



Leandro Léo Rebelo

**Watchmen under Watch:
the Inter-American Human Rights System as an
international legal field**

Dissertação de Mestrado

Dissertação apresentada como requisito parcial para obtenção do grau de Mestre pelo Programa de Pós-graduação em Direito do Departamento de Direito da PUC-Rio.

Orientador: Prof. Florian Fabian Hoffmann

Rio de Janeiro

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Abstract

International human rights law inherits the theoretical criticisms against both “international law” and “human rights”. As does international law, the field (c)aims to possess objective meanings for its norms, but must account for ambiguities and subjectivities inherent to legal interpretation. As with human rights, the field relies on a vocabulary that maintains its universal aspirations even as it is used by different constituencies to mean different things.

Following contributions made by international legal theory, international human rights law will be analyzed as a field of practice. Under this lens, a professional community produces relatively stable meanings for the contested vocabulary it must use. Thus, even if the concepts applied are abstract, their usage in institutional contexts can be studied in predictable and concrete ways.

These theoretical considerations will then be applied to the Inter-American Human Rights System. The field sees itself as having the core objective of constraining State action. Notably, its lawyers see their professional activity as a delicate balancing of “State interests” with “the demands of justice”, in which going too far to either pole is risky. As States both fund the System and select its highest authorities, they are more active participants in producing the law that binds them than this account would suggest. Finally, some research agendas incorporating this notion will be sketched.

Keywords

International law; human rights; field; Inter-American System; international human rights law

Resumo

O direito internacional dos direitos humanos está sujeito às críticas teóricas feitas tanto ao “direito internacional” quanto aos “direitos humanos”. Assim como o direito internacional, o campo gostaria de ter significados objetivos para suas normas, o que é desafiado pelas ambiguidades e subjetividades inerentes à interpretação jurídica. Assim como os direitos humanos, o campo utiliza um vocabulário que tem aspirações universais, mesmo sendo rotineiramente utilizado por grupos diferentes para expressar mensagens diferentes.

Recorrendo à teoria do direito internacional, o direito internacional dos direitos humanos será visto como um “campo prático”. Essa lente indica que uma comunidade profissional produz significados relativamente estáveis para o vocabulário contestado que precisa utilizar. Assim, mesmo que os conceitos sejam abstratos, sua utilização em contextos institucionais pode ser estudada de forma previsível e concreta.

Essas considerações teóricas serão aplicadas ao Sistema Interamericano de Direitos Humanos. O campo enxerga como objetivo central a restrição à ação dos Estados. Para tanto, as pessoas que o integram veem sua atividade profissional como um equilíbrio entre “os interesses estatais” e “as exigências da justiça”, em que ambos os extremos seriam arriscados. No entanto, os Estados financiam o Sistema e selecionam suas mais altas autoridades, de forma que são mais ativos na produção das normas do Sistema do que poderia parecer. Por fim, o texto esboçará algumas agendas de pesquisa.

Palavras-chave

Direito internacional; direitos humanos; campo; Sistema Interamericano de Direitos Humanos; direito internacional dos direitos humanos

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List of abbreviations

ACHR	American Convention on Human Rights
IACHR	Inter-American Commission on Human Rights
IAHRS	Inter-American Human Rights System
IHRL	International human rights law
IL	International law
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

1. Introduction

What does the Inter-American System of Human Rights¹ do, and what are the practical and theoretical concerns to this activity? The present text is an effort in how to adequately ask this question. As a dictionary definition, the System is a regional system for the promotion of international human rights law, accessible only to the Member-States of the Organization of American States, though not all eligible States are fully under its jurisdiction. Its flagship institutions are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which produce normative statements based on international human rights law (which will be called standards²) applicable to States.

As the System attempts to “do” international human rights law, it is worth discussing what both “international law” and “human rights” entail. For the first purpose, I will present considerations on international legal determinacy developed by Martti Koskeniemi (chapter 2). For the second purpose, I will discuss some theoretical writings on pragmatic conceptions of human rights (chapter 4). However, prior to chapter 4, it is relevant to contextualize these discussions under sociological considerations on “professional fields”, especially as applied to international legal fields (chapter 3). The Inter-American System will be tentatively described according to this vocabulary (chapter 5), leading to some outstanding research questions about its internal dynamics (chapter 6).

Chapter 2 presents some points on the “foundations” of international law. Drawing heavily on Martti Koskeniemi’s *From Apology to Utopia*, it will be argued that international law aspires to being “objective”. If it is not “objective”, it either conceals raw power, or is a quagmire of endless philosophizing. This objectivity requires international law to be followed by States – “concrete” – and also to demand of States something they would not already be doing – “normative”. But practitioners can never agree that law possesses the correct degree of both “concreteness” and “normativity”. Worse, the legal statutes and the “facts”

¹ Also referred to as “System” or “IAHRS”.

² This word is not meant to imply that such norms are “standards” as commonly opposed to “rules”, only as a shorthand to the notion of normative statements which differ in scope and application. This usage recalls the System’s specialized meaning of “Inter-American standard”, but not much lies on this (for this meaning, see, e.g., RAMÍREZ, Manuel Quinche. *Los estándares de la Corte Interamericana y la Ley de Justicia y Paz*. Universidad del Rosario, 2009.).

themselves possess no automatic meanings, and can only be understood through the highly subjective process of interpretation. International law, then, cannot escape indeterminacy, and this threatens to make its argumentation unsatisfactory.

From Apology to Utopia is also going to be emulated in its loose basis in “deconstruction”³, also present in other texts of a similar critical vein⁴. Koskenniemi engages with the work of authors such as Saussure and Derrida directly, but while they are clearly influential, it is hard to argue that any one program is followed completely⁵. He argues “‘backwards’, from explicit arguments to their ‘deep-structure’”⁶; instead of establishing a concept of international law, the reader is taken to the definition of international custom as having a psychological and a material element, and the argument continues from there⁷. All of the following chapters will assume a similar tone, in that they take as starting points the existence of the “fields” or “practices” or “discourses” which are the object of discussion, and move from there to interrogate what are their bases and characteristics.

While a full exposition of these notes on international legal theory will not be attempted, two characteristics described by Koskenniemi will be briefly highlighted. First, international law will be described as structured around a “domestic analogy”, according to which the international organization of States in the global “society” mirrors the national arrangement of individuals subject to a State. As many individuals are arranged in a State, many States are arranged in a global “order”. In both schemes, the collectivity (the international “society”, or the State) may make demands of its units (States, or individuals), but there is a sphere of interests that it may not interfere with, and must be left to the discretion of the

³ KOSKENNIEMI, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge University Press, 2005, p. 6.

⁴ KENNEDY, David. *The Last Treatise: Project and Person*. (Reflections on Martti Koskenniemi’s *From Apology to Utopia*). German Law Journal, vol. 7, issue 12, available at: <https://iglp.law.harvard.edu/wp-content/uploads/2022/02/LastTreatise.pdf>, p. 9. David Kennedy speaks of how his own ideas on “deconstruction” compare to Koskenniemi’s, and how both of them were significantly influenced by Duncan Kennedy’s work with the concept in Critical Legal Studies, even as neither of them use it in precisely the same way.

⁵ Indeed, there are important discussions on whether *deconstruction* is a programme in this sense, which prove meaningful to the ultimate interpretation of the book’s message, as will very briefly be alluded to in chapter 6. The gist of this discussion is whether Koskenniemi’s professed goals of “deconstructing” international law permit him any room to speak of a way forward; is this way forward also not subject to “deconstruction”?

⁶ KOSKENNIEMI, M. *From Apology to Utopia*, p. 6.

⁷ *Ibid.*, p. 6.

units (sovereignty, or human rights⁸). But neither interest, the collective or the individual, can be consistently preferred against the other. The second characteristic, then, is that international legal argumentation is highly (or endlessly) *reversible*. As international lawyers cannot point to either objective as “defeating” the other, there is often an interest in basing one’s argumentation on both of them, further cementing its indeterminacy.

Although (international) law is indeterminate, it is still practiced, and generates more or less consistent and predictable outcomes. Chapter 3 will attempt to explain this through the idea of international law as a “professional field”. The actors involved in such a field attempt to advance their own preferred meanings to legal statutes, and compete amongst themselves to define which views are “law”. Even if there are no “true” meanings, lawyers must be seen by their peers as knowing how to “speak the language” of international law. Although lawyers “in” a field disagree and compete, their union against the ones who are “out” is a core property of the field, and this professional community is able to constrain available interpretations of the law.

The idea of “objectivity” reappears in this discussion of a field, not as a measurably true property of international law, but as one of the rules of the game. Even if outcomes are not determined by international legal statutes, there exists some sort of agreement between the components of the fields regarding what are the correct interpretations. The precise nature of this agreement will not be described; this characteristic will be defined more broadly as part of the “character” of the international lawyer. This “character” embodies a “world-view”, and lawyers in the field are socialized to “become” it, to share in the field’s evaluations of legal problems and structures. This socialization allows new players to participate in the field’s games in a way that will be approved by fellow participants.

Chapter 4 deals with the challenges of “doing” international “human rights” law, as opposed to its more general counterpart. The characteristics of international legal argumentation presented above also add specific complications to human rights projects. International human rights law is significantly challenged by the “domestic metaphor” that undergirds international law. Its project is to oppose natural persons’ rights to the State, privileging the “individual” over the

⁸ No distinctions will be established between “human” rights and any other “categories” of rights, such as “fundamental rights” etc., as is sometimes done in IAHRs-based scholarship.

“collective”. At the same time, some leeway must be given to State sovereignty: as the “individual” in the international society, the State cannot have its self-determination fully eclipsed by the “international community”. This means, however, that States could opt out of the project built to contain them.

With public international law, the lawyer takes refuge from the creeping indeterminacy in a sense of pragmatism; maybe the discipline does not need “objective” meanings after all. Human rights, however, cannot immediately embrace this subjectivity of meaning and strong appeal to pragmatism. A core part of its project (at least as enshrined by international organizations) is the “universality” of human rights. While this is often seen as a point about the scope of legal protections, it also is, as Florian Hoffmann shows, an epistemic statement: these universal human rights require a universality of meaning to work. But as with any project based on interpretations, its meanings are highly situated and contingent.

After the presentation of these theoretical points, chapter 5 will discuss the Inter-American System itself. The previous considerations will not be fully repeated, but some of its parallels in the System will be more directly shown. The System has the stated goal of controlling State action in the name of human rights, which is, necessarily, a highly subjective task of interpretation. Its community of professional lawyers constructs relatively stable meanings for the indeterminate rights they have to work with. Important voices in the field have also talked about “polarities” to this work that resemble Koskenniemi’s *apology* and *utopia*. The Inter-American lawyer, then, sees herself as *balancing* between the State and the petitioner, and attempting to find a sustainable middle ground.

As in any legal field, the study of case-law reveals stable and predictable meanings, and the lawyer is able to work without pondering deep theoretical meanings. But building on some examples, the argument will be made that this field is fully open to theoretical challenges. Its judgments need to deal with overbearing legal indeterminacy, and exhibit the reversibility of legal argumentation explained in chapter 2. An insistence on “pragmatism” is also insufficient for understanding even the legal standards themselves, as the difference between “case-law” and “politics” is not always clear.

Chapter 6 will present a sketch of outstanding questions and ways forward that emerge from this theoretical framework. The critique of international legal

argumentation of chapter 2 shows it as baseless, as requiring non-legal criteria to operate. Chapters 3 and 4 gesture at some sort of “commitment” from the international lawyer, based on a “sentimentality”, an “intuition”. While a comprehensive survey of this phenomenon will not be undertaken, it could explain why the international human rights lawyer continues to participate in such a baseless and difficult enterprise. Chapter 6.1 will try to discuss the role of these “values” in the profession, leading into chapter 6.2, which will showcase how the field of “international organizations” sees some of these issues.

Lastly, chapter 6.3 examines the field’s assumption that the professional community has the last say over the field’s legal standards, and can keep the characters of the State and the victim in check. This does not seem to be the case. The institutional architecture of the System means that States retain the last word over the field’s standards; they ultimately control their own constraints. Since they freely nominate and select the field’s highest authorities, they can, with sufficient articulation, decisively alter the field’s standards. There is no reason to see this process as necessarily negative or stemming from bad faith, since the field’s ability to alter existing standards and develop new ones is an inherent part of its activities. The vignette of lawyer-as-balancer, however, suggests that the States will not always make the “correct” decisions, and the very mission of the System implies they need to be kept in check; this demands further reflection.

Finally, the concluding remarks will briefly suggest a characterization of the IAHR lawyer as a “fortress-defender”, in the terminology of Outi Korhonen. This is, as she notes, a tragic character, who defends a “lost cause”, and does not seem to have all the tools needed for the task. But this might have to do.

2. International legal (in)determinacy between *Apology* and *Utopia*

2.1. Overview of the core points

The starting point of this section is not a comprehensive definition of the term “international law”. Some of the central texts that influenced this section adopt a similar approach, starting from the realization that many institutions and professionals practice “international law”, but that what they do precisely is always a little out of reach; they are places where great “formalism” and great “open-endedness” coexist⁹. There is a “profession”, a “tradition”, a body of “professors” and “practitioners”¹⁰, but it is worth interrogating whether all of these people and institutions are doing the same thing at the same time. In an impressionistic description, international law will be treated “as a *practice* of decision-making that interferes in peoples' lives instead of a theoretical exercise in deduction-subsumption from abstract rule-formulations, principles of 'justice' or the 'policies' of international institutions”¹¹.

