸ and of “empowering experts.”⁴⁹

Understanding how these strategies *succeed*—as opposed to just being what they are—involves drawing links between social structures and the structure of international human rights argument. At the heart of international human rights’ legal power lies what one might call “human rights paternalism,” i.e., an ability to cut short political and moral discussion by reference to some incontrovertible essence of humanity separate from peoples’ self-determination about it. The fact that we will respect the human rights of even those who would deny them to themselves—i.e., the person who sells a body part in violation of his own physical integrity—is in some ways a source of human rights’ *noblesse*, what makes human rights an ideology of last resort to safeguard dignity. But it is also the source of human rights’ violence because it suggests that there is something inherent about human beings that one can reach for behind their own expressed will and views about themselves, as it were, to hold against them. In that respect, the “we” in human rights is constantly at risk of being hijacked by the particular group that at any time and place is the most successful in doing so—men, Europeans, heterosexuals, the middle class, etc.

So, for example, as the victim of advanced motor neuron disease paralyzed from the neck down goes to Strasbourg to beg to be able to put an end to her life, pushing the sense of Socratic adherence to the law to the extreme, she is told that she must stay alive and that her “right to life” does not include a right to the state turning a blind eye to her husband helping her end her life;⁵⁰ the French small person who argued that the prohibition of “dwarf tossing” as entertainment in discotheques would deprive him of his ability to earn a living and condemn him to poverty, is told that this is regrettable but that France had merely sought to protect

47. See generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); ALFRED WILLIAM BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF THE EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001).

48. Koskeniemi, *Human Rights Mainstreaming*, *supra* note 7, at 47.

49. *Id.* at 51.

50. See *Pretty v. United Kingdom*, App. No. 2346/02 (Eur. H.R. Rep., Apr. 29, 2002), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448>.

his dignity;⁵¹ Sahin, the Turkish student who is denied her university diploma in Istanbul and showed no sign of being coerced is told that it is appropriate for the Turkish state to treat her as it does because the veil is hardly compatible with a modern concept of gender equality;⁵² the British men prosecuted for their sadomasochist activities are informed that consent to their activities is no defense to the criminal charges brought against them.⁵³

In all of these cases, individuals are asked to sacrifice their autonomy and submit themselves to the law of rights so as to preserve the rights of others and the interests of society. Pretty must not be granted her desire to die, for to do so might take us on a path to untrammelled euthanasia and cheapen the right to life; the little person must lose his job, for in continuing to consent to his own use he reinforces stereotypes about persons with disability that go against their dignity; the veiled student must understand that not getting her diploma is for her own good and that of society's since it preserves gender equality and protects Turkey from terrorist threats; the sadomasochist men must appreciate that their activities cannot take precedence over a particular form of Victorian sensitivity about male bodies. For them to do otherwise would be to act against the immanent spirit of rights. International human rights law essentially faults the instrumentalization of individuals by groups—the French discotheque, Muslims—only to instrumentalize them for the greater success of its own project. Through an extraordinary twist, supposedly deontological rights end up being invoked to justify the very utilitarianism that they were supposed to have been invented to keep at bay.

Human rights' reach for a natural essence thus ends up trumping individuals' musings and deliberations about what they want to do with their lives as self-determining beings. There is a *proper* self-determination, of the sort that fundamentally expresses the virtues of an abstract form of citizenship rather than the unhindered and chaotic aspirations of humans. Human rights law thus appears as a disciplinary power of the highest order, a technique of governance that does not say its name, and which in some cases feeds on individuals' aspirations to justice only to better control their lives. International human rights law, then, works in essentially the same way vis-à-vis states. It reaches out to an immanent essence—humanity, the will of the world community, the once-and-for-all expression to be bound by rights instruments—and bypasses the deliberative actualizations of views of the good society, replacing them by adjudication. There is in fact one implicit vision of the “good society” which states should bring about—that good society based on the rejection of a common vision of a good society—and although actual, self-determining democracy is claimed to be part of

51. See *Wackenheim v. France*, Views of the U.N. Human Rights Comm., Commc'n No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (July 26, 2002).

