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New Approaches to International Law

The European and the American Experiences

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Preface

Everywhere we can see the impact of things foreign and far away. People everywhere feel vulnerable to global economic and political forces. But how do these things threaten us and what levers are available to respond? So much about global society remains obscure. What holds it together? How much is chaos, how much system? How are we governed at the global level? Urgent issues implicating people and places across the globe seem to call out for a coordinated global response. How might we aspire to govern?

The local—and diverse—impact of faraway things makes a global response to them difficult, even when it seems most necessary. Although the economic crisis is "global," it is felt differently by each person and each nation. Just as the costs and opportunities of climate change will fall unevenly across the planet. This disconnect between local and global and the diverse distribution of gains and losses ensures that many significant issues will be solved neither by one city or nation or corporation alone, nor by the United Nations and the routines of global summitry. We might conclude that improved "global governance" is the answer: a diffuse global public policy capacity to aggregate interests, resolve conflicts, manage risks, address common problems, and promote prosperity. International law might well be the material from which such a capacity might be wrought. Intellectuals and policy professionals have ploughed these fields for more than a century, imagining and promoting international law as a tool for global governance.

In their work, we can follow the emergence of global governance as an idea, a promise, and a reform proposal. Indeed, to trace the contours of global governance is to follow the hand of knowledge in arrangements of power, if only because global governance is so often an assertion, an argument, a program of action, or a call to resistance. Indeed, when it comes to global governance, saying it is so can make it so. Indeed, saying it is so is often all there is to it. Global public authority always comes into being and functions as an assertion. In other contexts, we forget the power of claims to right. Other than in moments of revolutionary turmoil, we forget that the sovereign is just a person who says he is King. Institutionalization makes public power and sovereign authority seem "real," just as it makes

distinctions between things like "public" and "private" or "national politics" and the "global economy" seem natural.

In global governance, the saying and performing are right on the surface. Global governance must be claimed through an assertion that this or that military deployment or human rights denunciation is the act of a global public hand, the "international community" in action. Moreover, the world to be governed must also be identified and thereby made. Forty years ago it was common to say that the most significant product of the space race was a distant photo of planet earth and there was something profound in the observation. Such things constitute our world before we begin to identify actors or structures, assert rulership or solve problems. Of course, such ideas arise from somewhere. Without a space program, perhaps without a Cold War, without Life magazine, we might not have had those photos at that moment in that way, and the idea may have arisen differently, at a different moment, or have seemed less compelling. For the globe, the constitution of a world is ongoing. It is technical and institutional work, as well as a communicative and performative accomplishment of the imagination.

The assertive and performative dimensions of global power are equally significant for those who would resist global governance. Identifying the global hand in local unpleasantness is also an assertion and an allegation of responsibility. Where jobs are lost at our local factory, we might finger Wall Street or the transnational corporate elite, just as we might blame our national government, or the currency—even the butterflies—in China. Whether one aspires to bring global governance into being or fears its power, one must name it, assert it, and identify it, before it becomes something to build or destroy.

We might say that what we mean by "global governance" is simply the sum of what those who wish to manage and to resist globally have jointly drawn to our attention as governance. We can read the ideas that compose the world and aspire to rulership both in the centrality of law to the effort—the proliferation of legal institutions, rules and modes of argument across what remains a dispersed, and ad hoc terrain for the exercise of public authority—and in the role played by expertise in global order—the striking transnational effects of shared expert vernaculars for thinking about everything from economic life to war. Policy makers, pundits, and politicians are all hard at work asserting a world, identifying the players and their powers, attributing responsibility, distinguishing cause and effect.

Scholars of global law and governance have periodically paused to ask how this work of world making is going. We are passing through such a moment of self-reflection now. I routinely ask my students how they see the world now. Is it like 1648 or 1919 when it seemed everything needed to be rethought? Or is it like 1945, when the international order seemed to need reforming but not remaking. Tweak the League Covenant and you have the UN. Replace European empire with self-determination under American hegemony and continue. Or is this like 1989, when the demand was not reform but implementation: finally, with communism defeated we could implement the solutions put forward a generation before. Many opt for the middle position: reform, add Brazil to the Security Council, sort out the democracy deficit and currency travails in Europe with another round of treaty drafting, and

keep going. But an ever increasing number come to the study of international law feeling this is or should be another 1648 or 1919. The essays collected in this volume reflect in various ways on scholarly work, including some of my own, written over the last few decades in this spirit. What if we thought it was 1648 and we could start again? What if we saw existing institutional arrangements and proposals for reform as hopelessly inadequate to the tasks at hand? Could we understand where our predecessors went wrong? Might we begin anew? That, it seems to me, is the aspiration behind the search for "new approaches" to international law.

It is immensely flattering that the authors collected here have found my own writings useful. I am grateful for the sustained engagement, commentary, and criticism. These essays differ a great deal in emphasis and direction. That is surely partly a matter of geography, of generations, and of each author's own preoccupations and projects. Nevertheless, to my mind, those who seek "new approaches" to international law today do share a common impulse. An impulse to step back from contemporary common sense about the nature of global order and the available paths for reform, as well as a recognition that despite decades of careful study, we still lack a good picture of how we are, in fact, governed at the global level. Simply mapping the channels and levers of influence and public capacity remains an enormous challenge.

Nor do we have a persuasive program of action. The International Criminal Court could triple its budget and jurisdiction, the United Nations could redouble its peacekeeping efforts, the international human rights community could perfect its machinery of reporting and shaming—and it would not prevent the outbreak of genocide, the collapse or abuse of state authority. Every American and European corporation could adopt standards of corporate responsibility, every first world consumer could be on the outlook for products which are fairly traded and sustainably produced, and it would not stop the human and environmental ravages of an unsustainable global economic order. America could sign the Kyoto Protocol, could agree with China and the Europeans on various measures left on the table at Copenhagen, and it would not be enough to prevent global warming. The United Nations' Millennium Development Goals could be implemented and it would not heal the rupture between leading and lagging sectors, cultures, classes. The Security Council could be reformed to reflect the great powers of the twenty-first, rather than the twentieth century, but it would be scarcely more effective as a guarantor of international peace and security. Global administrative action could be everywhere transparent and accountable without rendering it politically responsible.