The *determinacy* of law generally, and of (public) international law specifically, is one of the favored subjects of doctrine. This dissertation breaks no new ground on this matter; for its purposes, it suffices to broadly adopt some of the argumentation developed in Martti Koskenniemi's *From Apology to Utopia* (though not its final project) and some comments to it. For these purposes, the book's central scheme of international law as suspended between two “polarities” (“apology” and “utopia”, “concreteness” and “normativity”) will be reconstructed, with some degree of simplification. Following this, two specific dimensions of international legal argumentation, as described by Koskenniemi, will be highlighted: the “domestic analogy” of international law, and its “reversibility”.

In Koskenniemi's description of international law, it involves “an extended effort to solve certain problems created by a particular way of understanding the relationship between description and prescription, facts and norms in international

⁹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 562.

¹⁰ KENNEDY, David. *The Last Treatise: reflections on From Apology to Utopia*, p. 8.

¹¹ KOSKENNIEMI, Martti. *The Politics of International Law*. Hart Publishing, 2011, p. vi.

life”¹². The scheme of international legal argumentation described below will speak of “legal commands” opposed to States, and of competing forms of interpreting such standards. As a broad scheme, “norms” in international law only attain this status with the consent of States, and the discussion below does not intend to suggest that professional lawyers are able to “create” standards wholesale¹³.

The lawyers who practice international law are conscious of centuries-long, overarching discussions of what international law “truly” means and what are its grounding forces. This dimension, however, is seen as mostly separate from the “actual” work in international law¹⁴, the solution of conflicts, the interpretation of standards. While these discussions may be important ones in the realms of philosophy or international relations, they seem not to be “law” in some important sense; by discussing “theory”, the lawyer is not truly “doing” law¹⁵.

In this scheme, “theory” is highly abstract and unmoored from the actual study and practice of “jurisprudence”. While the international lawyer does not fully ignore “theory”, she may see it as a realm of persistent disagreements, where no actual solutions are found, and one ultimately relies on highly subjective and personal views¹⁶. It seems more worthwhile to her task to focus on “doctrine”, on case-law, on learning how to solve practical problems and actually do the work asked of her in drafting briefs and memoranda; after all, the problems she has must be solved with valid law, not with philosophical speculation¹⁷.

The problem with this pragmatism, however, is that it is more dependent on “theory” than it may appear at first glance. “Doctrine” is constantly shifting, and is also the site of persistent disagreements. Even lawyers fully focused on “practice”, then, need some way to categorize and evaluate “doctrinal” outcomes that does not

¹² This is certainly not intended by Koskenniemi as a formal definition of the term “international law”, and is not presented here as such. There, as here, a “true” and comprehensive definition of international law seems at odds with the overall point being made about indeterminacy. KOSKENNIEMI, M. *From Apology to Utopia*, p. 4.

¹³ This is, of course, without prejudice to the tension between “creation” and “interpretation”, which is a core discussion of legal practice. This matter will not be discussed frontally, but lies at the background of much of the topics broached here. It can also be seen more directly in the discussion of specific judgments, and the resolution of specific problems, such as in chapter 5.5 below. In the examples below, even cases that result in clear doctrinal changes insist in some continuity between the “new” case-law and the “old”.

¹⁴ KOSKENNIEMI, M. *From Apology to Utopia*, p. 2.

¹⁵ *Ibid.*, p. 2.

¹⁶ *Ibid.*, p. 3.

¹⁷ *Ibid.*, p. 3.

solely depend on what “doctrine” says, and see themselves forced to return to “theory”¹⁸.

After presenting this core tension of international legal practice, international law’s reliance on a “domestic analogy” will be explained. In Koskenniemi’s view, international law is implicitly based on what he terms a “liberal theory of politics”¹⁹, which are essentially “the assumptions which characterize modern social and political discourse”²⁰. This “theory of politics” preaches the existence of “public” and “private” spheres (of interests), which define each other by their contrast and opposition. The collectivity is able to request that the individual behave in certain ways, as far as “public” interests go; but there remains a “private” sphere, in which the individual has sole discretion.

Both “individual” and “collective” interests must be safeguarded. The system cannot, however, consistently prefer either position, as both must be upheld, even if this is contradictory and untenable. For this reason, international legal argument attempts to ground itself *both* on the individual and the collective, the normative and the concrete, the apologetic and the utopian. As it needs characteristics of both, it cannot avoid this movement, even as no position along the way is fully logical or supported by international law.

2.2. International Law between normativity and concreteness

Simplifying Koskenniemi’s well-known scheme, international lawyers realize their practice is quite close to other projects relating to the “international political order”²¹. International law, then, must seek its distinction from *descriptions* of how the international order works, and from “political” or “subjective” beliefs of how the international order should work²². International legal argumentation distinguishes itself from these two domains by being, respectively, *normative* and *concrete*, and both of these characteristics are important to a claim of *objectivity*.

¹⁸ *Ibid.*, p. 4.

¹⁹ *Ibid.*, p. 5.

²⁰ *Ibid.*, p. 5.

²¹ *Ibid.*, p. 16.

²² *Ibid.*, p. 16.

The scheme continues by positing international law is not a mere description because it would like to give commands to States; this is its characteristic of “normativity”. In a smaller scale, a legal standard²³ is not “normative” if it is a reproduction of State practice, and so does not ask that States change their conduct. In the Koskenniemi vocabulary, this standard is “apologetic” to States. By being apologetic, it fails to be “objective”, as it cannot be differentiated from the (subjective) whims of States.

Conversely, international law’s orders don’t want to be confused with abstract considerations of justice and moral principles. A standard which is not “concrete” fails to acknowledge what States have willed and agreed to in constructing the existing international system. Such a standard would be “utopian”, replacing State practice with “a natural morality”²⁴ that is quite difficult to justify. As the standard can only be understood in reference to such a “morality”, it is not “objective”, as it depends on one’s (subjective) views of the common good.

Both “excessive” apology and “excessive” utopia, in this sense, generate important problems to the international legal project of constraining State action²⁵. A standard that is too utopian will simply not be followed by States; if it is too distant from what States have “actually” willed and agreed to, the conduct it dictates will not be implemented. A standard that is too apologetic, on the other hand, will have its conduct followed by States, as it describes an already existing behavior. This is still a failure of international law, as even if a State does perform the conduct described, it does not do so for *legal* reasons²⁶; the norm follows State conduct, and not the contrary.

Both charges, apology and utopia, threaten international law’s project. International law would no longer retain its separation from “politics”. Apology

²³ The word “standard” will be used generally to refer to normative statements, and does not take on specialized meanings (such as the ones that oppose “standards” to “rules”). This also allows the word to bundle the “text” of the rule and its “interpretation” into a “command”; this characteristic is important because, as discussed below, the theoretical framework adopted is suspicious of the difference between “text” and “interpretation”. This is why it is possible to speak of “apologetic” or “utopian” standards as something which is somewhat in control of the professional community, even though, in general, norms in international law are created with the States’ full participation.

²⁴ KOSKENNIEMI, M. *From Apology to Utopia*, p. 20.

²⁵ *Ibid.*, p. 17 (defining and contrasting contrasting normativity and concreteness).

²⁶ This idea can be compared to the *opinio juris* requirement in determining international custom. Namely, for a behavior to be held a “legal” custom, it must be shown that States only undertake it because they believe themselves to be legally obligated to this end. Koskenniemi poses a similar comparison in KOSKENNIEMI, M. *From Apology to Utopia*, p. 410 (explaining the traditional definition of custom).

means international law has capitulated to power, now serves to validate powerful States and preeminent economic actors' interests *du jour*. The image of dispute resolution by force is all too familiar to international lawyers, and this must be avoided. Utopia, on the other hand, would not furnish a distinction between international law and morality. By abandoning a common mooring in what States have willed and agreed to, utopia seems powerless against rival utopias, and would substitute international law with endless philosophizing. International law, thus, must pose some challenge to States, request of them behaviors they would not do normally; at the same time, it is in the best interests of international lawyers to demonstrate that their standards have a concrete relationship with practice²⁷.

Determining whether States do follow a standard requires determining this standard's meaning, as well as the adequate definition of the State's conduct. Both tasks are consequential, and neither is automatic. By even the most traditional accounts, legal interpretation is open-ended and supplies some room for discretion²⁸. As to behavior, territorial disputes are a good example: the outcome may change if State A's conduct is seen as "acquiescence" or "protest", or whether State B's actions are truly "possession"²⁹. Fitting a "fact" into such categories is also an interpretative task, incurring in the same challenges³⁰.

The recognition that international law is made of "interpretation", however, poses a problem to what Koskenniemi defines as international law's pursuit for "objectivity", and threatens a descent to "politics"³¹. As alluded to above, "objectivity" seems to require a distance from the subjective whims of States, as well as from subjective moral views. Even without believing that standards have automatically verifiable meanings, we would need to ascertain and verify their meanings without recurring to these subjective factors³².

According to Outi Korhonen's scheme of international law as situational, this task is essentially impossible:

²⁷ Such arguments are often advanced in international litigation; for example, KOSKENNIEMI, M. *From Apology to Utopia*, p. 377.

²⁸ *Ibid.*, p. 36 (citing H. L. A. Hart's *Concept of Law*).

²⁹ *Ibid.*, pp. 283 *et seq.* (discussing ICJ case-law on territorial acquisition and relevant concepts).

³⁰ *Ibid.*, p. 386 (claiming that "facts" do not contain automatic meanings).

³¹ *Ibid.*, p. 24.

³² *Ibid.*, p. 25.

The semantic meaning and the significance of international law become known only through an act of interpretation. This is the actuality character of international law. Norms complete with meaning and significance do not exist a priori as independent objects which could be picked up by whomever, whenever. They come into existence in a network of actual factors. The practitioner of international law knows this from experience. There is no book or store where he could find universally applicable norms and put them to use as they are.³³

Under this scheme, there is no way to truly banish the creativity and subjectivity brought by interpretation. The legal system can interfere with the space available for subjectivity, and can certainly constrain it. Outi Korhonen is highly critical of such a move, however, affirming it treats the symptom instead of the cause. Hard cases constantly appear, lying at the boundaries of established knowledge and technology. Insisting that no subjectivity be used to solve these cases would equate to not meeting the challenges brought by such hard cases; “[h]ence, the retreat is made at the cost of the relevance of international law”³⁴.

Still, Outi Korhonen continues, the mainstream consensus has not given up on some form of “objectivism”. To be sure, this is not a “naïve”³⁵, idealized stance, that would wish away any complications. Still, a full acceptance of the critical challenges would mean “nihilism”³⁶, entering a terrain in which international law is barely possible as a practice, “abolishing the meaning and significance of international law”³⁷. Insisting on some measure of objectivism presents itself as a position under which international law is possible³⁸. Outi Korhonen’s image of the Vienna Convention on the Law of Treaties is illuminating. The Convention famously states interpretation shall take into account the ordinary meaning of the text, in light of the objective of the parties, and in good faith. This may sound objective, but establishing what is the “ordinary” meaning and what are the “objectives” are still subjective tasks³⁹. It is worthwhile, then, to interrogate what

³³ KORHONEN, Outi. *New International Law: Silence, Deference or Deliverance?* European Journal of International Law, vol. 7, issue 1, 1996, p. 1.

³⁴ *Ibid.*, p. 14.

³⁵ *Ibid.*, p. 15.

³⁶ *Ibid.*, p. 15.

³⁷ *Ibid.*, p. 3.

³⁸ *Ibid.*, p. 3.

³⁹ After suggesting the rule is meant to be “objective”, but is, in fact, subjective, Korhonen adds: “Or, and this is the most problematic feature, *vice versa*”. KORHONEN, O. *New International Law*, p. 8.

Koskenniemi believes to be some of the founding dimensions of the discipline of international law.

2.3. Liberal politics and the “domestic analogy”

Koskenniemi believes international law is fundamentally moored in “liberal” thought, as developed between the 16th and 18th centuries⁴⁰. He defines this school of thought as concerned with “liberty”, but as also positing that “to preserve freedom, order must be created to restrict it”⁴¹. There are, in other words, two entities whose interaction lies at the core of this liberal doctrine of politics: the individual and the collective. By recourse to the canon of European political thought, Koskenniemi argues that this liberalism places individual liberty at a central place in its political scheme, also recognizing that the fulfillment of individual goals requires some sort of collective infrastructure⁴².

The way to advance these conflicting goals is to delimit separate “spheres” of life to be controlled by the “private” and the “public”⁴³. Naturally, individuals in a State will not present a unanimous opinion of how the State’s affairs should be conducted, and any arrangement will be to someone’s loss, which does not make them necessarily illegitimate. Political theory has long discussed the submission to a State as consent-based even if one does not agree with the specific policy outcomes, emphasizing consent to the “process”, for example⁴⁴. Liberal theories of politics emphasize the “private sphere”, which could also be defined as the realm of (human) rights.

This “private sphere” stops the collectivity’s search for “optimized” outcomes⁴⁵, establishing a realm in which the collectivity may not overrule the individual’s subjective preferences. A core concept in understanding this scheme is the “subjectivity of value”. Politics, philosophy, notions of “the good life”, are all seen as ultimately subjective and individual realms. It is, then, not permissible for the collectivity to impose a version of the good life upon its subjects; in fact, the

⁴⁰ KOSKENNIEMI, M. *From Apology to Utopia*, p. 71.