52. See *Sahin v. Turkey*, App. No. 44774/98 (Eur. Ct. H.R., Nov. 10, 2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-70956>.

53. See *Laskey v. United Kingdom*, App. Nos. 21627/93, 21826/93, 21974/93 (Eur. Ct. H.R., Feb. 19, 1997), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58021>.

it, international human rights law has in a sense already decided in advance what is “necessary in a democratic society.”⁵⁴

This hegemonic tendency, then, is given considerable reach by international law, which it in turn both reinforces and contributes to modify it significantly, in particular by amplifying its indeterminate possibilities. As such, the embrace of human rights can be seen as part of the broader “turn to ethics” in international law.⁵⁵ Whilst the orthodox view is that human rights radically constrain power, the Koskenniemi view is typically to the opposite effect, namely that it liberates it. Hegemony never thrives as much as on utopia, where apology’s grounding in state sovereignty at least remained a precarious bulwark against imperial overreach. International human rights law promises to replace international law’s proceduralism—the hard and inconclusive work of hammering diplomatic compromises—with substantive standards that claim to have decisively captured the “essence” of the international system—as one meant to bring about and protect humanity. Paradoxically, because, as has already been argued, these standards necessarily fail in providing an answer to the riddles of international law, one gets neither decisiveness nor hard diplomatic work, only inflated claims, the random preferences of gender, race or class, and brutal reassertions of sovereign prerogative.

B. Human Rights’ Substantive Politics

Having thus considerably expanded the range of politics that international law can engage in, what substantive political project, then, is actually enabled by the technologies of human rights? Here, it is important to emphasize that there is no reason to think that it is necessarily a socially progressist agenda. Because human rights have tied their fortunes to international law they must, as we have seen, engage in a degree of apology. This means almost never being caught, when it comes to the definition of rights, in a too characteristically utopian position. Hence, the tendency of human rights bodies to err on the side of safety when it comes to a host of novel issues, which are often the most sensitive in terms of rights at any given moment. Where were human rights in 1950s and 1960s Europe when homosexuality was criminalized in many member states? Why did the Human Rights Committee exclude homosexuals from the right to marry in the 1990s? The truth is that international human rights law has more often been used to ratify the prevailing consensus than as a tool to forge a new one. International human rights law endorses particular understandings of human rights once they have become uncontroversial domestically, once others have done all the political work of making certain causes acceptable. In the process, the movement often presents itself as the cause of what it is merely a consequence of, in ways that deeply misrepresent the nature of change in the international system.⁵⁶

54. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, E.T.S. 5.

55. See Koskenniemi, *The Lady Doth Protest Too Much*, *supra* note 8.

56. See generally Frédéric Mégret, *The Liberation of Nelson Mandela*, in *EVENTS: THE*

Of course, there is always the outlier who is caught up by the emerging “European consensus.” For example, the United Kingdom (Isle of Man) is found in violation of the obligation to protect persons within its jurisdiction from degrading treatment when it threatens to birch 15-year-old Tyrer for drinking beer on school grounds.⁵⁷ Such is the revenge of utopia against the unfortunate laggards in conditions where “the developments and commonly accepted standards” of member States of the Council of Europe point to a newfound lack of appetite for corporal punishment. The Court, it seems, is never as sure of its right as when a particular practice has already been grossly marginalized by history. Until that time, however, international human rights law will have made it difficult for well meaning individuals with a cause to make progressive arguments about the law. The passage through international human rights *law* may well serve to demobilize, to weaken the human rights argument and the ability to continue to make a point against the powers that be. What doesn’t kill the technology of state power, only makes it stronger.