Each of these efforts might be salutary. Some may be terribly important. Yet the intuition that this would all somehow not be enough has become widespread. We know that these well-meant projects may do more to render problems sustainable for the regime than to resolve them. Just as we know the most well-intentioned efforts to strengthen global governance and reinforce international law may, in fact, be as much part of the problem as of the solution. As a result, restating these proposals is not a recipe for reform or revival. It is a recipe for disenchantment and

for a withdrawal of confidence, affiliation, and interest from the machinery we know as international law or "global governance." At such a moment, it is not surprising that many are rethinking our capacity for global governance and reassessing the role of international law. Striking off in new directions today requires more than stepping back from the classical international law tradition. By now, we know that international law is more complex than simply adding up national law and international law, public law and private law. For a century, international lawyers have known that the Westphalian vision of states interacting with one another in a horizontal public legal order has been demoted. For years it has been said that the state has been opened up, broken apart, replaced by the shifting internal dynamics of national bureaucracies and local powers. Already in 1949, the ICJ redefined sovereignty as "an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law."

The twentieth century was an enormously rich one for disciplinary renewal. The structure of international law was radically rethought, shifting focus from assessments of normative validity to depictions of an interactive dynamic of persuasion and legitimacy. New international legislative, administrative, and judicial institutions were built only to have their activities be reimaged as functions and dispersed, exercised wherever two were gathered in their name. The language of law was marked off from political discourse, articulated in hundreds of codifications, only to be re-integrated with political life as the mark, measure and language of legitimacy. Across the last century, international lawyers, policy makers, intellectuals, and statesmen built new modes of world public order by reinterpreting dispersed institutions in legal terms, as a transnational policy process, a transnational judicial network, a global civil society. The big ideas of the mid-twentieth century, such as transnational law, policy science, and functionalism broke disciplinary boundaries and framed a more sociological inquiry into the operations of law in the world. They taught us that if it worked like law, we could learn a lot by treating it as law, and they remind us that things may not, in fact, all add up. Legal and institutional pluralism is our fate. Twentieth century scholars spawned new fields like "international economic law" or "international environmental law" or "global administrative law" to foreground new institutions, new problems, new ideas about how governance works across great distances. All these ideas were born as responses and challenges to the Westphalian regime. These are the reinventions which have faltered. Today, approaching the world anew demands more.

If we step back for a moment, we could say that international law promises to play a series of quite distinct functions in international society. Many look to international law for the expression of universal values, most commonly in the human rights canon. But we now know that people disagree about the most fundamental things, that values are not universal, and that even human rights can often be part of the problem as of the solution. Even virtues have dark sides. I am not the first to notice that human rights was a late twentieth century project and that is now, in some sense, over. At the same time, international law also promises

to identify the legitimate actors and their powers, most formally by enumerating the "rights and duties of states." This is partly sociological, simply registering the powerful and their capacities. And of course it is also normative, offering a measure of the legitimate uses and misuses of power which may be useful in resolving disputes about who can do what. But international law no longer catalogs the sites of power, nor delimits their authority, for all the functional reinventions of the last century. Too much remains off screen, even there. We are neither describing the world as it is nor imagining a world that could be.

Perhaps most importantly, international law promises a catalog of policy tools and institutional arrangements with which to confront global problems. We have long said that like the European Union, only more so, the international order governs in the key of law rather than that of budgets or a monopoly of force. Yet the tools for addressing the most severe global challenges facing us are not to be found in international law, even after the dispersion and functional re-imagination of global governance as a matter of networks sharing common vernaculars of legitimacy. It would be more accurate to identify the cramped channels of public order entrenched by our legal system as among the root causes of the difficulties we face.

A new approach to international law and global governance would begin where these efforts have left off. A first step would be realizing that global governance is not only about management and problem solving. It concerns the making of the world. And in this it may indeed be up to our problems, for they are not technical or political challenges. They are structural. Their roots run deep. To develop a new approach, we must grasp the depth of the injustice of the world today and the urgency of change. We must realize that the most egregious problems are not those that "cross borders" or threaten the sustainability of the current order. They are precisely those occluded and reproduced by that order—and, often, by our best efforts to set things right

Imaginary boundaries have become fault lines built into the world: public and private, national and international, family and market. A conceptual separation between economics and politics has become a startling mismatch between a global economy and a political order lashed to local and territorial government structures. The result is a rupture between a national politics on the one hand, and a global economy and society on the other. At the top and the bottom of the economy, we have deracinated ourselves, moving ever more often across ever greater distances. In relative terms, the middle classes are the ones who have become locked to their territory. Increasingly, the relative mobility of economics and territorial rigidity of politics have rendered each unstable as political and economic leadership have drifted apart.

Government everywhere is buffeted by economic forces, captured by economic interests, engaged in economic pursuits. Everywhere governments operate in the shadow of disenfranchised and disillusioned publics who have lost faith in the public hand, in its commitment to the "public interest," in its sovereignty, its relevance, its capacity to grasp the levers that affect the conditions of social justice or economic possibility. In the face of integrated supply chains, global markets,

financial uncertainty, workers, corporations, banks—all turn to the nation state for redress, bailout, support—only to find there is often little their sovereign can or will do.