⁴¹ *Ibid.*, p. 71.

⁴² *Ibid.*, p. 71 *et seq.*

⁴³ *Ibid.*, p. 83.

⁴⁴ *Ibid.*, p. 75.

⁴⁵ *Ibid.*, p. 85.

collectivity should allow the individual to live their conception of the good life. Of course, this individualism is limited by the “public sphere”; the individual can only do as they please within their own private sphere. The private sphere, then, is defined in opposition to the public: that which the public cannot reach; just as the public sphere can be defined as the matters outside one’s private sphere.

Of course, the heart of the issue is drawing the border between the public and private spheres, as “if liberalism does not indicate any material rights as fundamental, then it cannot provide the constraint for government for which it was made”⁴⁶. But, summarily, it does not produce such a list of rights, because it cannot do so according to its own tenets. By aiming to organize society according to a substantive list of what is “the good life”, liberalism would fail its own core principle of neutrality. But by upholding this neutrality, it is at risk of allowing a majority to overrun a minority’s rights, by leaving them up to vote and majority decisions⁴⁷.

Such a maneuver seems to require working from “claims about what is good for persons or groups, according to some standard independent of individuals’ wants”⁴⁸ as expressed by them. But one of the main reasons why liberal theory insisted in its procedural neutrality is that “substantive ends are beyond critical reproach”⁴⁹. In a society where all are free to develop their own ends and their own concerns, it is especially difficult to delimit the correct contents of citizens’ private sphere. This delimitation equals, in practice, a restriction of ends and values. To give a crude example, when a citizen is being *commanded* by the State to “take no interest”⁵⁰ in, say, her neighbor’s religion, she is prevented from developing a conception of the good life in which all persons must follow her own religious practices. We must, in other words, “determine what social choices should not be made democratically”⁵¹.

A wider discussion of this centuries-old problem will not be attempted. Andrew Levine presents some interesting complications to the matter, in discussing in greater detail classical accounts of liberalism, such as the one developed by John

⁴⁶ *Ibid.*, p. 85.

⁴⁷ *Ibid.*, p. 86.

⁴⁸ LEVINE, Andrew. *Liberal democracy: A critique of its theory*. Columbia University Press, 1981, p. 65.

⁴⁹ *Ibid.*, p. 69.

⁵⁰ *Ibid.*, p. 101.

⁵¹ *Ibid.*, p. 102.

Stuart Mill. He notes that Mill attempts to define “harm” as the concept that delimits the public from the private: one is not free to cause harm to another, and so what causes harm may be interfered with by the collectivity⁵². Levine argues, however, that liberalism seems to require all individuals to be free to delimit (in their “internal” capacity) what are their interests. If “anyone may want anything”⁵³, individuals may have “illiberal” interests, being, in fact, “harmed” by another’s “intimate” choices⁵⁴.

However intractable this problem may be, Levine argues it lies at the heart of the conception of “liberal democracy”⁵⁵. To Koskenniemi, the “international order” is structured around very similar principles. There is no one authoritative description of this analogy, as theorists of different strands add their own spin and their own conceptions of international order⁵⁶. But a minimalistic description would claim that States, as individuals, have their own “interests” and “desires”, which may lie in some conflict with one another. Thus, some degree of coercion to States is necessary in the name of the “collectivity”. States’ private sphere, in this metaphor, is their sovereignty. They can, of course, consent to limitations of their power.

International law, then, is structured around a “domestic analogy”. Obviously, there exists no entity that wields the same power *vis-à-vis* States that States do to their domestic subjects, and so the “collectivity” that States are asked to observe needs more elaboration. A noteworthy difference is in consent. Political theorists of the State speak of a theoretical or implicit consent the subject gives to being governed by the State⁵⁷. The State’s consent to international legal standards, however, is presumably explicit and specific. The binding force of treaties is subject to States’ consent⁵⁸; it is arguably from this consent that the international legal order derives the basis for constricting States.

Given the aforementioned difficulties in interpreting both legal standards and the conduct of States, some complications can be seen in this scheme. Applying a

⁵² *Ibid.*, p. 109 *et seq.*

⁵³ *Ibid.*, p. 116.

⁵⁴ Of course, there is no reason to assume we can know which choices are “intimate” in the first place, and so on.

⁵⁵ LEVINE, A. *Liberal democracy*, p. 75.

⁵⁶ KOSKENNIEMI, M. *From Apology to Utopia*, see generally ch. 2.

⁵⁷ See generally KOSKENNIEMI, M. *From Apology to Utopia*, ch. 2.1.

⁵⁸ See generally Vienna Convention, section 4.

restriction to the will of a State seems to require arguing it has consented in being restricted in that manner. Of course, since the State *wants* to do something which is (presumably) forbidden, it will not agree that it is limited, and will instead argue that it has never consented to such a restriction. At times, international lawyers develop and apply concepts of “acquiescence” or “tacit consent”; although the State has not explicitly consented, it did, in fact, “consent”, and so it may be bound⁵⁹.

As Koskenniemi has expanded on, this exercise is difficult to distinguish from a mere imposition of one’s “correct” views over the State’s. Simply “asking” the State and taking its word for it is “apologetic”, as the State would probably not wish to be bound when it would need to be bound the most. The very existence of systems of international legal adjudication suggests that States will not automatically and uncontroversially fulfill all of their obligations. At the same time, wanting to “know better” than the State regarding what it has consented to is an inherently subjective exercise, even if one seeks the “standard” meanings⁶⁰ (there being little reason to believe that the words “standard” or “ordinary” can dispel subjectivity⁶¹).

2.4. Reversibility and international legal argumentation

The issue expanded above is that international law wants to show itself as respecting State sovereignty to the highest possible degree. This sovereignty, however, is mitigated in some sense by the States’ obligations to one another. The usual basis for this obligation, however, is States’ own sovereign consent; but the standard doctrines of international law have found the need to suggest alternative bases for obligations (such as “tacit” consent) due to the significant practical obstacles this conception generates.

This tension has no abstract and general solution. International law cannot consistently prefer “sovereignty” to “community”, neither its opposite. According to Koskenniemi, this dilemma plays out in the doctrine’s constant opposition between these two modes of argumentation, which he terms “ascending” and “descending”, respectively. His greater point is that, as neither option “beats” the

⁵⁹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 117. “Acquiescence” is also an important legal category in territorial discussions, as expanded on in chapter 4.7.

⁶⁰ *Ibid.*, p. 328.

⁶¹ KORHONEN, O. *New International Law*, p. 8.

other, doctrine is caught in constant movement between them and usually attempts to ground arguments in *both* modes of argumentation, to at times confusing results.

Under this scheme, one modality of arguments in international law starts from “State behaviour, will, or interest”⁶², which does not necessarily have any *ex ante* constraint⁶³. International law, then, is what States have arranged it to be. The quintessential legal argument then shows that States consider one’s preferences to be law (which will often involve determining that States follow the behavior demanded by the norm), in what Koskeniemi terms an “ascending” argument. Conversely, the opposite view presupposes the existence of “justice, common interests”, “world community”, or some other type of “normative code” according to which international law must be organized⁶⁴. This code “precedes the State”, or is superior to it, and constrains what it may will or do⁶⁵. Naturally, if such a code exists, an international legal argument must place itself as in accordance with it, and this is what Koskeniemi terms a “descending” argument.

These two modes of argumentation are, importantly, “both exhaustive and mutually exclusive”⁶⁶. Either some normative code overrides State behavior, or State behavior overrides normative codes; and there is no other path available for international legal argumentation. The previous dichotomies can be easily mapped into this scheme: “ascending” argumentation attempts to give international law greater concreteness, risking apology, while “descending” arguments are likely to be highly normative and possibly utopian. The first quality is its claim to objectivity; the second, the standard accusation for its subjectivity.

But in Koskeniemi’s scheme of the *objectivity* of international law, as detailed in section 2.2 above, it needs *both* concreteness and normativity. The possible consequence of this divide between ascending and descending arguments, then, is that international law is liable to being apologetic as it tries to be concrete, and utopian when it seeks normativity. Successful doctrines would then ideally show themselves as reflecting both strands of argumentation. But Koskeniemi argues that attempting to display both characteristics usually results in “an

⁶² KOSKENIEMI, M. *From Apology to Utopia*, p. 59.

⁶³ Indeed, this is the argument made by the “domestic analogy”: States may “internally” wish whatever they please, and in their dialogue, they arrange for limitations to one another’s powers, etc.

⁶⁴ KOSKENIEMI, M. *From Apology to Utopia*, p. 59.

⁶⁵ *Ibid.*, p. 59.

⁶⁶ *Ibid.*, p. 59.

incoherent argument which constantly shifts between the opposing positions while remaining open to challenge from the opposite argument”⁶⁷. In Mégret’s words,

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.⁶⁸

This is not, it should be noted, a point about the indeterminacies in the use of language generally. The indeterminacy does not lie at the level of the *language*, but in the norms themselves, as they attempt to reflect contradictory assumptions and expectations⁶⁹. To summarize this scheme, each of the modes of justification contain part of what international law needs to prove itself as “objective”, but in reaching for this goal, expose themselves to accusations of “subjectivity” from the opposite party. This party, however, is no safer from the same criticism.

Koskenniemi dedicates most of *From Apology to Utopia* to arguing that the ascending-descending oppositions (or apology-utopia, concrete-normative) are present in the mainstream accounts of essentially all important concepts of international law, such as sovereignty⁷⁰, sources⁷¹, territorial disputes⁷², etc. Still, at the end of the day, the practice we call “international law” results in concrete outcomes, which one can be trained to predict, more or less accurately. In fact, *From Apology to Utopia* itself acknowledges the production of consensual opinions and dominant claims that can be studied⁷³, even as it asks the international lawyer not to insist on her sense that “practice works” as a way to distance herself from theoretical discussion⁷⁴.

⁶⁷ *Ibid.*, p. 60.

⁶⁸ MÉGRET, Frédéric. *The Apology of Utopia*: Some thoughts on Koskenniemiian themes, with particular emphasis on Massively Institutionalized International Human Rights Law. *Temple International & Comparative Law Journal*, vol. 27, issue 2, 2013, p. 459.

⁶⁹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 63.

⁷⁰ *Ibid.*, chapter 4.

⁷¹ *Ibid.*, chapter 5.

⁷² *Ibid.*, chapter 4.7.

⁷³ MÉGRET, Frédéric. *Thinking about What International Humanitarian Lawyers ‘Do’*: An Examination of the Laws of War as a Field of International Practice. In: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (eds.). *The Law of International Lawyers*: Reading Martti Koskenniemi, Cambridge University Press, 2017, p. 266.

⁷⁴ KOSKENNIEMI, M. *From Apology to Utopia*, p. 2.

The objectivity that the traditional account of international law emphasized seems to be unattainable. The breadth of Koskenniemi's critique is a significant challenge to the practice of international law, and appears to leave little way out⁷⁵. In his own work, continuing to "do" international law under such indeterminacy requires a turn into history, and a move away from its account of objectivity⁷⁶. As Mégret states, Koskenniemi then turned to a historicization of international law, attempting to situate its practitioners⁷⁷. If the practice is to be understood and continued, it helps to see the "social reality" in which the conflicts happen, and attempt to develop a sociological account⁷⁸.

Under a "sociological" account of international law, it is a practice, an activity done by organized groups of individuals. These individuals appear to justify their activities in reference to certain theoretical notions, "objectivity" being one of them. These notions do not need to be "true", but only to "invent their own origin and regulate their own functioning"⁷⁹. Even if they are not fully reflected by international legal output, they can still be useful in studying how these individuals act. Even if one is convinced that there are no overarching theoretical foundations to the project of international law, it is a project in which many people partake and towards which many resources are directed. Through this lens, international law will be analyzed as a "field", in the sociological sense.

⁷⁵ MÉGRET, F. *Thinking about What International Humanitarian Lawyers 'Do'*, p. 266.

⁷⁶ *Ibid.*, p. 265.

⁷⁷ *Ibid.*, p. 267.

⁷⁸ *Ibid.*, p. 267.

⁷⁹ D'ASPREMONT, Jean. *International Law as a Belief System*. Cambridge University Press, 2017, <https://doi.org/10.1017/9781108375542>, p. 1.

3. Professional fields and their stabilizing effects

3.1. Brief introduction

The following section will describe what is a *field*, in the sense given by Pierre Bourdieu, with special attention to legal fields. Some Bourdieusian concepts will be explained by passing reference to his *Force of Law*, which already presents insights specific to legal fields. Frédéric Mégret's applications of Bourdieusian theory to international legal fields will then be discussed.

It should be noted that a somewhat "loose" approach will be taken to these sociological concepts. While it is important to emphasize the "relational" character of legal fields⁸⁰, this text does not constitute a comprehensive sociological survey, as even the Bourdieusian definition of field faces its challenges⁸¹. Other sociological bases could also supply similar insights, such as Weberian notions on law⁸², which supply other thematic emphases⁸³.