More substantively, I can see at least three directions in which the actual substantive politics of international human rights might be going. First, it might become the preferred register of the normative validation of the state’s centrality to international affairs.⁵⁸ Human rights are often seen by realists and the left alike as a threat to the state, but one might argue that at a deeper level their fusion with international law is a formidable boon for at least some states or the very idea of the state. Paradoxically, international human rights law may, under its cosmopolitan guise, actually end up making it even more difficult to challenge the state system in some of the ways that it can be said to limit possibilities for justice globally. In one of his most powerful analyses of the operation of rights, for example, Koskenniemi has emphasized how the resort to human rights may serve to normalize the jurisdiction of occupying powers and simultaneously, by making occupation more humane, make it harder to question.⁵⁹ International human rights law is particularly prone to take the circumstances of states as givens, seeking to humanize and reform practices at the margin rather than challenge them directly. For example, it now has a sizeable case law on appropriate prison conditions—how many square meters a cell should measure for example—but has been much less sanguine when it comes to challenging the heavy resort to incarceration in the first place.

Here, I can only briefly suggest some of the ways in which this ratification of the prevailing order manifests itself specifically in the international system. The mainstream of international human rights law might be said to present as necessary the existence of sovereigns, including in the ways in which it: (i) deproblematizes

FORCE OF INTERNATIONAL LAW 117 (Fleur Johns, Richard Joyce & Sundhya Pahuja eds. 2011).

57. *Tyrer v. United Kingdom*, *supra* note 36.

58. Frédéric Mégret, *L'étatisme Spécifique du Droit International*, 24 REV. QUÉBÉCOISE DROIT INT'L 105 (2011).

59. See generally Martti Koskenniemi, *Occupied Zone—“A Zone of Reasonableness”?*, 41 ISR. L. REV. 13 (2008).

the existence of borders and the situation of minorities, condemning all to live within the borders and under the sovereign that they have more or less randomly been allocated by history, and arbitrarily distinguishing between some situations of extra-European colonization whilst ratifying the general (colonial) domination of indigenous persons or other minorities;⁶⁰ (ii) reifies the global distribution of natural resources even when that distribution is an integral part of global economic inequality;⁶¹ (iii) upholds the supreme power of the state to decide who enters and who does not enter its territory in flagrant opposition to what might be a cosmopolitan obligation of hospitality, not to mention a liberty to roam the planet at will, in a way that is the cause of much actual discrimination, tragedy and vexation; and (iv) reifies the idea that there is such a thing as war which, whilst not entirely legitimate in and of itself when it is waged aggressively, nonetheless benefits from our presumptive humanitarian recognition that killing combatants and a host of civilians collaterally is legitimate, especially when the artisan of destruction is a state, given the practical inevitability that sovereigns will every now and then need to exercise their monopoly on the legitimate international use of force.⁶²

Second, international human rights law—and this is in no way necessarily incompatible with the previous project—might be said to be more deeply implicated in the construction of the world as a global marketplace. There is an old origin of the human rights movement as an anti-taxation program by an aristocratic or bourgeois class tired of having to replenish the King's coffers after episodes of military adventurism or architectural spree. This is probably as it should be. Yet, in defining property as a central plank of the human rights project, its promoters also ensured that it would loom particularly large in the discussion of any distributive scheme, which is likely to be equally supported and opposed by social-democratic and liberal rights rhetoric. Before long, it may be that the ability to trade will be defined as the central right.⁶³ Corporations will argue vociferously that, as legal subjects, they too have human rights (and succeed), but will resist the notion that they should be imposed strong human rights obligations in the international arena; or they will accept and endorse human rights duties only to see their social status magnified and the state—particularly the Global South state—further marginalized. Human rights, as the ultimate humanist project, will endlessly reproduce modernity's economic appropriation of nature and the plunder of global resources, even as it seeks to tweak that process at the margin through a “human right to the environment.”⁶⁴

60. See Patrick Macklem, *Minority Rights in International Law*, 6 INT'L J. CONST. L. 531, 548–51 (2008).

61. THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 19 (2002).

62. Frédéric Mégret, *Theorizing International Humanitarian Law*, in OXFORD HANDBOOK OF INTERNATIONAL LEGAL THEORY (Anne Orford & Florian Hoffman eds., forthcoming 2014).

63. See generally Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 241 J. WORLD TRADE 281 (2003); Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407 (2003).