Just as the global economy has no "commanding heights," so the political system has no sovereign center. The institutional structure for each has been broken up. Political life has drifted into neighborhood and transnational networks, been caught up by the media, transformed into spectacle. Politics is diffused into the capillaries of economic and social life and condensed in the laser beam of media fashions. The institutional roots of the economy are informal networks, embedded in local and private rules, rather than the regulatory schematics of any nation, let alone the institutions of the "trading system" or the WTO. Think of the network of obligations which tied our global financial system in knots: collaterized debt obligations, credit default swaps and securitization so complex, and markets so rapid no regulatory authority can unravel them. Corporate governance so fluid and inscrutable one rarely knows who calls the shots. We have only begun to understand private law or corporate governance as global governance. But credit default swaps stand in a long line of private arrangements, including slavery, made in one place that restrict public policy alternatives elsewhere.

The result: the old worlds of diplomacy, foreign policy, and national economic management have become obsolete and left to play catch up with forces for which they were not designed. In such a world, we can dream about global governance, but we cannot have it. Not until the political economy of the world has been rebuilt. The relationship between the institutional frameworks for economic life and the channels for politics will need to be remade, a project demanding institutional innovation and experimentation.

Effective governance is no longer a matter of eliminating the corruption or capture of public authorities—difficult as that is. Nor is it a matter of sound corporate governance, corporate social responsibility and effective regulatory supervision—difficult as those are. Effective governance requires that public and private actors become adept at something none are now well organized—or well disposed—to attempt: managing the distribution of growth, linking the leading and lagging, managing the political economy of dualism. And they must do this not only in their backyard, in their territory, in their sector—but in a new world of shifting relations and linkages. Where small things have large effects, where local rules govern global transactions, and where very little is transparent or predictable.

If that is our world, how might scholars of international law contribute? How might we articulate the values, map the world, proffer the necessary policy tools? How might we speed politics, rewire economic life, encourage institutional innovation and experimentation? New approaches for this century might begin by clearing the ground. The debris of the traditional Westphalian narrative—and of its twentieth century modernizations—will need to be hauled away. Indeed, perhaps that is all we can offer now—vigilance against the repetition of renewal, vigilance cultivated in the gnarled vines of critique that have grown up alongside a century of optimistic renewals.

We can at least offer these—mistakes to avoid, bridges to nowhere built once too often. We will want to remember that the fragmentation of economic and political power has not de-legalized them. The governance challenge is not to bring political actors into law—they are already there. Law remains a language in which governance is written and performed. Even war today is an affair of rules and regulations and legal principles. At the same time, we will want to remember that global governance is—and will likely remain—extremely disorderly, plural and uncertain—a matter of performance and assertion, of argument as much as technique. The world's elites have long learned to inhabit a fluid policy process in which they as often make as follow the law. We must now draw the consequences of that knowledge. They will not be tamed by constitutional schemes. We must look for the politics in the cracks of fragmentation and search for economic possibilities in the choices it enables.

We must remember that things we does not like are also legal institutions and structures of governance. We spend far too little energy understanding the role of law and policy in the reproduction of poverty or the continuity of war in times of peace. We will need to abandon the comforting idea that "international environmental law" concerns only environmental protection and remember that law also offers comfort to the sovereign or property owner who wants to cut down the forest. We must remember what it means to say that compliance with international law legitimates, whether on the battlefield or off. It means, of course, that grinding poverty, terrible inequality, environmental destruction, and the premeditated destruction and death of war have become acceptable.

And we will want to remember that the informal and clandestine, the sacred and the violent, the spectacular, also govern. We push so much off-screen, either back in history or below the waterline of sovereignty. Before Westphalia—religion, empire, conquest as law. Religious confession—and ideological conviction—we say, are matters of national or local concern. Force today the expression and enforcement of right. This is comforting—but it is not accurate. Global governance remains as much a matter of religion, ideology, and war, as of persuasive interaction among the elites we call the "international community" about what is legitimate. It is a terrain for political engagement rather than a substitute for political choice.

Exercising our critical muscles, we can discourage being carried away by the dream of universal values. People disagree about the most fundamental things. Nor will the challenges we face yield to technical expert consensus. They are political. And politics is no more dominated by statesmen and politicians than the economy is directed by "investors" and "multinationals" standing on the commanding heights. Both are far more diffuse and dynamic systems, held together, if at all, by belief, expertise, assertion.

Ultimately, politics is less a matter of structures and agents than of ideas and expertise. After all, if for a generation everyone thinks an economy is a national input/output system to be managed, and then suddenly they all become convinced that an economy is a global market for the allocation of resources to their most productive use through the efficiency of exchange in the shadow of a price system,

lots has changed. That is also governance. We rarely have a good picture of the blind spots and biases of expertise. We too often focus on the authority of agents we can see to act within structures we understand. We have paid too little attention to the myriad ways power flows through belief, common sense, affiliation, or the experience of victimization, pride, and shame. All these things move like a virus or a fad, but our epidemiology is weak, our sociology of status, convention, and emulation at the global level rudimentary.

All this is an enormous positive program for thought. While we pursue it, the global order will be remade—indeed, it is already being remade. International lawyers can wait to see what emerges and write it down—or they can embrace the challenge of midwife-ing a new political economy. After all, the global nature of "problems" and the local nature of "government," whether linked to a city, a state, or to the international order itself, is not only a troubling fact to be overcome. It is also the product of a very particular political economy and a historically specific set of institutional arrangements.

Our traditions for thinking about global governance, however, remain surprisingly uninterested in remaking the political economy of the world, in redistributing economic growth and political authority. For all our talk about global governance, the national, local, and transnational institutions that reproduce the problems we deplore remain totemic focal points, objects of a cult-like veneration. No sensible discussion of global governance can begin with the premise that "independent central banks" or the "demands of the market" or "the European project" will need to be swept away or substantially transformed. They simply must be defended. In the United States, an enormous majority can view the government as a dysfunctional part of the problem without anyone seriously proposing to alter anything about it. The government is crazy, but the constitution is sacred.