3.2. Fields

A useful starting point is Bourdieu's *Force of Law*, which attempts to interpret the relationship between law and "the social world"⁸⁴. This debate, in his description, has two major positions, that can be termed "autonomy" and "heteronomy" (in his description, "formalism" and "instrumentality", respectively)⁸⁵. The first ("autonomous" or "formalist") would equate to the study of "jurisprudence", as it is usually termed, attempting to place law's theoretical foundation within itself. The second ("heteronomous" or "instrumentalist") would

⁸⁰ BYRNE, William Hamilton, *Is critique part of the practice of international law?*, London Review of International Law, vol. 12, issue 1, March 2024, p. 12.

⁸¹ *Ibid.*, p. 13.

⁸² KOSKENNIEMI, M. *From Apology to Utopia*, p. 548.

⁸³ TRUBEK, David M. *Max Weber on Law and the Rise of Capitalism*. Wisconsin Law Review, vol. 1972, issue 3. Available at: <https://openyls.law.yale.edu/server/api/core/bitstreams/eff143b3-1d21-4265-a410-20627f3192bf/content>.

⁸⁴ BOURDIEU, Pierre. *The Force of Law: Toward a Sociology of the Juridical Field*. Hastings Law Journal, vol. 38, issue 5, 1987. Available at: https://repository.uclawsf.edu/hastings_law_journal/vol38/iss5/3, p. 814. It should also be noted that this footnote references a translation into English, and the original French version will also be cited.

⁸⁵ *Ibid.*, p. 814.

see law as directly reflecting existing power relations, and being an instrument for the exercise of dominant groups' interests⁸⁶.

Bourdieu's view of law would fall in neither category. According to him, law does show signs of autonomy, in that the juridical corpus is produced by "legal" actors "relatively independent of social constraint"⁸⁷. Still, this autonomy is born of "historical conditions", and the interaction between actors is influenced by "power relations" which are permeable to social dynamics⁸⁸. Law "creates" the social world, not only through altering it, but also by defining it to fits its categories, but law is also a product of this social world⁸⁹.

Actors in the field compete for "capital"⁹⁰, and this competition is decisive of what the field outputs. At the same time, these disputes are constrained by an "internal logic of juridical functioning", that defines what positions can be plausibly called legal, without determining the outcome⁹¹.

The object of this competition is the "monopoly" to define what is "law"⁹². Legal fields are based on *interpretations*, and as such, the actors in this field enjoy a "socially recognized capacity to interpret"⁹³. This interpretation may be freer or more constrained, more or less orthodox; but meaningfully, the legal texts interpreted reflect "the legitimate, correct, view of the social world"⁹⁴. These texts should be presented as "unanimously accepted"; this acceptance is what differentiates legitimate coercion from "naked exercises of power"⁹⁵.

One can glimpse a belief in objectivity, as this attitude "claims to produce a specific form of judgment, completely distinct from the often wavering intuitions of the ordinary sense of fairness because it is based upon rigorous deduction from a body of internally coherent rules"⁹⁶. In fact, the legitimacy given to the texts

⁸⁶ *Ibid.*, pp. 814-815. Bourdieu reserves scathing criticisms to what he describes as excessive "structuralism" in detriment of the "symbolic" aspects of the legal system.

⁸⁷ *Ibid.*, p. 815.

⁸⁸ *Ibid.*, p. 816.

⁸⁹ *Ibid.*, p. 839.

⁹⁰ BYRNE, W. H. *Is critique part of the practice of international law?*, p. 12.

⁹¹ BOURDIEU, P. *The Force of Law*, p. 816.

⁹² In Bourdieu's words, "*le monopole du droit de dire le droit*". BOURDIEU, Pierre. *La force du droit: Éléments pour une sociologie du champ juridique*. Actes de la Recherche en Sciences Sociales, vol. 64 (De quel droit?), September 1986, p. 4.

⁹³ BOURDIEU, P. *The Force of Law*, p. 817.

⁹⁴ In the original, "la vision légitime, droite, du monde social" (BOURDIEU, Pierre. *La force du droit*, p. 4).

⁹⁵ BOURDIEU, P. *The Force of Law*, p. 818.

⁹⁶ *Ibid.*, p. 820. It should be noted that later Bourdieu reproduces a criticism of law as "elastic" very reminiscent of Llewellyn's discussion of canons of interpretation (LLEWELLYN, Karl N. *Remarks*

blends in with the social standing and position enjoyed by some of the field's most prestigious actors: the judge bases their decision on "a system of values very close to those of the texts which he must interpret"⁹⁷. Notably, as facts do not present automatic meanings, legal actors also must learn how to describe the relevant controversies in their language⁹⁸. Legal professionals "reveal"⁹⁹ the rights contained in case, the characterization of conduct as just or unjust; this vocabulary produces both problems and solutions¹⁰⁰.

He does not, however, see the transcendental aspirations of this highly subjective process as an "ideological mask"¹⁰¹. It is simply a well-accepted convention of how arguments can legitimately be made in this field. For him, descriptively, cultural fields have a "tendency to conceive of the shared vision of a specific historical community as the universal experience of a transcendental subject"¹⁰².

As it is a long-standing convention, actors who would enter this field must show their mastery of this sort of argumentation; entrants need to have a "universalizing posture"¹⁰³ in their expression. At times, the legal actor must engage in an act of "creation", but they would often prefer to "dissimulate"¹⁰⁴ it as a simple application of existing law. Legal interpretation would then have a "theological" and a "logical" component": the actor seeks a "revelation of what is just in the text of the law"¹⁰⁵, and would generally claim to solve cases in a simple, deductive fashion. But:

For anyone who does not immediately accept the presuppositions upon which the legal field's operation is based, it would be hard to believe that the pure constructions of legal scholars, still less

on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vanderbilt Law Review 395, 1950). He notes that jurists see as valid forms of interpretation (i) "narrowing" a standard, meaning not applying it to a situation where it would normally apply; and (ii) "expanding" a standard, applying it where it should not, originally, be applied (BOURDIEU, P. *The Force of Law*, p. 827).

⁹⁷ *Ibid.*, p. 826

⁹⁸ *Ibid.*, p. 832.

⁹⁹ *Ibid.*, p. 833

¹⁰⁰ *Ibid.*, p. 834.

¹⁰¹ BOURDIEU, P. *La force du droit*, p. 5.

¹⁰² BOURDIEU, P. *The Force of Law*, p. 819.

¹⁰³ BOURDIEU, P. *La force du droit*, p. 5.

¹⁰⁴ *Ibid.*, p. 6.

¹⁰⁵ BOURDIEU, P. *The Force of Law*, p. 825.

the decisions of ordinary judges, comply with the deductive logic which is the spiritual point of honor of all these professional jurists.¹⁰⁶

Specifically legal reasoning has an important role in defining what tools are available to actors in the legal field. But specific understandings, and the distribution of power between “orthodox” and “heterodox” interpretations, depend on the struggle within the social field¹⁰⁷. One of the principal tasks of an agent in the legal field is “disqualifying” their opponents’ views as not truly expressing the requisite technical knowledge¹⁰⁸. This is done in accordance to the *habitus*, the professional notions and worldviews, starting from which actors behave in strategic ways to maximize their capital¹⁰⁹. The dissemination of this worldview guarantees a predictability to the field’s behavior¹¹⁰, but this does not mean actors are consciously attempting to follow rules¹¹¹.

The *habitus* is a “structuring structure”¹¹²: it causes practice to be “regular” without properly functioning as a rule, so that the field is neither random nor concerted¹¹³. For all of international law’s regularity, there is a sense in which the knowledge regarding its practice is unavailable. As noted in chapter 2 above, the international lawyer is able to understand what is or isn’t “law”, to discern correct and incorrect outcomes; still, there is no handbook that fully encapsulates what it is. The knowledge is both “available and hidden”¹¹⁴.

After briefly establishing these central concepts, I turn to Mégret’s application of them to international legal fields. To him, sociology supplies the “tools” necessary to attain “a sense of the social reality and incidence of these struggles on

¹⁰⁶ *Ibid.*, p. 826.

¹⁰⁷ *Ibid.*, p. 827

¹⁰⁸ *Ibid.*, p. 828.

¹⁰⁹ BYRNE, W. H. *Is critique part of the practice of international law?*, p. 212.

¹¹⁰ BOURDIEU, P. *The Force of Law*, p. 833.

¹¹¹ In the original, “principe de génération et de structuration de pratiques et de représentation qui peuvent être objectivement « réglées » et « régulières » sans être en rien le produit de l’obéissance à des règles, objectivement adaptées à leur but sans supposer la visée consciente des fins et la maîtrise expresse des opérations nécessaires pour les atteindre et, étant tout cela, collectivement orchestrées sans être le produit de l’action organisatrice d’un chef d’orchestre”. BOURDIEU, Pierre. *Le sens pratique*. Collection “Le sens commun”, Éditions Minuit, 1980, p. 88.

¹¹² In the original, “structures structurées prédisposées à fonctionner comme structures structurantes”. BOURDIEU, Pierre. *Le sens pratique*, p. 88, *apud* BYRNE, W. H. *Is critique part of the practice of international law?*, p. 14.

¹¹³ BOURDIEU, P. *The Force of Law*, p. 852.

¹¹⁴ KENNEDY, David. *The Last Treatise: reflections on From Apology to Utopia*, p. 8.

the nature and reality of international law”¹¹⁵. More specifically, sociological analysis appears in Mégret’s argument as a way to bridge the gap between international law’s “actual” (or practical) determinacy, and its “conditions of ontological indeterminacy”¹¹⁶.

3.3. The field of international (human rights) law

Frédéric Mégret has applied this conceptual scheme to both international humanitarian law and “massively institutionalized international human rights law”¹¹⁷, as fields that rely on a certain “humanitarian sensitivity”¹¹⁸. In both fields, agents “disqualify and ostracize” rival views as “not being law”¹¹⁹. From the outside, these fields may look cohesive, but the link between the actors that inhabit it is often loose¹²⁰. These actors are locked in fierce competition within the field, as well as struggling with those outside of the field to legitimate it¹²¹. Social conceptions reject the idea that outcomes are determined by the structure of the field, and Bourdieu’s observations on this point have been criticized by Luc Boltanski¹²². Still, even if there is no determination, the “social conditions of possibility of certain arguments”¹²³ in a field are crucial. If actors in a field pursue “symbolic capital”¹²⁴, and this capital is collectively recognized¹²⁵, they must keep in mind the field’s view of themselves.

In Koskeniemi’s view of international legal argumentation, there exist two “extremes”, both untenable in themselves, that frame legal discussion. The successful argument should ideally be acceptable under *both* conditions, however unlikely this may be. For this reason, Mégret notes that the *habitus* of the international lawyer “naturally veers towards the mid-stream”¹²⁶. It seems risky to

¹¹⁵ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 268.

¹¹⁶ *Ibid.*

¹¹⁷ MÉGRET, F. *The Apology of Utopia*.

¹¹⁸ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 268.

¹¹⁹ *Ibid.*, p. 274.

¹²⁰ *Ibid.*, p. 269.

¹²¹ *Ibid.*, p. 269.

¹²² As William Byrne notes in BYRNE, W. H. *Is critique part of the practice of international law?*, p. 14, Boltanski sees Bourdieu’s own views on the relationship between actors and fields as “underestimating the capacity of ordinary actors to act apart from their structures”.

¹²³ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 270.

¹²⁴ BYRNE, W. H. *Is critique part of the practice of international law?*, p. 12.

¹²⁵ BOURDIEU, Pierre. *Outline of a Theory of Practice*, Cambridge University Press, 1977, p. 41.

¹²⁶ MÉGRET, F. *The Apology of Utopia*, p. 460.

position oneself as rejecting either polarity, even if the position one settles at is not any more logically sound than a number of rival views¹²⁷. Positions which are too distant from the accepted interpretations, too “quixotic”¹²⁸, receive the field’s greatest sanctions¹²⁹. Staying in the middle means one stays vulnerable from criticisms from either side¹³⁰; but, in Koskenniemi fashion, if neither criticism is truly avoidable, this will have to do.

It is worthwhile to briefly discuss this idealized construction of “the” international lawyer. Social descriptions of fields often emphasize the “roles” or “characters” that actors play in the field. These characters supply a sense of objective, of morality, of background; in other words, a “moral constraint”¹³¹. The subject matter of international (human rights) law is profoundly enmeshed with moral and political matters¹³². Thus, identifying the roles available in this field supplies much information about actors who occupy them, especially if the field is understood through a combination of personal sensibilities and institutional activities¹³³.

These characters are stylized and unreal representatives of moral beliefs¹³⁴, but this does not diminish the analytic significance of their descriptions. To be sure, roles don’t fully determine an actor’s conduct¹³⁵, as other influences in a field also do not. The practitioners of the field expect it to be inhabited by these roles. As experiences of the field are mediated by these personal biases and expectations – much as “social facts” do not contain automatic meanings¹³⁶ –, these notions cannot be dismissed.

Indeed, entering a field is, to a large degree, socializing oneself to occupy its roles¹³⁷. Becoming *an* international lawyer is also becoming *the* international lawyer, learning the world-view of such a character. The international lawyer’s

¹²⁷ *Ibid.*, p. 460.

¹²⁸ *Ibid.*, p. 460.

¹²⁹ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 278.

¹³⁰ MÉGRET, F. *The Apology of Utopia*, p. 460.

¹³¹ MACINTYRE, Alasdair. *After Virtue: A Study in Moral Theory*. Third Edition. University of Notre Dame Press, 2007, p. 52.