64. Frédéric Mégret & Jean-Baptiste Jeangène-Vilmer, *Are Human Rights Too Human-*

Third, international human rights law might be said to be deeply implicated in a *civilizational* project.⁶⁵ Particular international human rights projects—and one can argue that there are only ever particular human rights projects—have, as I have argued earlier, a way of standing in for identity. In that respect, they function both as a cleansing device internally—expurgating the “other”—and as a differentiating program externally—confronting the “other.” The experience of the ECtHR and the very indeterminacy of the margin of appreciation are a cautionary tale in this respect. By what legal miracle for example does the ECtHR simultaneously conclude that it is legal for the Italian state to display crucifixes in every class of the peninsula,⁶⁶ but also legal for the canton of Vaud to exclude a hijab wearing woman from kindergarten?⁶⁷ How if not through a highly peculiar reading that defers to the secular character of a state when religious symbols associated in the Court’s mind with the danger of terrorism and gender inequality are concerned, but fails to protect that secular character when an inoffensive symbol of Christianity is displayed? On a similar note, the Western indignation with moves, at the Durban conference, to restrict freedom of expression in order to protect religions from defamation must be compared to the enthusiasm with which limitations to freedom of religion are endorsed when they are adopted by states to defend “secularism” as it expresses itself dogmatically in the Turkish Republic. One might also compare the way in which the typically-seen-as-Muslim practice of excision has become something of a *cause célèbre* for international human rights activists, whereas a German decision to consider male circumcision to be illegal was widely frowned upon,⁶⁸ or the way in which feminist and LGBT issues quickly transform from hard-won and long overdue conquests in the West into the *fer de lance* of disparaging other cultures at home and abroad as backwards for their failure to adhere to our particular expression of rights.

VI. CONCLUSION: PASSION, TABOO, POLITICS

In this conclusion, I want to briefly reflect on Koskeniemi as someone who is wary of the international human rights law project, but who has also come up with some of the most compelling accounts of what might be worth safeguarding about human rights internationally. In a sense, there was always something particularly unforgivable about the heavy doctrinalization of international human

Centric? (forthcoming).

65. See Frédéric Mégret, *Droit International et Esclavage: Pour Une Réévaluation*, ANNUAIRE AFR. DROIT INT'L (forthcoming); Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'*, in INTERNATIONAL LAW AND ITS OTHERS 286–90 (Anne Orford ed. 2006).

66. *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R., Mar. 18, 2011), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

67. *Dahlab v. Switzerland*, App. No. 42393/98 (Eur. Ct. H.R., Feb. 15, 2001), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643>.

68. *Criticism of German Court's Circumcision Decision: Jews Denounce Ruling, Seek Ways to Proceed*, SPIEGEL ONLINE (July 9, 2012, 7:06 PM), <http://www.spiegel.de/international/germany/international-criticism-of-german-court-s-circumcision-ruling-mounts-a-843453.html>.

rights law—or international humanitarian law—as a set of substantive ideas about the good life that was begging for deeper engagement. There are arguably two casualties of an excessively doctrinal treatment for the content of international human rights law: a necessary engagement with the politics of human rights and the ability to cling to non-debased moral intuitions. Koskenniemi’s instinct seems to be that human rights would be better left to both, rather than to the simulacra of law. I am fond of the intuition, but I would argue that Koskenniemi makes it into too much of a general prescription when of course, in proper Koskenniemi fashion, it must really be down to circumstances whether human rights does actually lead to these perverse results.