Perhaps our attitude toward global governance would be quite different if we began with the idea that our world is already governed, but that we are not part of, nor likely to become part of, the governing class. From this perspective, things we do not like, from economic instability, poverty, and warfare to environmental degradation, are not problems which escape governance. They are the byproducts—or even the intended consequences—of our current governance arrangements. Were we to start here, the urgent issue would be precisely to reinterpret and remake of the world rather than seeking to harness existing institutions to new rulership possibilities.

These two perspectives—global governance as the public good we need and the system of power we resent—are at war in contemporary discussions of global public policy. An endless debate between them has been institutionalized, professionalized, and stylized. Indeed, in large measure, debate about the desirability and limits of global governance is what global governance has become, just as international law has become debate about the bindingness of norms, the boundaries of process, the meaning of sovereignty, and so on. Substantive debates about what to do turned into debates about the boundaries of process, power, and norm, or into technical matters to be managed by familiar institutional players. In such debates, global governance appears both as a project and promise and as a frightening and disappointing reality. The promise seems always to recede before

us, our fervor to get there fueled by our disappointment in its reality. Starting anew will mean pulling ourselves away from this mesmerizing and repetitive discussion about the governance that might be.

We might turn our attention, instead, to the world—what do we see outside the window? What is the world—how is it arranged, what wars are continued in its settled structures and routines? We might say, for example, that in political economic terms, what is going on in the world today is less the rise of Asia or the internet than a rapid process of factor price equalization and technological assimilation. After all, the last two centuries have been an aberration—characterized, in the wake of the industrial revolution, by one nation, and then a small group of nations, rising to unprecedented levels of prosperity relative to everyone else. It was only a matter of time before the scientific and human technologies which enabled the dramatic rise of the North Atlantic, including the governance arrangements, would become more widespread. Until everyone aspired to a refrigerator, an air conditioner, a car—and until their societies began to provide the means to realize those ambitions.

But relative income equalization, like growth, is an extremely uneven business. It certainly does not mean the elimination of income differentials. On the contrary. Inequality is everywhere. Nor is a global economy a uniform economy. Things turn at different speeds. People are left out. People are dragged down. Economic change is profoundly destructive.

When people turn to their sovereigns for help the results are terribly uneven. Some are too big to fail—others too small to count. Indeed, the public hand everywhere has become a force multiplier for leading sectors, nations, regions. As it was between nations in the colonial era.

As a result, our modern global economy rests on an accelerating social and economic dualism between leading and lagging sectors, economies, nations, and populations. We face a revolution of rising frustrations among the hundreds of millions who can see in, but for whom there seems no route through the screen except rebellion and spectacle. At the same time, we face the restive demoralization of all those whose incomes, economic opportunities, and expectations have fallen—and will likely continue to fall. Indeed, the fundamental organizing framework for global political struggle today is neither ideological hegemony nor great power competition. It is the political economic question of the distribution of growth. How will economic opportunity be distributed between those who lead and those who lag? The wild horse to be ridden now is precisely this dynamic of dualism, the tendency for growth here to impoverish there.

We know that not everyone can be a highest tech, greenest technology leader—any more than everyone can be the lowest wage manufacturer. These are niche market dreams. Justifications for mobilizing resources behind those most likely to lead one way or the other. But the global, political, and economic challenge is to link experimental, leading edge economic dynamism with everyone else. Across cities, within and between nations, in regions, across the world. The central questions today are not political questions—if by that we mean questions to be addressed by governments acting alone or negotiated through conventional

diplomatic circuits. Nor, however, are they economic questions—if by that we mean questions to be answered by the operations of markets, guided by the hand of robust competition. They are questions of political economy—and they will be decided in the diffused institutional and regulatory structures which frame the interconnected, fluid, and chaotic operations of political and economic life after globalization.

Once we see this world, it will be hard to avoid the conclusion that the relationship between politics and economics is being remade. And in that effort, law has much to contribute. After all, economic thinking is not only the product of academic economics departments, any more than politics is owned by political science. Legal scholars have generated new economic and political ideas before. Prior to the Second World War, a robust institutionalist tradition was shared between the legal, political, and economic fields. Over the last 30 years, some of the most influential economic ideas were forged in law faculties by the "law and economics" movement. The return of "political economy" will require an alternative, for which the intellectual foundations have already been laid. Heterogenous traditions in social theory, in economic and legal scholarship, have opened a window on the politics embedded in the basic operations of economic life, the nature of political economy in a world of global markets and local rules, the nature of instability and risk in economic activity, and the mechanisms by which inequalities between leading and lagging sectors, nations, and regions are reproduced.

We know that the elements of economic life—capital, labor, credit, money, liquidity—are creatures of law. Law not only regulates these things, it creates them. The history of economic life is therefore also a history of institutions and laws. Economies configured differently will operate differently. We may discover choices among different economic trajectories—among alternative, perhaps even equally efficient, modes of economic life with diverging patterns of inequality. Too often, even scholars sensitive to the interaction of economic and political forces, whether in law, history, political science, or economics, nevertheless treat these domains as distinct, generating accounts of political change sensitive to materialist drives, or registering the impact of political and institutional change on economic life. This work can entrench the assumption that economic and political life follow different logics. The presence of law in the foundations of economic and political life suggests a different path. Not to explore the relationship between "efficiency" and cultural or political commitments, but to understand the concrete forms through which these are each constructed as different and placed in a relationship with one another. Pursuing this path will strengthen our understanding of inequality and dualism in political and economic life.