¹³² KORHONEN, O. *New International Law*, p. 5.

¹³³ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, pp. 267-269.

¹³⁴ MACINTYRE, A. *After Virtue*, p. 53.

¹³⁵ KENNEDY, David. *Spring Break*. Texas Law Review, vol. 63, issue 8, May 1985, p. 1387.

¹³⁶ KOSKENNIEMI, M. *From Apology to Utopia*, p. 386.

¹³⁷ KORHONEN, O. *New International Law*, p. 6.

foremost skill is what Outi Korhonen terms the “technology” of his or her field¹³⁸, similarly to Koskenniemi’s image of international law as “grammar”¹³⁹. Just as mastering a language is not learning countless words, international law is not just made of countless rules; in both cases, connecting and articulating knowledge is the truly important ability¹⁴⁰. The “speakers” of international law become able to discern whether legal phraseology is used professionally and correctly¹⁴¹. Returning to Mégret’s characterization of IHL as a field, the *habitus* is a “feel for the game”, more than a conscious knowledge of rules¹⁴². As Koskenniemi put it,

I have not met an international lawyer who would have said: ‘Look, here is my liberal theory of politics. The international law which I teach is based on that theory’. (Though quite a few legal or political theorists have said it.) And yet, I know of no modern international lawyer who would not have accepted some central tenet in it. Obviously, this is not a matter of conscious political choice. I don’t think it is a matter of choice at all – apart from the sense that one can, presumably, in some sense “choose” whether or not one wishes to become an international lawyer. The case appears that if one tries to engage in the sort of debate about international legality which international lawyers undertake, then one is bound to accept an international legal liberalism. Self-determination, independence, consent and, most notably, the idea of the Rule of Law, are all liberal themes¹⁴³.

This being said, Mégret’s description of the professional field(s) of international law notes that “characters” often stand in for idealized “arguments” or “positions”. In other words,

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

¹³⁸ *Ibid.*, p. 6.

¹³⁹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 566.

¹⁴⁰ *Ibid.*, p. 566.

¹⁴¹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 567.

¹⁴² MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 274.

¹⁴³ KOSKENNIEMI, M. *From Apology to Utopia*, p. 5.

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.¹⁴⁴

The character of the international lawyer, then, sees herself as having to concretely “answer” to stakeholders who speak to her as representatives of the different polarities in legal argumentation. Some specific dynamics that play out in the Inter-American System regarding this point will be discussed in more detail in chapters 5 and 6 below. It suffices to say that, while actors attempt to take the field in their preferred direction, they realize that changing too fast may damage the field, and some defeats must be accepted if there is to be a field at all¹⁴⁵. This consideration is a core component of the image of the “international lawyer”, who, in Mégret’s words, wants to “chang[e] the world but not too much”¹⁴⁶.

The study of these professional relationships between distinct actors in a field is a supplement to the regularity of (international) legal outcomes noted in chapter 2 above. The lawyer retreats from theoretical issues to study the patterned and predictable outcomes that exist in a field. The contention presented by the study of fields is that this regularity is not a consequence of “legal reasoning”¹⁴⁷ – which cannot, in fact, give solutions to the complex issues that lie at its heart – but of these games and interactions between actors in the field.

An increased mastery of the international legal “grammar” causes this knowledge to become “natural”, but this naturalness may cause rigidity. As the international lawyer increases her mastery of this grammar, she depends on it to discern what *is* or *isn’t* international law. In Bourdieusian terms, actors in a field are aware of its “orthodoxy”, the views socially legitimized as correct, although one can resist them. There are costs associated with this resistance, and being too much of a firebrand may be negative; but, at the end of the day, the field contains “games”,

¹⁴⁴ MÉGRET, F. *The Apology of Utopia*, p. 483.

¹⁴⁵ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 278 (noting that the search for an equilibrium is essential to practitioners of humanitarian law, and that actors seen as too far from the middle ground are often chastised).

¹⁴⁶ *Ibid.*, p. 279.

¹⁴⁷ MÉGRET, F. *The Apology of Utopia*, p. 464.

and it is quite used to seeing “real” international lawyers be on the losing side of them¹⁴⁸.

Other norms, however, impose themselves as a “doxa”, as self-evident and “normal”, needing no coercion¹⁴⁹. This process threatens to determine the international lawyer, as some notions may become “first incontestable, then self-evident, finally natural until not even perceived any more”¹⁵⁰. Koskenniemi speaks of an “enchanted power” of legal language:

Law makes us believe things to be right or wrong, true or false. This power is also exercised by lawyers when they speak law; they are the guardians of the legal right and true. But it is also exercised by law on lawyers themselves, trained to say ‘this must be done because it is what the law says’. The fact that a lawyer *chooses* to read the law in this way (for example, in the way their colleagues *usually* read it) is made invisible. The appearance is created that ‘law’ itself decides what is authoritative and what is not, how social hierarchies should be organized and scarce resources distributed.¹⁵¹

As noted, the world-view embodied in this grammar has a moral component, as perhaps does all of international (human rights) law¹⁵². If this is the case, judging whether someone truly is an international lawyer would seem to require gauging the compatibility of their moral views with ones deemed plausible by the field, even if unorthodox. Hence, whether someone is a human rights lawyer can hinge on their views about what is legitimate State action, what “rights” mean, what constraints they place on the State.

¹⁴⁸ SOAVE, Tommaso. *The Puzzle of Freedom: Structure and Agency in International Adjudication*. In: MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel (eds.). *Ways of Seeing International Organizations: New Perspectives for International Institutional Law*. Cambridge University Press, 2025, p. 134.

¹⁴⁹ TERDIMAN, Richard. *Translator’s Introduction: The Force of Law: Toward a Sociology of the Juridical Field*. *Hastings Law Journal*, vol. 38, issue 5, 1987. Available at: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2904&context=hastings_law_journal, p. 82.

¹⁵⁰ KORHONEN, O. *New International Law*, p. 6.

¹⁵¹ KOSKENNIEMI, M. *Epilogue: To Enable and Enchant – on the Power of Law*. In: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (eds.). *The Law of International Lawyers: Reading Martti Koskenniemi*. Cambridge University Press, 2017, p. 393.

¹⁵² KORHONEN, O. *New International Law*, p. 5.

This, however, may prove problematic with the initial assumption of neutrality and objectivity of international law. Possessing a “fringe” moral view could disqualify one from being seen as an international human rights lawyer by the actors already in the field. If this is the case, international human rights law is not neutral and objective in Koskenniemi’s sense, as it depends on subjective views on the common good. Perhaps this is simply part of the notion of “human rights”. As Mégret said of humanitarian law, being part of such a field appears to demand a “commitment”, a belief in its goodness, an enthusiasm for its project¹⁵³. International human rights lawyers may just not be fazed by the demand to become a character that demands certain beliefs¹⁵⁴.

This tension between the “objectivity” and “subjectivity” of international human rights law is a variation on the theme of “objectivity” in international law generally. Still, it is also shaped by the rich and longstanding discussions over what the term “human rights” means, what it promises and how it is employed.

¹⁵³ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, pp. 272-273.

¹⁵⁴ *Ibid.*, p. 273.

4. “Doing” human rights law

4.1. Introduction: the objectivity of human rights

International lawyers have an ambivalent relationship with grand, “objective” meanings to their professional activity. The existence of such meanings has suffered countless attacks, yet arguably remains as a tenet of a classical description of international law. Still, international law (maybe even *contra* its lawyers) does not seem to really depend on this objectivity, and persists in its absence.

Is the same true of international human rights law? As an offshoot of public international law, it could be said to equally fluctuate between “apology” and “utopia”, much as the bigger field does. But in a very important sense, the addition of “human rights” is itself utopian¹⁵⁵. This addition could supplement international law’s perceived (over)reliance on procedure¹⁵⁶ with a substantive complement, in the form of a worldview that PIL should structure itself towards¹⁵⁷. However, such accounts appear to significantly rely on “human rights” having objectively determinable meanings, that would differentiate it from the mere power politics or the theoretical quagmires that flank international law. But as facts and (international) legal standards resist easy characterization, so too do “human rights”.

The objective of this section is to present relevant theoretical contributions on this absence of a specific and fixed meaning to human rights. This problem is perhaps more existentially challenging to “human rights” than it is to “international law”, the latter being able to insist on its procedural character. International “human rights” projects must rely on some shade of “universalism”, as they insist on similarities to all people everywhere. Not being able to ascertain these qualities is an important problem. The argument presented is that there is no reason to believe these similarities can be ascertained in any “objective” way, but that the project of human rights persists, as it also does not depend on its structuring narratives.

¹⁵⁵ MÉGRET, F. *The Apology of Utopia*, p. 463.

¹⁵⁶ KOSKENNIEMI, M. *From Apology to Utopia*, p. 238.

¹⁵⁷ MÉGRET, F. *The Apology of Utopia*, p. 458.

4.2. Compounding indeterminacy

There can be no definitive account of what “human rights” means, and the sociological approach alluded to above further discourages a search for a universal meaning. The criteria one initially adopts to investigate what counts as “human rights” determine which phenomena are to be analyzed¹⁵⁸: the choice of these criteria then becomes the defining factor. Further, these premises are not easily defeated by the affirmation of opposing premises, so that the debate has no clear end¹⁵⁹.

If the international lawyer is faced by apparently insurmountable “theoretical” dilemmas, focusing on “technical” aspects seems like the way to get work done. This shift away from “theory” is part of what Martti Koskenniemi calls the “pragmatic” option undertaken by the international lawyer¹⁶⁰. If this lawyer becomes sufficiently knowledgeable on the body of work of their international institution of choice, they should grasp how this institution applies “human rights” enough to replace any theoretical undertakings. Indeed, while “human dignity” is an impenetrable philosophical concept, the Inter-American Court of Human Rights has said that dignity depends on access to clean water¹⁶¹.

Indeed, the base reality in which the human rights lawyer works appears to require an urgency that can sideline any theoretical concerns. There is no end to grave human rights violations, extrajudicial killings, arbitrary detentions, “weeping children, frightened-looking women and beaten-up men”¹⁶² to take care of. In especially dire situations, it is more difficult to suggest that “theory” matters at all, as there surely is no legitimate reason for such abuse to be justified.

The problem with such “pragmatism” is that it may not always be possible to refer to such “technical” understandings to solve theoretical issues. Even if one

¹⁵⁸ ALSTON, Philip. *Does the past matter? On the origins of human rights*. Book review: MARTINEZ, Jenny S. *The Slave Trade and the Origins of International Human Rights Law*. New York, N.Y.: Oxford University Press. 2012, p. 2072.

¹⁵⁹ HOFFMANN, Florian. *Quite Enough (Still): Human Rights in (Times of) Crisis*. In: BHUTA, Nehal et al. (eds.). *The Struggle for Human Rights: Essays for Philip Alston*. Oxford University Press, 2021, <https://doi.org/10.1093/oso/9780198868064.003.0025>, p. 395.

¹⁶⁰ KOSKENNIEMI, M. *From Apology to Utopia*, p. 3.

¹⁶¹ Inter-Am. Court HR. *Case of the Inhabitants of La Oroya vs. Peru*. Judgment of November 27, 2023 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n° 511, para. 136.

¹⁶² HOFFMANN, Florian. *Human rights, the self and the other: reflections on a pragmatic theory of human rights*. In: ORFORD, Anne (org.). *International Law and its Others*. Cambridge University Press, 2006, <https://doi.org/10.1017/CBO9780511494284>, p. 222.

focuses on a specific institution, its opinions may change over time – or may not have been fully developed yet –, not to mention that equally “respectable” institutions disagree¹⁶³. But even if such friction did not exist, and it were possible to precisely grasp how a Court would decide any future cases on a subject, this does not truly mean theoretical issues are resolved.

International human rights scholarship at times describes “heroic, ‘landmark’ decision[s]” with magical effects¹⁶⁴, that can solve theoretical impasses, offer a “true” understanding of fundamentally contested areas. This is very often done without explicit mention to the original theoretical debates involved in the decision, and can read as if IHRL is “inventing” these categories *ex novo*¹⁶⁵. As Mégret notes, this laudatory retelling of decisions can also be flipped on its head. In his example, if the European Court of HR receives praise for “making” corporal punishment of minors unacceptable in *Tyrer v. United Kingdom*, it should also be asked why it did not use these magical powers any earlier¹⁶⁶. The point being made is that these changes in attitude, and the rise and fall of different interpretations, can hardly be ascribed to transcendental features of legal interpretation, and instead wholly depend on what these courts will.

In other words, while these decisions may indeed help the international lawyer decide future cases, they can hardly claim to find “objective” legal reasons that banish opposing views. If a theoretical disagreement exists, such attempts to solve it by avoiding the debate altogether work “at best, to mislead since what is at stake is an exercise of philosophizing under the guise of legal adjudication, at worst [to invite] the adjudicator to engage in an ultimately formal unconstrained exercise

¹⁶³ A very simple example is in the Inter-American Court of Human Rights and the European Court of Human Rights’ judgments of the cases *Olmedo Bustos v. Chile* (2001) and *Wingrove v. United Kingdom* (1996). Both cases involve movies that subvert the Christian faith, by depicting Jesus Christ in a sexualized manner, which led both Chile and the United Kingdom to restrict them. The European Court ruled this restriction to be compatible with freedom of expression, citing the movie’s capabilities to offend Christian sentiments. The Inter-American Court, on the other hand, ruled the restrictions to be unlawful prior censorship.