Human rights’ impact on “political culture” may be the aspect with which Koskenniemi is most concerned. There is, at best, a high degree of hypocrisy, and at worst something much more sinister going on, when the law becomes the place of an unacknowledged politics. This is a powerful critique, but one should be attentive to the fact that it may be more powerful in certain settings than others. There are times when one would want to speak from the point of view of law to politics—even if that opposition is theoretically factitious, it is at least tactically and socially powerful—and after all, the idea that some things should be beyond politics, beyond instrumentality or debate, is not that shocking. Surely, there was something nauseating about the way in which the possibility of torture was contemplated in the public debate and in popular culture, quite apart from the possibility of there being such a thing as an absolute prohibition of torture defensible in law on its own grounds. Surely some of the ECHR’s judgments manifest a welcome rebuttal of the instrumentalism and callousness of politics. The current political debate in Europe, most notably on immigration and Islam, suggests that if there is a jurisdiction that can—if it indeed does—serve as a bulwark against the most evident forms of xenophobia or racism, then so much the better. Moreover, the ECtHR does not exist in separation from regional politics and the politics of member states but has, on occasion, served to trigger significant debates within them—be they about the legitimacy of a Court in Strasbourg adjudicating on fundamental societal issues—and so has a political role of its own which is to constantly feed the conversation about what a society values most.

Perhaps more than politics, the arrogance of law can be devastating to the value of ethical intuitions. One could argue that what makes the intuition that torture should be absolutely prohibited grandiose and existentially worthy is not that it is inscribed in the law in a way that would be incontrovertibly verifiable, but that it is believed in strongly as a matter of one’s moral intuitions. Here, the point of speaking in terms of moral intuitions is that there is no universal or natural truth that torture ought always be prohibited, only the difficult decisions made by a constellation of human beings in conditions of ultimate uncertainty that, overall, a world in which torture is never justified is one more worthy living in, than one in which that taboo is constantly trivialized.⁶⁹

69. See Koskenniemi, *Faith, Identity, and the Killing of the Innocent*, *supra* note 33, at 152, 154 (arguing that taboos are a key feature that should be protected in an international legal

Hence, the prohibition of torture is recast not as something objective, even morally, but as something subjective, existential, and political at the same time, for which one is merely willing to fight, and even die. The same could be said of most values that undergird human rights and the feeling that the fundamental moral or political reasons for upholding certain normative outcomes are often much more powerful, interesting, and compelling than Vienna Convention style treaty interpretation or the deft handling of the “margin of appreciation.”⁷⁰ The point about dying is of course an important one for it underlines what human rights must and has in fact incarnated, namely an ethos of cosmopolitan sacrifice—of oneself obviously, not others—so that we would rather die not committing torture, than live committing it.

Following Koskenniemi, one might argue that the main reason why we may reject torture absolutely has to do with a mixture of identity and faith. The absolute insistence on the prohibition of torture, in the end, tells us more about the identity of international human rights lawyers, the desire to escape tragic choice by sticking to an unyielding line, and the project’s need to maintain at least one fundamental taboo to distinguish itself from the unprincipled nature of international law or politics. As Koskenniemi puts it:

it seems difficult to defend special rights (memories of fear and injustice) on the basis of their intrinsic value, irrespectively of any arguments we can produce to support them—which means that they must be accepted outside rational convention; as part of our self-definition, as part of our identity as members of our communities; perhaps as taboo.⁷¹

We do not want to argue as Dershowitz or Ignatieff did that a special regime should be set up to regulate torture in extreme cases (even though human rights is busy developing such regimes for every other right), we do not want to draw up even well-meaning, humanitarian, legalistic “torture memos,”⁷² and we will join the collective moral boozing to discipline the deviator.

However, we do so not because Dershowitz and Ignatieff are ultimately demonstrably wrong legally—after all, they seem intent precisely on saving the law’s relevance. Simply rallying the troops and marshaling support from a particular type of human rights lawyer only gives us a highly precarious sense of certitude. The point is the argument against torture—or for it—could not be made unproblematically from within human rights law as if it were a matter of course, especially in view of the fact that human rights law seems to tolerate so much otherwise when it is done for good purpose. Dershowitz and Ignatieff were wrong not because their argument was indefensible rationally, nor because they are enemies of human rights—indeed both are human rights scholars in good standing—or because the legalization of torture in extreme cases could not

system).