After three decades of "new approaches," a great deal of intellectual work remains to be done. I hope you will read these essays in that spirit—less a history of new approaches to follow than a record that as the century turned, people tried to shake off the promise of repeated renewals, looked hard at the arrangements of power and the complicity of law. They did not figure it out. These essays reveal no path forward, no recipe for a new world political economy. But we must recall

how long it took to invent a national politics and organize the world in nation states. For all the agony that has come with success, building a national public politics across the planet had a strong emancipatory dimension—slaves, women, workers, peasants, colonial dominions obtained citizenship in relationship to the new institutional machinery of a national politics. It will not yield easily. It was equally difficult to build a global economy atop that political order. For all the vulnerability, instability, and inequality wrought by the effort, the global economy has also lifted hundreds of millions from poverty. It will not be unbuilt in a day. Building a new political economy for a global society will be equally difficult. The promise is equally large. The spirit of new approaches is to begin. I hope it does not take as long, nor require as much violence to be born.

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Part I
History of the Human Rights Movement

Chapter 1
Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes

Frédéric Mégret

Abstract This chapter is an attempt to survey the broad field of critical approaches to international human rights law through a series of "vignettes" that give a sense of the diversity of the critique. Based on a stylized account of that critique's many voices—epistemological, historical, ideological, pragmatic, etc.—it suggests that it has much to contribute to our understanding of a series of challenges that the discipline of international human rights often has a hard time tackling. The chapter finishes by outlining a few leads for what a sustained critical/constructive engagement with human rights could be, one that is neither utopian endorsement nor mere pragmatic detachment but based on a deliberate reactivation of the politics of human rights.

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1.1 Introduction

Human rights increasingly occupy a central place within international law. In many ways, they have emerged as one of the key ways in which international law seeks to reinvent itself after the Cold War. The critique of human rights thus is bound to occupy a key place within the critique of international law, one that potentially makes more complicated or even threatens to compromise international law's reconversion into a "law of people" rather than a "law of peoples".

Yet there is no doubt that the last two decades have witnessed, coinciding with the dramatic rise of international human rights law as a force to be reckoned with, the emergence of a significant, sustained, and complex critique of the global reach of human rights. By and large, the "victory" of international human rights in the Post-Cold War era was a victory by temporary default, rather than one that heralded anything like the end of History. Debates supposedly buried by the rise of international human rights have simply (or not quite so simply) re-emerged as debates conducted *within* human rights. At the same time, the post-Cold War has also been a liberating era for a critique that is no longer constrained by or suspected of being simply an emanation of geopolitical interests. The critique is multifaceted and it is not the object of this piece to present an exhaustive portrait of it. However, it is also often misunderstood and caricatured by those who see it as an unmitigated threat to the human rights project.

This chapter seeks to survey the field by engaging in a broad exploration of what might be called "critical international human rights", i.e., a vision of international human rights broadly informed by critical insights. Critical approaches to human rights have their source in something approximating an existential angst about the practice of human rights. David Kennedy is probably the author who has been most forthcoming about the tension between reality and professional roles, as well as a subtle feeling of imposition that can affect even the best

meaning, compassionate professional.[1] However, this existential unease also has its source in some of the unavoidable and never resolved dilemmas that are at the very source of human rights as a way of seeing the world as much as a program to change it. As the expression suggests, critical human rights is not a project of hostility to human rights and therefore not to be confused with a long tradition of anti-human rights projects, but it is a project that is, at the minimum, prudent and even skeptical about some claims made relating to international human rights, even as it recognizes the particular place that human rights have come to occupy in our global legal imagination.

Critical approaches to human rights stand in a productive dialectical tension with human rights, and their attitude can best be expressed as one of ambivalence: willing to applaud the accomplishments of human rights when those seem significant, but keen to caution against some of the limitations and even dangers of the discourse—and, most importantly perhaps—dubious that the two can be disentangled. Perhaps the best way to describe that attitude is as agnostic about human rights, although broadly committed to the broad pursuit of some of the ideals that underscore them. There are many strands of the human rights critique, and this article will only deal with the relative few that specifically addressed international human rights law, as opposed to, for example, the general idea of human rights or domestic human rights law, even though the two are connected.

Critical approaches to international human rights should be distinguished from the great diversity of approaches and sensitivities *internal* to human rights that have, at any one point in time, expressed reservations about particular features of human rights. Needless to say, international human rights as a field of practice and scholarship is internally diverse, almost extraordinarily so. One of the difficulties in developing a coherent critique of international human rights as a project is this richness. This makes it easy to confuse a part for the whole, or what is said on behalf of human rights for what the project actually does, or manipulations of rights for "real" rights. It is important for the critique not to target a "straw man"[2] and to construct what it critiques in as fair a way as possible. This article will assume that classical human rights proponents are sophisticated, savvy, and worldly, even perfectly aware of the deeper critiques levelled against them, even if not always willing to engage with them.

Quite central to the idea of a critique is that, for all its diversity, there is such a thing as an "international human rights movement," part idea, part professional field, and part historical project. This project proposes the prospect of a unitary, all-encompassing ideal focusing on the dignity of human beings that transcends the world of states. It has its blind spots, its pet peeves, and a few skeletons in its closet. Although as we will go on to see, part of the challenge is defining who counts as the "international human rights movement", this chapter will primarily focus on the classical international human rights movement as it has emerged

[1] Kennedy 1984.

[2] Alston 1996.

principally in the West in the second half of the twentieth century and manifested through the rise of major transnational human rights NGOs and mechanisms within intergovernmental fora.

This chapter is in a broad panoramic and strategic genre that will sacrifice in detail what it hopes to gain in breadth of survey. It aims to offer a broad illustrative rendering of the critique of human rights in its diversity rather than a fully articulated discussion of its tenets. It will proceed to present 18 "vignettes" that each synthesize a crucial critical intuition of the critique of international human rights law whether at the level of theory, explanation, or proposal. I begin by suggesting a stylized portrait of the critique of international human rights as a movement and of its fundamental coherence (1.2). I then suggest a number of concrete ways in which critical approaches to international human rights envisage and shed light on a range of real world issues (1.3). Finally, I propose an outline of what currently seem some of the most fruitful leads to develop a critical sensitivity to international human rights law (1.4).