¹⁶⁴ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 282. Curiously, Bourdieu’s *Force of Law* also speaks about “magical” effects, stating that *judgments*, in themselves, are magical in a very similar sense (BOURDIEU, Pierre. *La force du droit*, p. 130).

¹⁶⁵ For example, the Inter-American Court’s judgment in *González Lluy v. Ecuador* recognized for the first time the importance of intersectional analysis in evaluating the distinct forms of vulnerability to which Talía Gonzalez Lluy was subject. But it is quite unclear where - if anywhere - this concept comes from (Inter-Am. Court HR. *Case of Gonzalez Lluy and others vs. Ecuador*. Judgment of September 1, 2015 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n° 298).

¹⁶⁶ MÉGRET, F. *The Apology of Utopia*, p. 476.

of discretion”¹⁶⁷. And if subjective opinions are this important in deciding outcomes, the messy “political” and theoretical discussions are still controlling.

In short, a purely pragmatic standpoint does not seem to offer meaningful solutions to theoretical disagreements. An appeal to international legal “sources” as controlling seems precarious, as these sources themselves may not have any ulterior mooring and can be in conflict with other equivalent statements. As Koskenniemi notes, undertaking to *analyze* such differing positions leads the lawyer back into the theoretical quagmire, as selecting “correct” interpretations demands precisely the sort of normative grounding that international lawyers often wish to avoid¹⁶⁸.

One further theme complicates the international human rights lawyer’s attempt to use this “pragmatism”: the impossibility to argue from “human rights” with no mention of a theoretical and moral background. An illuminating example is *FATU*’s discussion of the law of the sea. As Koskenniemi defines it, the UNCLOS refers conflict away from the law, “to become ultimately resolved beyond law by agreement or by political standards of equity”¹⁶⁹. Taking this criticism to its most extreme endpoint (and one not meant by Koskenniemi), one could conclude that the law of the sea reaches conclusions fully outside of any “legal” criteria, and is no law at all. Still, if one studies these new, non-legal criteria, one could become a specialist in this field. Human rights, on the other hand, cannot be undertaken without even the vaguest of gestures towards some form of “do-goodness”, of “intercultural translatability” and universality of some “rights”¹⁷⁰.

Even a quite minimalistic description of the enterprise meant by institutionalized human rights needs, in Florian Hoffmann’s words, to describe all human beings as imbued with certain characteristics, as holding some “rights”, which must, at least in principle, hold similar meanings for everyone¹⁷¹. This is a particularly heavy epistemological burden for any theory to bear. Such an “objectivist” account is thoroughly challenged by literature on the situatedness and context-dependency – ultimately, subjectivity – of the matters under discussion¹⁷².

¹⁶⁷ *Ibid.*, p. 467.

¹⁶⁸ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 25.

¹⁶⁹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 490.

¹⁷⁰ HOFFMANN, Florian. “*Shooting into the Dark*”: Toward a Pragmatic Theory of Human Rights (Activism). *Texas International Law Journal*, vol. 41, p. 404.

¹⁷¹ *Ibid.*, p. 404.

¹⁷² *Ibid.*, p. 404.

Not only are “human rights” indeterminate, but the attempt to develop “human rights” together with “international law” compounds the indeterminacy present in both elements. As discussed in chapter 2.4, international law seems to rely on a “domestic analogy” to explain the relationship between States and international law. While the community (of States) can decide on “collective” matters, each State retains its private sphere of interests. The issue of this description is that there is no objective or verifiable way to distinguish the “public” from the “private”; the promise of keeping politics out of certain realms is political, and only stokes the debate it should end.

But the epistemological properties of the project of IHRL only complicate this description. IHRL clearly necessitates the existence of a “descending justification”, an overarching morality, a private sphere. But it also requires the notion of what is the private sphere to be shared by countless actors, maybe even universally. How else can it make demands of States? Of course, in keeping with the reversibility of arguments in international law, the international human rights lawyer can point to the State’s adhesion to whatever treaty is being discussed as sovereign consent to a standard. But it is hard to deny that there is some subjectivity, or “creativity”, in deriving specific standards from the very vague and abstract bill of rights the State has signed.

To repeat a previous example, the professional community’s agreement that “clean water” is a component of “life” has important practical effects in enabling their lawyers to work. But in a meaningful sense, the State has really only consented to the right to “life”, and not to a specific “right to clean water”. It is not surprising that this “evolution”, or “progressive” interpretation, could bring some friction with the States¹⁷³, as this could simply amount to the professional community’s interpretation of the “rights” (or political choices) involved. The professional community recognizes that “sovereignty” – an ascending justification – is needed as a foundation for the standards, but it cannot leave its descending, “value”-based justifications, as then it is no longer “more than what the states have willed”¹⁷⁴.

¹⁷³ See chapter 4.4 below for a more specific discussion on “consent”.

¹⁷⁴ MÉGRET, F. *The Apology of Utopia*, p. 467.

4.3. The usage of human rights

It is unclear how any project done under the banner of human rights could avoid indeterminacy. Its manifestation as IHRL postulates the existence of obligations to States which are deontological¹⁷⁵, and are not based on the reciprocity which undergirds so much of international law. The current project of international human rights law looks quite different from what Francisco de Vitoria did in his time, although some international lawyers argue for a continuity in the “universal organizations and common values” that both allegedly express¹⁷⁶. At any rate, the project surely must defend that some values must be protected in spite of political consensus or opinions¹⁷⁷. Perhaps non-legal manifestations of the human rights movement have an easier time talking about universal ideals, by foregoing the requirement of arguing that its demands “are” law, and not only “ought to be” so¹⁷⁸.

Attempting to “rescue” universal values “from the onslaught of modernity”¹⁷⁹ requires either finding stable footing for one’s preferred moral views – a hard sell for audiences used to seeing this as an imposition of personal views¹⁸⁰ –, or, more plausibly, building a practice which does not depend as much on theoretical groundings. Perhaps, then, the international human rights discourse is foundationless, and its reliance on universality makes it fatally flawed. But it is still employed daily, as the vocabulary of choice for political demands, by very distinct groups, even “in the face of not only their permanent violation but also continuous contestation”¹⁸¹.

¹⁷⁵ MÉGRET, F. *The Apology of Utopia*, p. 463.

¹⁷⁶ KOSKENNIEMI, M. *From Apology to Utopia*, p. 161, note 7: “For another group, early lawyers are rather the forerunners of modern scholarship as their work contains the ideals of universal organization and common values. This is the perspective of the modern naturalist, frequently expressing his nostalgia towards early writers such as Suarez, Grotius and Vitoria”. He then supplies a list of authors he believes to have this inclination. Anthony Anghie suggests, in a very different direction, that there are parallels between Vitoria’s thought and the Bush administration’s doctrines of war on terror and “emerging threats” (i.e. preemptive strikes): “The structure of thinking articulated by Vitoria bears a striking resemblance to the ideology animating the war against terror. And it is the concept of ‘democracy’ that is being deployed for the purposes of pushing towards a new system of international law”. ANGHIE, Anthony. *On Critique and the Other*. In: ORFORD, Anne (org.). *International Law and its Others*. Cambridge University Press, 2006, <https://doi.org/10.1017/CBO9780511494284>, p. 395.

¹⁷⁷ MÉGRET, F. *The Apology of Utopia*, p. 463.

¹⁷⁸ *Ibid.*, p. 466.

¹⁷⁹ *Ibid.*, p. 464.

¹⁸⁰ MACINTYRE, A. *After Virtue*, chapter 2.

¹⁸¹ HOFFMANN, Florian. *Quite Enough (Still)*, p. 388.

This is the site of many criticisms of the project of (international) human rights. Replicating the points made on international law, the idea of “human rights” is not, in itself, controlling of the goals and outcomes of any groups organized around it. Instead, there exist “fields of practice”, in which power is divided unequally between its members, and these fields (attempt to) exert some degree of control over organized human rights. If this is so, we appear to have good reason to be wary of the power politics and internal struggles of this field. It wouldn’t be shocking if its internal hierarchies reflected those of the international community generally, reproducing imbalances between the “West” and its others, between the “first” and “third” worlds, etc.

Indeed, this is a common and longstanding criticism of this project. Many classic “hard cases” are ones that contrast the international lawyer’s sensibilities (sometimes perceived as “Western”¹⁸²) to traditions that seem “violent” or otherwise shocking (sometimes set in a faraway Global South). The human rights lawyer is torn between people(s) that have a right to live according to their beliefs¹⁸³, but also guaranteeing a minimum standard of “protection to human rights” that should be universal. To summarily note well-known examples, the UN system has longstanding campaigns against female genital mutilation, and the European Court of Human Rights has historically allowed States to limit outward demonstrations of faith (with much discussion around Islamic faith).

Briefly, both situations lead to the discussion of whether one can consent with restrictions to their rights (as attributed to them by the current iteration of the international human rights project). Perhaps, then, the movement is wrong in its attribution of universal rights, as some groups see this balance quite distinctly. There are many specific criticisms to be elaborated from this vantage point. An important critique, that will not be commented in greater detail, is the view of human rights as “handmaidens of the neoliberal advance”¹⁸⁴, which aim to change

¹⁸² Taking a cue from Florian Hoffmann, it is important to acknowledge the difficulty in defining what the term “Western” really means in such a context, and that it is at least a “problematic notion”. Still, it has its value in alluding to a broader (well-known) critique. See HOFFMANN, F. *Human rights, the self and the other*, p. 221.

¹⁸³ As can be seen in major human rights documents, such as article 18 of the ICCPR, article 9 of the ECHR, and article 12 of the ACHR.

¹⁸⁴ HOFFMANN, Florian. *Quite Enough (Still)*, p. 388.

nothing and uphold existing order¹⁸⁵. In this sense, the size to which the human rights discourse has grown suffocates other forms of political mobilization, seen as more effective¹⁸⁶.

The human rights movement can also be seen as operating from an idealized and oversimplified reality, in which a white knight saves damsels in distress¹⁸⁷, removing the agency of these “victims” and seeing them as an exotic “other”. Human rights, under this view, operates from an image of “savages, victims and saviors”, to quote Makau wa Mutua’s well-known scheme¹⁸⁸. It offers a caricature of “evil”, “inhumanity”, to be combatted; this evil preys on helpless and innocent victims, and is contained by well-meaning outsiders armed with knowledge and power. If the human rights movement is predicated on Western ideas, however, it is easy to see that divergent cultures can be recontextualized from “rights-holders” to “savages” that need combatting¹⁸⁹. There also exist latent racial dynamics at play in Mukua’s image, pitting the white saviors against the non-white and non-Western savages¹⁹⁰.

Conversely, this very scheme of the “savages, victims and saviors” has been criticized for supplying an idealized and caricaturized image of how human rights operate. According to this stance, some of the interpretations it has spawned are not nuanced, but simply models of “good” against “evil” with inverted polarities¹⁹¹. A movement that brands itself as “anti-imperialistic” or “non-Western” can still engage in “morally reprehensible” actions, and its labels should not mean it is “to be normatively embraced or shielded from criticism”¹⁹². In Shadi Mokhtari’s provocative retelling, the human rights establishment occupies the place of “savage”, aiming to impose Western views on defenseless local “cultures”, which are then protected by the “authentic” experience of anti-imperialistic States¹⁹³.

¹⁸⁵ MUTUA, Makau wa. *Savages, Victims and Saviors: The Metaphor of Human Rights*. Harvard International Law Journal, vol. 42, issue 1, Winter 2001. Available at: <https://files01.core.ac.uk/download/pdf/236359735.pdf>, p. 206.

¹⁸⁶ MUTUA, Makau wa. *The Ideology of Human Rights*. Virginia Journal of International Law, vol. 36, Spring 1996. Available at: https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1571&context=journal_articles, p. 591.

¹⁸⁷ KENNEDY, David. *Spring Break*, p. 1379.

¹⁸⁸ MUTUA, Makau wa. *Savages, Victims and Saviors*.

¹⁸⁹ *Ibid.*, p. 208.

¹⁹⁰ *Ibid.*, p. 207.

¹⁹¹ MOKHTARI, Shadi. *The Reverse Savages, Victims, Saviors metaphor of human rights*. Review of International Studies, 2025, doi:10.1017/S0260210525101071, p. 4.

¹⁹² *Ibid.*, p. 4.

¹⁹³ *Ibid.*, p. 9.

Karina Bidaseca offers, from a different theoretical background, a nuanced perspective into this challenge that resists easy characterization, but a striking point is the rejection of the binary “universal rights” and “local culture”. While hers is not an unabashed defense of a movement for universal rights, she suggests that the positions ascribed to “culture” or “local communities” are also marked by internal power dynamics, in which injustices can, in fact, be perpetuated in the name of this “culture”¹⁹⁴. The issue, then, may lie in recognizing that these “others” have agency, both to challenge the universal rights movement and to adopt its ideas. In fact, working from a view of “traditional peoples” who wholeheartedly (must) reject the ideas of the international human rights movement is also a process of exoticization and othering, and a significant denial of agency:

there are clearly power asymmetries and epistemic hegemonies, but they unfold through complex processes of interaction and are continuously manipulated, subverted, side-lined, and re-signified by those stylized by the critics to be merely on the receiving end of the human rights industry. Indeed, the claim of a hegemonic and potentially epistemicidal human rights expertocracy seems to problematically assume that those subjected to it have no meaningful agency (epistemic or otherwise) of their own and are merely under the sway of false consciousness—an assumption that would fly in the face of the express intent of the critics¹⁹⁵.