70. Koskenniemi, *The Pull of the Mainstream*, *supra* note 5, at 1952–53.

71. Koskenniemi, *The Effect of Rights on Political Culture*, *supra* note 6, at 113.

72. See generally Angus Stickler & Kate Clark, *The Torture Memos*, NEW STATESMAN, Aug. 29, 2011, at 33–35.

possibly flow from a legal argument about torture based on a certain concept of law. Rather, they were wrong because we think that all things considered their political and moral preferences were in the wrong place, for example, because we have been there before; because we suspect them of having agendas; or because we are actually pure deontologists on some matters. Torture is indeed not that different from nuclear weapons. Paraphrasing Koskenniemi, one might say that “only horror—the awful image of a human being being tortured—puts torture in a special category, detaching it from the banal logic of causes and consequences, gains and losses.”⁷³

In the end, however, the impression may emerge that international human rights lawyers seek the law’s authority without really engaging in the law’s games seriously. One may have no choice but to acknowledge that international human rights is indeed a new utopia unencumbered by apology, a faith that can be derived from conscience or universal laws, and needs no further grounding nor should seek one. The idiosyncrasies of international human rights jurisprudence, rather than being dismissed as anomalies, might be embraced as manifesting an entirely new style in international legal scholarship. Human rights lawyers after all, by temperament or sentiment, may be more inclined to forsake real world relevance for the sake of purity of intentions—to cast themselves, as it were, as little more than moralists. In acknowledging human rights as simply a moral or political passion—simply what one does, as it were—they may at least occasionally save them from the grinding work of reason, leave them as an indomitable commitment to justice rather than an instrument waiting to lend itself to some established order. This has been a consistent theme in Koskenniemi’s writing, although it is unclear whether his interest is in preserving human rights by ensuring that they retain their ultimate trenchant or marginalizing them by making sure that they do not contaminate the ordinary operation of international law.

Throwing off appearances and engaging, if not in actual human rights philosophizing, at least in a sort of Herculean jurisprudential reconstruction of the law that is all balancing act and no safety net, remains a lingering temptation for international human rights lawyers. As Koskenniemi has noted, “[i]t is, of course, true that courts do not always follow the paradigm of legal reason but sometimes quite remarkably depart from the conventions of the juristic *genre*.”⁷⁴ Some of the best and worst international human rights decisions attest to this. As an example of the former, when the Inter-American Court of Human Rights was asked an advisory opinion by Uruguay on “the meaning of the word law”—as in, “human rights shall only be limited by law”—it engaged in a relatively short but sophisticated doctrinal/theoretical/philosophical exploration of what “law” might

73. The original sentence reads, “Only fear – the irrational image of the Apocalypse – puts nuclear weapons in a special category, detaching them from the banal logic of causes and consequences, gains and losses.” Koskenniemi, *Faith, Identity, and the Killing of the Innocent*, *supra* note 33, at 153.

74. *Id.* at 156.

mean for human rights which avoided all reductionism.⁷⁵ By contrast, the individual, and often separate opinions of Judge Cançado Trindade that proclaim at length the end of the inter-state world and the absolute demands of humanity seem quixotic and even vaguely hysterical.⁷⁶ The question, at any rate, is how much of this sort of judgmanship can go on before lawyers undermine their own authority and questions arise about why we need adjudication at all if some theory-fest is all that is involved.

Of course, the price to pay for a flight into utopia is not necessarily irrelevance. When it comes to human rights, the real-world accomplishments of, say, the United Nation's treaty bodies pale historically in comparison to revolutions inspired by the rights discourse, which manifested themselves from outside the law. The law's promise of relevance may often have come at too high a cost. Moral claims independently entertained, strident but preferably anxious, are not irrelevant to international politics. Indeed, even absent a machinery of enforcement, they may in some cases have more traction than some hypothetically legal but probably watered-down and compromised norm. It often seems, today anyhow, as if there is no evident linkage between whether a norm is "hard" or "soft," and whether it is followed or not. There is a relevance of the gloriously irrelevant, of that which does not try to endear itself to the powers that be, even if it is not the positive relevance of mechanistic adjudication and enforcement.