1.2 A Portrait of the Critique as a Movement

Although the critique can appear diverse, it is arguably united by several strands. Three factors, in particular, inform its genesis. First is the perception that, unlike the human rights movement's own self-presentation and its recurrent emphasis on the "victim", human rights are actually in many ways all-powerful, even hegemonic, if only in that they have become the central criterion of the legitimacy of political action in many places (raised equally by the virtuous and not so virtuous). Human rights are what allow the Turkish government to refuse to give a veiled woman her university diploma because she wears a veil, what allows hundreds of human beings torn by shrapnel to be computed in the legal category of collateral damage, or what allows international financial institutions to dictate huge conditions to the attribution of loans. Indeed, it is the very turn from human rights as a revolutionary and vulnerable ideology of contestation to human rights as a rather established mode of governance[3] that opens the stage for the critique.

Second, the movement is based on a frustration with a certain tone of human rights: conquering, millenarian, end-of-History trumpeting, hubristic. The movement is suspected of claiming too much for itself, of portraying itself as a cause of that which it is merely a consequence of, of taking the credit retrospectively for accomplishments that it merely ratified. Indeed, human rights are suspected of being fetishistic, of liking the thing more than what it is made for ("humanism worshipping itself"),[4] of turning human rights into an "object of devotion". The reliance of proponents on the media, on the "cause célèbre" and a certain spectacular rendering

[3] Weiler 2001.

[4] Ignatieff et al. 2003, 53.

of the world causes them to be highly selective in their indignation,[5] and to perpetuate a crisis mentality.[6]

Third, the development of critical approaches is also triggered by what one might describe as the post-metaphysical turn in human rights, i.e., the idea that human rights do not really exist in an absolute or metaphysical sense. Critical theorists are not alone in taking that turn more or less for granted, but they take it further than various brands of human rights pragmatists: if human rights are the rights that humans beings decide to give themselves, then this opens up a considerable space not only for instrumental reason, but to think about why we want rights, what for, and even whether we want rights at all. The liberation from the ontology of rights, in other words, opens up much needed space for debates about what we are left with, such as an idea that is less truth-claim and more social practice.

In this context, it must be noted from the outset that the critical movement has profound misgivings about the possibility of transcending the world of states by projecting a global concept of the good life, and a suspicion that this cannot be done genuinely, without manipulation or violence, or without forfeiting things that we should value at least as much as rights. At the same time, critical views of human rights tend to share much of the distaste for oppression, injustice or discrimination that has arguably characterized the human rights movement at its best. Beyond that, critical paradigms are, in fact, a family of approaches that ties together different, sometimes competing and sometimes complementary critical sensitivities. In what follows, I will seek to highlight some of their fundamental coherence.

1.2.1 The Critique of Epistemology: of Indeterminacy

The claim that international human rights law is fundamentally indeterminate or at least inconclusive is one that is quite central to the critical project, although it is also often the most misunderstood. The peculiar indeterminacy of international human rights is both a feature of human rights, and of the international law in which it is embedded. International human rights law is the project to internationally "legalize" human rights. Even as it seeks to reform international law, it has a tendency to fall prey to it, and to the constant oscillations between apology and utopia that Martti Koskenniemi has famously identified.[7] Human rights law today is often a consciously transformative project that sees itself in opposition to classical public international law. It proposes something else to what came before it. Hence, human rights will be grounded in appeals to some higher law, antecedent or superior to the international law of states. However, they can never entirely overwrite the international law in which they are embedded, except at the cost of

[5] Mégret and Pinto 2003.

[6] Charlesworth 2002a; Starr 2007.

[7] Koskenniemi 2005.

irrelevance. They must render their own apologetic tribute, which is not that far removed from that of international law *simpliciter*, recognizing what they owe to the sovereign as a source of legitimacy, power and order. Irrelevance is too high a price to pay even for idealism. However, sticking too much to the reality of the interstate world will result in the project's implosion through excessive apology.

In addition to the indeterminacy of international legal thought, international human rights law has to deal with the inconclusiveness of the concept of human rights itself.[8] This is the sheer indeterminacy of human rights as a body of law that is all principles, that does not even try to have the pseudo rigidity of rules. Here we are in the familiar terrain of even positivist critiques of rights adjudication except that the critique is not based so much on the indeterminacy of words as the embeddedness of human rights legal discourse in intractable liberal dilemmas. As Koskenniemi has argued, the attempt to prioritize "rights" over the "good" is doomed, because the former are constituted by our visions of the latter, and that when it comes to the latter we are notoriously undecided.[9] This manifests itself in rights being forever subject to "reasonable", "necessary" and "proportional" limitations, which only seems to push back the problem and to involve debates about what the function of the state is, and the status of the individual in relation to it—exactly the sort of question that resort to rights language was supposed to have at least significantly resolved. "Reasonableness" either barely conceals a reference to "Reason", which we have reason to be skeptical of, or is a recipe for generalizing the preferences about what is reasonable for whoever happens to be deciding.[10] To answer these difficult questions one cannot safely proceed from rights. One must instead understand what the right was meant to protect and why, but this leads us back to foundational debates and invariably questions the utility of rights.[11]

Moreover, most contemporary rights claims involve the complex weighing of some rights against others. This forces human rights back into the utilitarian calculations that it initially forcefully rejected. The only way human rights reach a degree of determinacy is by referring back to certain community understandings buried deeply behind the veil of rights talk. What is then seen as relative determinacy and routinely credited to rights, is simply the comforting feeling of looking back at oneself. Domestically, such community understandings may exist, although it may just as likely be the imposition of a majority on the minority. The internationalization of rights, if anything, radicalizes the claim of intrinsic indeterminacy, as rights now uncomfortably straddle borders and a vast plurality of cultures. The trouble with inconclusiveness is that it leads straight to the discretion of the judge or the technocrat, a risk that is perhaps even direr in the case of human rights than it was in the case of international law, which at least was substantively uncommitted and bent on process.