Indeed, part of this dichotomy seems predicated on descriptions of “culture” which no longer correspond to modern anthropological understandings of the term, as this field is quick to recognize the global interconnection between “cultures”, and its ambiguous boundaries of identity and practice¹⁹⁶. Florian Hoffmann and Julie Ringelheim argue that anthropologists have abandoned this monolithic understanding precisely not to construe other cultures and peoples as “exotic” others¹⁹⁷. Its revival precisely as a way to defend “exotic” peoples from the intrusive

¹⁹⁴ BIDASECA, Karina. “*Mujeres blancas buscando salvar a mujeres color café*”: desigualdad, colonialismo jurídico y feminismo postcolonial. Andamios, Revista de Investigación Social, vol. 8, issue 17, 2011, <https://doi.org/10.29092/uacm.v8i17.445>, p. 76.

¹⁹⁵ HOFFMANN, Florian. *Quite Enough (Still)*, p. 400.

¹⁹⁶ HOFFMANN, Florian; RINGELHEIM, Julie. *Par-delà l’universalisme et le relativisme* : La Cour européenne des droits de l’homme et les dilemmes de la diversité culturelle. Revue interdisciplinaire d’études juridiques, 2004, n° 52, p. 3.

¹⁹⁷ *Ibid.*, p. 3.

dictates of the “outside” should be at least questioned¹⁹⁸. Indeed, for all the discussion on this debate, it “remains extremely difficult to understand”: does international law “just ‘get used’ that way – or is there a ‘logic of domination’ in the disciplinary imagination and materials?”¹⁹⁹.

Philip Alston has long maintained a summary of helpful texts on this matter. He showcases how “local” groups have legitimate concerns regarding the “landing” of “international human rights”, as a project which does not take enough account of cultural notions²⁰⁰. At the same time, “culture” is often presented as a monolithic concept, to the exclusion and oppression of the people included in it. Feminist authors, for example, have often advanced arguments that men are the ones responsible for deciding and enforcing the “culture”, so that the women in this faraway idealized land do not have the same level of enjoyment of rights as they should²⁰¹. After all, if IHRL believes in the universality of these rights, such appeals to “culture” should not stop it; but it attempts to fully universalize itself at the cost of peoples’ rights to self-determination.

This is an important contention in debates surrounding the “historiography” of human rights. Many debates in this area involve the “transferability” of different historical discourses, roughly meaning the determination of which historical events are in fact part of the same “tradition” and which are not²⁰². Such an exercise depends fundamentally on what is the original definition adopted for the search²⁰³. This choice can be criticized in the same way applied to similar “choices” in the preceding chapters: it cannot defeat its rivals under some objective criteria for measuring the correct option, as these very criteria are also in dispute, and so on.

In an important sense, some criticism of human rights (practice) stems from an “essentializing” that ignores their real-world usage²⁰⁴. The debate of whether

¹⁹⁸ *Ibid.*, p. 3.

¹⁹⁹ CHARLESWORTH, Hillary; KENNEDY, David. *Afterword: and forward – there remains so much we do not know*. In: ORFORD, Anne (org.). *International Law and its Others*. Cambridge University Press, 2006, <https://doi.org/10.1017/CBO9780511494284>.

²⁰⁰ ALSTON, Philip. *International Human Rights*. New York University School of Law, 2025. Available at: https://static1.squarespace.com/static/6679cd373785ec44baf76213/t/68a26d8944665b14743dbadd/1755475337734/08.17.25_InternationalHumanRights_FULL-FINAL.pdf, p. 486.

²⁰¹ MNISI, Sindiso; CLAASSENS, Aninka. *Rural women redefining land rights in the context of living customary law*. South African Journal on Human Rights, vol. 9, 2009, p. 491; *apud* ALSTON, Philip. *International Human Rights*, p. 484.

²⁰² ALSTON, Philip. *Does the past matter?*, p. 2051.

²⁰³ *Ibid.*, p. 2066.

²⁰⁴ While not written in the tradition of international law, C. L. R. James’s *Black Jacobins* is an uniquely interesting text on this point. It showcases Haitian revolutionary leaders appealing to the

“human rights” can “transcend cultural barriers” is past: they are *de facto* present everywhere, claimed by countless groups as a basis for moral or political claims²⁰⁵. There is no reason these moral or political claims have to be “true”; and it seems strange to argue that the vocabulary itself contains latent “moral claims” which supersede and determine its usage, in the face of its widespread adoption to mean patently different things²⁰⁶. Reinforcing the previous points on “epistemicide”, such a claim places the “observer” in the position of knowing the “true” meanings of human rights (as these true meanings would supplant whatever the original speaker means in the instant moment). This does not survive previous considerations on “objectivity” in international law, and disregards their fundamentally contested²⁰⁷ character.

More accurately, what is meant by “human rights” can probably only be measured by taking specific instances into account, as the concept is always under the pull of complex interactions between “local” and “global” forces²⁰⁸. This process is not structured around a single objective or orchestrated by any one actor²⁰⁹, much as Bourdieu describes the *habitus*’s role as a *structure structurée structurante*. Hoffmann and Ringelheim speak of the “provisional crystallization”²¹⁰ of ideas that have the upper hand; the juxtaposition evokes the image of an international lawyer stating that her preferences are the only logical consequence of hundreds of years of legal thinking, even if they may only have ascended yesterday and are liable to being overthrown tomorrow.

The lack of inherent meanings to human rights is restated as a condition for their globalized usage, not as an obstacle to building political discourse around the idea²¹¹. Geertz has noted as “illusory” the discussion of these matters under sweeping characterizations of “relativism” as threatening “nihilism, incoherence”

“values” of the French Revolution, even as the French Revolution itself attempted to quell the movement. JAMES, C. L. R. *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution*. Vintage Books, 1989.

²⁰⁵ HOFFMANN, F.; RINGELHEIM, J. *Par-delà l’universalisme et le relativisme*, p. 4.

²⁰⁶ HOFFMANN, F. *Shooting into the Dark*, p. 411.

²⁰⁷ GALLIE, W. B. *Essentially Contested Concepts*. Available at: <https://cooperism.law.columbia.edu/files/2023/12/Gallie-Essentially-Contested-Concepts-1955-CL.pdf>.

²⁰⁸ HOFFMANN, F.; RINGELHEIM, J. *Par-delà l’universalisme et le relativisme*, p. 4.

²⁰⁹ *Ibid.*, p. 4.

²¹⁰ *Ibid.*, p. 4.

²¹¹ *Ibid.*, p. 4.

and general chaos²¹². This is satirized as being “afraid reality is going to go away unless we believe very hard in it”²¹³. Of course, international human rights still require speaking some fashion of the “absolute”, trading in something that looks like the “universal human natures” Geertz criticizes²¹⁴, though it appears relevant why and how this is done (or at least so we must hope).

These are some of Florian Hoffmann’s bases for arguing that human rights activism is a “shot into the dark”. Different conceptions and arguments (must) clash, both in informal conversation and in international tribunals, and this process follows no rules, has no preset outcomes or “single correct use”²¹⁵. Through this discourse, human rights are “instantiated momentarily”²¹⁶. Even this instance is not under the control of those who generate it, just as a shot into the dark implies not knowing what one will hit:

As such, discursive hegemony, if it occurs at all, is accidental and always only momentary, as any petrification of the meaning of human rights in concrete contexts can always be itself “shot at”. No imposition, no rationality, no law, no judgment, no argument is ever safe from being challenged by the many uses of human rights. While this way of looking at human rights may just highlight their groundlessness, it nevertheless points to potentially new forms of conceiving human rights activism: one not based on the assumption of universal rationality, values and understanding, but one based on an ultimately non-rationalizable inner motivation to “shoot” human rights at what is perceived as oppressive structures, an awareness that such shooting is “into the dark”, and an openness to be oneself, in turn, “shot at”²¹⁷.

²¹² GEERTZ, Clifford. *Anti Anti-Relativism*. In: GEERTZ, Clifford. *Available Light: Anthropological Reflections on Philosophical Topics*. Princeton University Press, 2000, p. 263.

²¹³ *Ibid.*, p. 264.

²¹⁴ *Ibid.*, p. 271.

²¹⁵ HOFFMANN, F. *Shooting into the Dark*, p. 409.

²¹⁶ *Ibid.*, p. 410.

²¹⁷ *Ibid.*, p. 412.

4.4. From theory to pragmatism and back²¹⁸

It is clearly not fruitful to try and discern “a politics” that applies to all (international law-based) human rights movements and is able to define them clearly. However, Mégret suggests that, whatever the *range* of political choices is, it is constrained by the liberal assumptions of international law²¹⁹. The confusion and subjectivity described by chapter 2 above is not a boundless one, as whatever politics arises must conform to some of the liberal order’s tenets if it is to be seen as law at all²²⁰.

Having *any* “politics”, IHRL can be seen as transcending the “agnostic” component of liberalism²²¹, under which such overarching projects should allegedly strive to have “no politics”. But international human rights law contains possibly the strongest distillation of the complications brought to a legal project by the liberal divide between “public” and “private”, as it appears both between the “individual” and the “sovereign”, and between this “sovereign” and the “international community”.

First, it is concerning that the sovereign State is both an individual and a collectivity²²². From a natural person’s point of view, the State is the collectivity that threatens to constrain their interests, and against which persons must erect defenses in the form of (human) rights. But the State may also look outward to the “international society” and see in them a threatening collectivity, against which to assert its “private” sphere, in the form of State sovereignty.

A traditional account of international human rights law shows it as a project of constraining the collective (State) to keep away from an inalienable private (individual) sphere. But an individual-centric approach to international society would mean that the State has a sovereign right not to be bound by international

²¹⁸ Paraphrasing Mégret’s *The Apology of Utopia*, p. 458.

²¹⁹ MÉGRET, F. *The Apology of Utopia*, p. 460.

²²⁰ *Ibid.*, p. 460. This point could be compared to Moyn’s insistence on human rights as being “above and outside” the State (Last Utopia, p. 13), although his full description, and the consequences he draws from it, have been criticized for their artificiality, in my view correctly (see ALSTON, P. *Does the past matter?*, p. 2072).

²²¹ *Ibid.*, p. 463.

²²² In the study of international organizations, some scholars have suggested the concept of “meta-organizations” to illustrate this issue, in the sense that an international organization is composed of other organizations (States). See AHRNE, Göran; BRUNSSON, Nils. *Meta-organizations*, Edward Elgar, 2008, *apud* KLABBERS, J. *Inter-disciplinarity and the Law of International Organizations*, p. 54.

norms imposed on it by the collective – such as, in some cases, the norms of international human rights law²²³. By the same token, international human rights lawyers sometimes turn to the “international community” to constrain the recalcitrant State into implementing standards they believe to be widely accepted. But transposing this logic back into the second scenario, this could mean that the sovereign State has the power to constrain the individual person, so they will behave in a way believed to be correct by the collective (whose voice is, of course, expressed by the State).

Indeed, Derrida suggests the possibility of reversing this arrangement. The traditional account places the sovereignty of States as a “fact of the world”²²⁴, against which human rights appear as an “improvement”. But, today, human rights are such a fact of the world, and are invoked in lawmaking, in civil society organizing, in warmongering, and in countless other contexts. In its most extreme version, “it is now argued that imperialism is the mechanism by which human rights may be made a reality”²²⁵. Against this backdrop, State sovereignty can be recontextualized as an “indispensable bulwark against certain international powers, certain ideological, religious, or capitalist, indeed linguistic, hegemonies”²²⁶: that is, as one would traditionally define human rights.

This reversibility between ascending and descending justifications inherits the problems discussed in chapter 2.4. Once again, the issue returns to the subjectivity of value²²⁷. The international community cannot boundlessly constrain the State (which we term sovereignty) as the State cannot boundlessly constrain the individual (which we term human rights), because conceptions of the “good” or the “just” are part of the “private sphere”, and may not be decided by the will of the majority. But some States clearly are opposed to the view of “human rights” as represented by current international organizations, and have voiced this opposition continuously. Is this State not entitled to its own view of “international law”,

²²³ MÉGRET, F. *The Apology of Utopia*, p. 470.

²²⁴ HOFFMANN, F. *Human rights, the self and the other*, p. 225.

²²⁵ ANGHIE, Anthony. *On Critique and the Other*, p. 396.

²²⁶ DERRIDA, Jacques. *Rogues: Two Essays on Reason*. Translated by Pascale-Anne Brault and Michael Nass. Stanford University Press, 2005, *apud* DOUZINAS, Costas. *Speaking law: on bare theological and cosmopolitan sovereignty*. In: ORFORD, Anne (org.). *International Law and its Others*. Cambridge University Press, 2006, <https://doi.org/10.1017/CBO9780511494284>.

²²⁷ MÉGRET, F. *The Apology of Utopia*, p. 465.

something that should belong to its private sphere? Is the professional community of IHRL entitled to *impose* its conception of the good on the recalcitrant State²²⁸?