For most human rights lawyers, however, too much seems to be lost by the admission that theirs is only a utopia, or a kind of distant reserve of indignation. At least since Lauterpacht's analysis of the Universal Declaration, the common perception has been that giving up on human rights' legal promise would be to abandon the ideal altogether⁷⁷—and this coming from someone who entertained no doubt that human rights actually existed in natural law and Western thinking. Indeed, what good are human rights if they do not change the world, and how can they change the world if—in addition to having the ambition to change—they are not taken at least somewhat seriously by the powers that be? The question is how to convince the recalcitrant state and there, it seems, too much is lost by provincializing one's claim to law as merely that of a particular idiosyncratic faith. The claim to being law must be a claim to law recognized as such by its subjects.

The human rights lawyer—and he or she could have chosen to remain a human rights activist, or a liberal revolutionary, or a politician, or merely a philosopher bent on promoting human rights—is inevitably drawn to the law's presumed real world relevance and how it makes some outcomes result from formal compulsion. In effect, the marriage between human rights' deontological bend and the allure of the rule of law's obligatory character is positively

75. *See generally* The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6 (May 9, 1986).

76. *See, e.g.*, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 523, 525 (July 22) (separate opinion of Judge Cançado Trindade).

77. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 3, at 395.

intoxicating, thanks to its ability—illusory as it may turn out to be—to make human rights separate from both politics and morality, and thus excuse the human rights lawyer from the messiness of the former and the suspiciousness of the latter. Being taken seriously by the—however dreaded—international lawyers, then, becomes a key disciplinary goal.

It does seem, however, that the human rights movement's infatuation with the law is not entirely misguided. The one weak point of Koskenniemi's critique of the mix of human rights and international law is that it seems to make short shrift of the agency of actual international human rights lawyers. The emphasis on adjudication may put too much emphasis on judges at the expense of litigators of various stripes. While judges' allegiance may be more to the law as such, leading to a degree of doctrinal reductionism when it is least useful, we have no reason to think that the victims of human rights violations that trigger actual cases have a commitment to international human rights law as such, as opposed to their own or some general cause. Cases will be brought by human rights lawyers in ways that manifest political and moral sensitivity to what their repercussions might be, including the risk of blowback and instrumentalization. At least as important as the cases that are brought are those that are deliberately not brought to courts' attention because it is deemed by the relevant actors that this particular struggle is better left away from the law.

Even though the discourse is indeterminate, one may think—unorthodoxly, admittedly—that human rights law was never as much about the discourse as about a particular form of social interaction, the range of symbolic benefits that flow from states being sued by their own citizens, or the constant dialogue between parties and judges that an active litigation of rights issues creates. The ratification of the occasional small victory before human rights courts and the recognition of adjudicators' power may well be costs that states decide that they can live with politically or morally, even though we entertain no doubt that it is anything else than a form of power. At any rate, it does not seem plausible to ask women and men of good will to abandon the struggle within the law based on the risk that politics will be downgraded or morality made vulnerable, for surely various other apologists or utopians will have no such qualms. While the legal terrain as a terrain of power may never be conquerable, neither can it be deserted or simply abandoned to others. International human rights law may become a managerial conspiracy by elites but, if it does so, it will be largely because the terrain has been left to them. The question, rather, becomes whether certain issues, all things considered, should be dealt with through the law.

This is a political and moral question, and one that has increasingly been taken up by Koskenniemi as his work in the last decade more deliberately takes on the question of distributive outcomes involved in the switch to certain forms of expertise over others.⁷⁸ There will be situations where human rights law exceeds its welcome, becomes too comprehensive a blueprint for the just society, in ways that

78. Koskenniemi, *Human Rights Mainstreaming*, *supra* note 7, at 54.

effectively bypass a necessary politics, or situations where it touches upon some fundamental moral intuition that is best left as a taboo. I have hinted at ways in which international human rights law is less helpful, or at least less about what it claims to be about: when it cannot make the point that it seeks to make from within the law and therefore travesties that point, or makes it dishonestly; or when it becomes a vehicle for something else, for example the *consensus mou* of the mainstream, the ratification of the status quo, or an attempt to engage in exclusionary politics under the guise of an inclusive one. There are also cases where international human rights law's prescriptions are so mushy that their embrace merely risks debilitating any normative system's ability to come up with useful outcomes. Determining the proper role of a human rights legal culture rather than dismissing it as always threatening to political culture and moral intuitions, then, seems the better political and moral stance.