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[8] Tushnet 1983.

[9] Koskenniemi 1990.

[10] Koskenniemi 2000.

[11] Petman 2011.

1.2.2 The Critique of History: The Never Ending Civilizing Mission

What is missing from the relatively theoretical claims made about indeterminacy is a sense of where these ideas come from and, to put things bluntly, *à qui le crime profite*. Much critical work on international human rights is archaeological in nature. To understand the system's biases internationally is to reach back in time substantially for the dawn of the movement. For international lawyers, particularly international human rights lawyers, who consider that international law has moved on once and for all, the invocation of the specter of colonization is a particularly stinging one. But the idea that international law has already purged itself of some of its colonial biases allows it a little too easily off the hook. The colonial moment will not go away that easily because it helped forge some of the very basic concepts of international law and human rights. In particular, the claim that human rights is new to international law and transformative of it and therefore does not come with the baggage associated with the emergence of international law is a point that is remarkably misleading. As Tony Anghie has argued, cardinal concepts of international law did not pre-exist the colonial encounter as readymade rules to be applied to new problems; rather, they were given their specific meaning *through* the colonial encounter.[12] The "standard of civilization," in this respect, was not so much an instrument as a product of the colonial encounter, one that served to vet new entrants on the basis of something remarkably akin to "human rights".

Vitoria believed Indians to have a rationality of sorts, which meant that they could and should abide by the *jus gentium*. But the benefit of reason was granted to Indians only to allow them to extend an open ended invitation to the Spaniards. Moreover, Indians were found not to be quite up to their ontology as rational beings, and thus in need of being brought up to Spanish universal standards, thus arguably making Vitoria one of the founders of humanitarian imperialism.[13] Of course, Vitoria may have been an improvement on many of his contemporaries. His was not the brutal colonialism of the ruthless conquistadores, who would have simply butchered everyone for gold. But it was a particular form of "enlightened" colonialism nonetheless. In due course, the great birth pangs of modern human rights coincided with the perpetuation of slavery and colonization. In the nineteenth century, colonization was justified in part because of the failure of the Africans to abolish slavery.[14] Similarly, the plight of women has consistently been invoked to justify intervention in the affairs of non-European peoples.[15] Later on, international human rights would miss a historical chance to be at the forefront of

[12] Anghie 2005.
[13] Anghie 1996.
[14] Mégret 2012a.
[15] Ahmed 1992.

decolonization, only ratifying self-determination in the structure of international law by the time it had been hard won by peoples.[16]

The ways in which that colonial past expresses itself today continue to haunt international law. Human rights have been associated with processes of "othering," often heavily focused on racial, cultural, or religious markers. Makau Mutua has framed this in terms of a "savages-victims-saviors" metaphor.[17] Female genital mutilation is presented as the most abhorrent of practices, for example, but the West's own long tradition of subjugating the female body, be it in informal and subtle ways, is neglected[18]; the media vividly portrays the Southern despot (Bokassa, Mobutu) as eccentric and the Eastern despot (Hussein, Pol Pot) as uniquely cruel whilst disenfranchisement, fraud, and massive confusion of interest in the North are presented as accidents of democracy; the Middle-Eastern terrorist is presented as nihilist whilst the Western response is presented as political.[19] Human rights law continues to be part of the "standard of civilization", albeit in more subtle ways.[20] International human rights institutions for example are a product and a guarantor of a certain differentiating function, regulating the gates of accession to the EU for example, or deciding which cases are prosecuted internationally or ripe for armed intervention.[21]

1.2.3 The Critique of Voice: Who Speaks?

The critique of "voice" or of the "subject" has perhaps never been as important as in critiquing a movement that famously begins with a "*We* believe these truths to be self-evident". Who is the "we"? What does it hide? Who is speaking in whose name? International human rights' power lies in its ability to portray certain issues as being "human rights" issues and others not, in ways that can leave certain groups profoundly sidelined. Women, children, migrants, workers, the disabled, indigenous groups, or sexual minorities have all at one point or another been presented as raising issues that are not strictly about human rights. There is a strong suspicion among critical voices that human rights' inclusive embrace always comes at the cost of exclusive practices.

In contesting these boundaries, perhaps no strand of thinking about international human rights has been more illuminating than feminism. Gender has proven to be a powerful prism to challenge hierarchies implicit in the international human rights movement. The critique of international human rights law's androcentrism arguably operates at three levels. First, in the way the proclamation of the great

[16] Rajagopal 2003; Mégret 2009b.
[17] Mutua 2001.
[18] Tamir 1996.
[19] Mutua 2002.
[20] Donnelly 1998; Fidler 2001.
[21] Mégret 2011.

domestic "men's" rights instruments was seen as compatible with inferior status in private law, denial of the right to vote, violence against women, or a general failure to take issues of discrimination seriously. Second, feminist scholars have highlighted the way human rights law is structured by masculinist assumptions including, most notably, an emphasis on the public sphere of the state as opposed to the private sphere where most women's experience of rights violations occur. Third, feminist analysis has focused on how international law, in which human rights are embedded, is itself deeply indebted to certain schemes of thought—for example, sovereignty as a form of private-sphere writ-large, and which profoundly conditions human rights' development.[22]

Following some of these feminist overtures, critical race theory has challenged the "whiteness" of the dominant narrative and indeed of the human rights movement itself,[23] whilst indigenous people,[24] the gay and lesbian community,[25] and the disabled,[26] have all sought to both challenge and be recognized by the human rights narrative. The relationship between these critiques and human rights however is fraught with tension and raises complex dilemmas about whether liberal human rights can ever accommodate the demands of difference,[27] in a context of sobering reassessments of the contribution of international human rights to women's rights.[28]

1.2.4 The Critique of Substance: What Lies Behind Human Rights?

Against claims that human rights are neutral, critical lawyers have emphasized their core ideological assumptions.[29] The critique of international human rights is based on a strong skepticism of a number of claims that are often made about human rights.[30] First, the critique of universalism. After the global spread of international law, the suspicion is that human rights is a second, deeper stage in Western universalization. The universality of human rights rests on the plausibility of certain minimal criteria for the good life, abstracted from culture, religion or even politics. There is by now considerable and convincing critical literature on the extent to which human rights "expresses the ideology, ethics, aesthetic sensibility and

[22] Romany 1993.
[23] Lewis 2000.
[24] Williams 1990.
[25] Sanders 1996.
[26] Stein 2007.
[27] Brown 2002.
[28] Otto 2009.
[29] Mutua 1995.
[30] Kapur 2006c.

political practice of a particular Western Eighteenth-through Twentieth-Century liberalism".[31]

Second, critical thinkers typically take issue with this other standard of Enlightenment thinking, the idea of Progress. Human rights occupies a very special place in international law's contemporary rhetoric of triumph, it is its *avant garde*, perhaps its best hope for redemption. Progress validates the idea that a project can break loose from its moorings, that there is no curse, no fatality from which one cannot recover decisively. It encourages a developmentalist and convergencialist view of the evolution of societies towards human rights. This sentiment is reinforced by a narrative of progress which always presents the "crowning addition" (a new treaty, a new court) to be just round the corner. Critical views of human rights counter this narrative of progress and renewal by inscribing it against a historical background of repetition and continuity. Every move to liberate has tended to be simultaneously a move to incarcerate. The present is haunted by the ghosts of the past, mental habits die hard, structures even more so. From this perspective, progress as a concept is at best unhelpful at worst, it is a dangerous obfuscation.

Finally, and linked to all of the above, critical theorists take issue with human rights' close association and occasional virtual indistinguishability from the tradition of political liberalism. Rights are criticized for their individualism and its tendency to do violence to the communal nature of human life, even in those societies that have given rise to the individualist archetype (and far more beyond them). Human rights, like modernity, tend to disaggregate the social fabric by making each the keeper of his/her rights. International human rights law has insisted that it is compatible with a range of political regimes, but in practice some clearly attract more of its favors. Although liberalism presents itself as a "thin" and minimalist theory of justice, there is a strong suspicion that its basic foundations individualism, rule of law, democracy, are quite thick, and this becomes particularly apparent in the context of the transnational diffusion of human rights. The suspicion is that human rights are occasionally a sort of Trojan horse for the global expansion of something much broader, including not only liberalism but also democracy, the rule of law, good governance, and market capitalism.

1.2.5 The Critique of Means: On Over-Reliance on Law and Lawyers

The rise of international human rights is the result of a massive investment in law as a regulatory project.[32] In fact, perhaps the defining phenomenon in human rights of the last 60 years globally is the attempt to operate a *rapprochement*, emulating many a domestic constitutional reform, between rights as aspirational rhetoric and

[31] Kennedy 2002.

[32] Meckled-García and Cali 2006.

positive international law. Whilst rights are powerful ways of formulating claims against the powers that be, critical theory has a long-standing issue with their formalism, and not simply because of the problem of indeterminacy. There are dangers to entrusting our most deeply held moral intuitions to lawyers. The legal discourse of human rights can lose us in a meander of debates about whether a norm is customary or not, or whether it has *jus cogens* status or not, or whether a state is actually a party to it, rather than discuss the substance of the norm itself. It can make us believe that what drafters said about a treaty decades ago matters more than the complex issue at hand today. It can lure us into a false sense of safety that certain values are protected because they are embodied in the Law, even as the jurisprudence busily outlines exceptions and limitations to these values. It can make the most important issue hang on whether something called "genocide" was committed or not, even when tens of thousands are killed; or make ratification of a treaty seem like the most important item on a reformist agenda. The law can set up a veil between us and the norms, encouraging us to believe that if we produce "valid" law then we also achieve just outcomes.

The discourse of rights dramatizes oppositions rights are either violated or respected through strident moralization of political discourse, in a way that makes necessary political compromises more improbable.[33] Human rights are said to foreground procedure over substance, elections over meaningful participation, economic rights over economic justice, etc. The prioritization of human rights as opposed to citizens' rights in itself devalues the significance of political associations, suggesting an image of the state as purveyor of rights rather than locus of political association within which all are more than their individuality. At a certain level, rights talk is decried as profoundly anti-democratic (in that popular sovereignty is reduced to an expression of the search for rights), and even anti-political (in that taboo reinforces struggle).[34] The pursuit of a strategy of legalization for human rights is also part and process of a transfer of authority to international technocrats and judges.

In fact, "institutionalization" may be the defining trend in the growth of international human rights rather than simply the amorphous rise of an idea.[35] Inevitably, international human rights law will become caught up in professional projects and the construction of fields of expertise that tend to present themselves as an all-encompassing solution.[36] Internationally, the investment in law may be seen by some as a form of "overlegalization" that in fact does harm to its own purported goals,[37] or stultifies the necessary development of our political and moral intuitions,[38] or more generally sanitizes the radical charge in human rights

[33] Ignatieff et al. 2003, 20.

[34] Gauchet 1980.

[35] Oberleitner 2007.

[36] For a fascinating introduction to the sociology of the movement, see Dezalay and Garth 2006.

[37] Helfer 2002.

[38] Waldron 1993.