Presumably, massively institutionalized international human rights law has a place, if, and when, it produces intelligent outcomes that delineate a space that is both outside and within politics and morality. The prisoner of conscience who is freed, the parents who are compensated for their child's disappearance, or the journalists whose profession is protected—to name but a few—all because they have been able to argue from the perspective of a mature human rights culture, part of which has translated into international legalization, hardly have cause to complain about the system. The critique's focus on the more improbable and unjust instances of human rights adjudication or expertise often underestimates the degree to which—through a combination of community, identity, and passion—the system also sometimes gets it right. This may be correct, so long as one sees such outcomes as the result of “good” people fighting “good” fights rather than the law's immanent operation.

It is strange that for Koskenniemi, ever the consummate observer of legal practice, the lines seem to be so drawn leaving little space for the international human rights lawyer to appear other than a fool or a hypocrite. Human rights lawyers may occasionally fail and may occasionally win whatever social pursuit they are engaged in. To credit the law for either may certainly be to endow it with too much of a role when what is at stake has much more to do with the willpower of various social actors. Nonetheless, it is probably the case that the social practice of law, including international human rights law, can occasionally punch above its theoretical weight whether by tricking the system or, more plausibly, using the system's considerable symbolic capital to its temporary advantage. As long as possibilities of retreat are safeguarded and the engagement with the international legal system is essentially tactical, then it is hard to argue for human rights letting go of the ambition to make sense of the project through international law.

It seems at times as if Koskenniemi will not grant international human rights lawyers the sort of intellectual nimbleness that he sees as defining the best practice of international law. Whilst that practice seems ultimately salvageable by appeal to a “culture of formalism,” no similar treatment is reserved for human rights, which appear as beyond even that sort of savvy internal-external approach to the law. At times, Koskenniemi may appear to be merely defending one particular vocabulary

of expertise, that of international law, against another, without quite highlighting the sort of politics that inform that preference.

At any rate, I wonder if Koskenniemi does not make too much of the difference between international law and human rights. One of the ways in which thinking about international human rights law may help understand Koskenniemi's work is by providing a linkage between the two main facets of his work: the theoretical critique of the international legal project⁷⁹ and his historicist turn in *The Gentle Civilizer of Nations*.⁸⁰ The tendency of human rights to absorb international law's oscillation between apology and utopia—or, which is almost the same thing, to be absorbed by it—suggests that human rights is much more part of a continuum in international legal thought than the relatively clean break from it that it is sometimes presented as being. The novelty of “human rights” in the development of international law is thus implicitly radically minimized: although the particular rhetoric of human rights may date only to the post-Second World War, and it would be misleading to see a strong concept of human rights antedating this period, human rights is essentially only taking the place, within the ever-cyclical movement of international law, of something that was there before it—humanitarianism, the “white man's burden,” the “standard of civilization,” Christianity, natural law, etc.

International human rights law may thus merely be the latest avatar of international law's role as the “gentle civilizer of nations.” Its place in that older project is to help sustain international law's Grotian promise, an indispensable help in retaining the law's normative character whilst sustaining its claim to change. It is quite evident, nonetheless, that over time international human rights law itself navigates towards its own via media: progressist, but not too much; destabilizing of the status quo but not rocking the boat excessively; somewhat utopian but adequately apologetic. International human rights law, then, becomes really another name for international law *tout court*.⁸¹

79. See KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 1, at 563–64.

80. See generally KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 3.

81. Koskenniemi comes to a very similar conclusion regarding the convergence of bureaucratic practices and human rights expertise. See Koskenniemi, *Human Rights Mainstreaming*, *supra* note 7, at 47–48.