Curiously, the *Force of Law* reproduces a part of this standard challenge to human rights as a *feature inherent to law* generally. According to Bourdieu, law includes a “tendency to conceive of the shared vision of a specific historical community as the universal experience of a transcendental subject”²²⁹. Bourdieu also defines the law as aiming at “universalizing” descriptions, which quite often include mention to values the lawyer believes to be subject to an ethical consensus (the example is a reference to a “good” or “responsible parent”²³⁰). Thus, legal statutes would reflect (purportedly) common values, punishing those actions that deviate²³¹.

Faced with this theoretical dead-end, it is tempting to turn to a more “practical” conception. Still, human rights may have less recourse to this strategy than international law generally. In Mégret’s words, the “international human rights movement” is “part idea, part professional field, and part historical project”²³². International human rights law is a project born of utopia, of a “normative code” that looms above States; at the same time, its “massively institutionalized”²³³ face must adhere to the dictates of apology.

As chapter 2.4 above discusses, international legal argumentation is *reversible*, and must *reverse* itself to be justified, as neither apology nor utopia suffice. The international human rights lawyer seems to arrive at a very similar endpoint through a much longer path. To start, she cannot really say that international law is roughly equal to the sum total of what States have agreed on, since IHRL appears to need a permanent critical distance from what States do²³⁴; why would it exist otherwise? The project of human rights was defined in the

²²⁸ Of course, this issue is not only the stuff of theoreticians, and lies at the heart of the debate on “persistent objectors” to international custom, for example.

²²⁹ BOURDIEU, P. *The Force of Law*, p. 816. This passage was also quoted in section 3 above.

²³⁰ BOURDIEU, P. *La force du droit*, p. 5; BOURDIEU, P.. *The Force of Law*, p. 820.

²³¹ BOURDIEU, P. *The Force of Law*, p. 844.

²³² MÉGRET, Frédéric. *Where Does the Critique of International Human Rights Law Stand? An Exploration in 18 Vignettes*. In: KENNEDY, David; BENEYTO, José María (eds.). *New Approaches to International Law: Lessons from the European experience*. T.M.C. Asser Press, 2012, p. 3.

²³³ BOURDIEU, P. *The Force of Law*.

²³⁴ Certainly, under this simplification, States could still behave correctly and adequately. But this approval would stem from the State acting in accordance with what it *has* to do, which is quite different from discerning law from objective and subjective components of State action.

previous section as consisting of universal values which can be opposed to (any) State, a very apt description of a “descending” or “utopian” argument. Indeed, this is what brought Costas Douzinas to declare that “the end of human rights comes when they lose their utopian end”²³⁵.

Of course, the international lawyer who inhabits the field today does not find it in a state of *tabula rasa*, but with (several, competing) institutions dedicated to the cause of “human rights” that have been formed by States. One can, then, attempt to “do” international human rights law from the point of view of what has been consented to by States, emphasizing the creation and practice of these organs.

Coupling this with the previous points about the “usage” of human rights, it seems possible to construct some form of pragmatic approach. Specific usages of the rights discourse may stem from wildly different foundations, but taken in aggregate, one can still discern stable meanings²³⁶. However severe the damage from epistemological and theoretical criticism may be, a pragmatic account of human rights is possible, looking at how prevalent its usage is²³⁷. Thus, the recognition of these epistemological challenges can lead to a human rights practice conscious of its challenges and limitations²³⁸, as well as seeking greater responsibility for its situated conclusions and recommendations²³⁹. This practitioner does not reach for a pretense of objectivity as a precondition for her professional activity²⁴⁰: without knowing or controlling the outcome of their use of human rights, they can work from inner motivations that are ultimately not rationalizable²⁴¹. This definition foregoes the search for objectivity, while still recognizing human rights activism as possible.

As the previous chapter notes, this pragmatism only goes so far. Since no consolidated or hegemonic position can claim to be the sole correct interpretation, the true representative of shared values, alternative interpretations of human rights can and do always appear to challenge them²⁴². Critics of an epistemological baselessness of human rights activism must take into account the consequences of

²³⁵ DOUZINAS, Costas. *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Hart Publishing, 2000, p. 380.

²³⁶ HOFFMANN, F. *Shooting into the Dark*, p. 405.

²³⁷ *Ibid.*, p. 406.

²³⁸ *Ibid.*, p. 409.

²³⁹ KORHONEN, O. *New International Law*, p. 18.

²⁴⁰ *Ibid.*, p. 15.

²⁴¹ HOFFMANN, F. *Shooting into the Dark*, p. 412.

²⁴² HOFFMANN, F; RINGELHEIM, J. *Par-delà l'universalisme et le relativisme*, p. 4.

their attempt to “rock the boat” and destabilize the project²⁴³. At the same time, the consummate practitioner of the field’s “technology” must be responsible for unintended exclusions and distortions that may occur by reproducing dominant views and eschewing theoretical discussion²⁴⁴. Recognizing the legal phraseology as subject to indeterminacy does not render action impossible, but foregrounds considerations of how international lawyers deal with their pliable materials²⁴⁵. Of course, this theoretical perspective can be criticized from a pragmatic standpoint, and pragmatism from a theoretical one, nearly endlessly.

Under this paradigm, human rights lawyers, and the institutions they contribute to and work in, have little epistemological grounding to claim to possess an universal meaning to their actions or discourse. But this is not something they can give up easily, as it implies losing an important part of their textbook justifications of the human rights project, namely the recourse to universal and mutually intelligible “values” as the scaffold for human rights.

Attempting to give up the “worldview” creates major complications, as fully embodying the “character” of the international human rights lawyer requires some mention of universalities and values, even if unspecified, not based in theoretical reflections, and perhaps insincere. As Koskenniemi put it, if he had, as a legal consultant, told his supervisors that law is meaningless and material interests are determining, his career at this role would not have been very long²⁴⁶. However “cliché” this phraseology may be, its status as precisely the “textbook answer” regarding the human rights project elevates it into a meaningful tenet that cannot be disregarded²⁴⁷. This unwarranted notion of universality may be a “kitsch assumptio[n] vulnerable to a million critiques”, but “perhaps if we remember that this is what they are, they may turn into something else”²⁴⁸.

²⁴³ HOFFMANN, Florian. *Quite Enough (Still)*, p. 392.

²⁴⁴ HOFFMANN, F. *Shooting into the Dark*, p. 16.

²⁴⁵ MÉGRET, F. *The Apology of Utopia*, p. 459.

²⁴⁶ “Little seemed to be gained by thinking about international legal argument as being ‘in fact’ about something other than law. Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where the Finnish interests lay, or what type of State behaviour was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again”. KOSKENNIEMI, M. *From Apology to Utopia*, p. 564.

²⁴⁷ HOFFMANN, F. *Shooting into the Dark*, p. 406.

²⁴⁸ KOSKENNIEMI, Martti. *International Law in Europe: Between Tradition and Renewal*. European Journal of International Law, vol. 16, issue 1, 2005, p. 123.

At the end of the day, the radical critique of epistemology and communicability does not only need to apply to “we” versus “they”. Inside the in-groups, and between actors in a field who presumably share a professional vocabulary, there may be cause to wonder *how* (or whether) it is possible to build shared understandings. At the same time, if *communication* is such an indeterminate and difficult process generally, there is no need to single out human rights activism as a particularly impossible practice, and there is room for “doing” it through these problems:

On the other hand, however, there is the often overlooked fact that at the heart of the epistemological critique of cross-cultural communication lies a more radical critique of communication as such which contradicts the very idea of a ‘shared understanding’ supposedly enjoyed by the members of an imagined community. Perhaps, ultimately, it is as uncertain whether my colleague across the corridor really understands what I mean when I ‘talk’ human rights to her/him, as it is when I talk to an Iraqi kidnapper of aid workers? Perhaps, then, everyone purporting to ‘know’ what human rights are about vis-à-vis any others ought, for heuristic purposes, to be considered a ‘human rights activist’²⁴⁹.

4.5. A summary of the issues

Human rights are described as a barrier to the powers of the State over natural persons. This, however, will require an epistemological certainty over whether this barrier lies, which the project cannot convincingly justify as being something other than power politics. Theoretical uncertainty pushes the lawyer to “pragmatics”, but “pragmatics” in human rights lead back to theoretical problems at a very quick pace.

Recognizing human rights discourse to have a pragmatic inclination, and to not “actually” represent universal and intelligible values, opens the door to another meaningful critique. Namely, if we have no claim to truly access a “higher” level of “values”, and if what we produce is the result of subjective and situated preferences, human rights discourse is a way to “cheat” at political discussions. By

²⁴⁹ HOFFMANN, F. *Human rights, the self and the other*, p. 224.

situating our (individual or collective) preferences as above the pale of debate, “the dirty work of political confrontation”²⁵⁰ is avoided, while we still get to weigh in on public policy and on distributional issues. Human rights would then be an “anti-politics”²⁵¹, a “trump card”, that serves both a hopelessly romantic international lawyer and a promoter of imperialism²⁵². This is a significant challenge to the promise of human rights as “transcending the value-agnosticism of the classical liberal international order”²⁵³, and also of its universality generally.

To some, these criticisms are enough for a disillusionment with the project of international human rights law, which is not seen as salvageable. But this needs not be so, as even Makau Mutua’s *Savages, Victims, and Saviors* speaks of “the quest to craft a universal bundle of attributes with which all societies must endow all human beings” as “a noble one”²⁵⁴, and of a “new” or more “genuine” structuring of the international order²⁵⁵. If one remains committed to the cause, these criticisms force the international lawyer to recognize the situatedness of her worldviews and the high degree of contingency that originated her movement and the institutions she works for. Important concessions are required on the idea of universality and communicability, which means this movement takes place from a quite distinct starting point. In so many words, there really is no overriding reason to “do” human rights, but this does not mean “doing” them is impossible (or undesirable).

Returning to the idea of a “language” or a “grammar”, human rights can be understood as a discourse, susceptible to changes in meaning derived from each specific usage²⁵⁶. It cannot be otherwise, as this would demand an “empirical reality ‘out-there’” against which one can measure the descriptions and evaluations undertaken by the human rights project²⁵⁷. Although one cannot insist on objective meanings to legal statutes and to facts, there is still a path to a professional practice of international law.

²⁵⁰ MÉGRET, F. *The Apology of Utopia*, p. 456.

²⁵¹ *Ibid.*, p. 456.

²⁵² While, of course, the reverse can also be argued, with the “anti-imperialist” faction portrayed as recurring to its trump cards to stave off criticism of its policies. But the exact polarity and tint of the argument is less important than its challenge to the epistemological assumptions of the broader human rights project.

²⁵³ MÉGRET, F. *The Apology of Utopia*, p. 457.

²⁵⁴ MUTUA, Makau wa. *Savages, Victims and Saviors*, p. 209.

²⁵⁵ *Ibid.*, p. 243.

²⁵⁶ HOFFMANN, F. *Shooting into the Dark*, p. 407.

²⁵⁷ *Ibid.*, p. 407.

This criticism is not presented with the objective of quickly disposing of it, in the defense of this “massively institutionalized”²⁵⁸ practice of international human rights law. Instead, it is better interpreted as a lurking threat to international lawyers. Certainly, one should not seek a highly idealized version of human rights practice that can magically distinguish itself from politics, and can really hover above the material world, as sometimes textbooks promise. At the same time, taking responsibility for the work done in the name of international human rights law means recognizing the consequences on distribution and public policy that this work has. Universality can be read as either (or both) a tendency to impose a “filiation” to international legal claims, and as the means to contest such filiation and its hegemonic effects²⁵⁹.

The previous section alluded to human rights as a “descending” or “utopian” project, for self-explanatory reasons. It advances the view that there exists an overriding set of norms to which State action must conform. At the same time, the pragmatic lawyer notices that there already exist countless institutions producing international human rights law. But many of these institutions are, in fact, created and maintained by States; States decide what is their jurisdiction and what is the reach of their statements. In other words, an *ascending* element is included to human rights law.

Discussing the Inter-American System can help illustrate some of the dynamics highlighted in this section. Some 60 years after the drafting of the American Convention on Human Rights, it is a highly professionalized field, and would-be entrants have much material to familiarize themselves with. At the same time, landmark judgments and “hard cases” are seldom decided in this “technical”, case-law-based register, and the System very straightforwardly goes beyond “State will” in an effort to better protect “human rights”. In alluding to the muddy terrain of debates on the “good” rather than the “right”, the professional community is concerned with the “values” or “worldviews” of its entrants, and not only with their “technical” knowledge of caselaw.

²⁵⁸ MÉGRET, F. *The Apology of Utopia*, p. 455.

²⁵⁹ DERRIDA, Jacques. *Globalizations, Peace and Cosmopolitanism*. In: ROTTENBERG, Elizabeth (ed., trans.). *Negotiations: Interventions and Interviews 1971-2001*. Stanford University Press, 2002, *apud* DOUZINAS, Costas. *Speaking law: on bare theological and cosmopolitan sovereignty*. In: ORFORD, Anne (org.). *International Law and its Others*. Cambridge University Press, 2006, <https://doi.org/10.1017/CBO9780511494284>, p. 37.

5. Inter-American Human Rights System

5.1. Introduction: a professional field of IHRL

The Inter-American Human Rights System is a creation of the States party to the Organization of American States. Its founding documents are the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The first is a declaratory document, in the style of the Universal Declaration (which it predates by a few months), speaking about rights every person possesses, but without establishing formal mechanisms for redress²⁶⁰. The Convention, on the other hand, speaks more directly about State duties regarding these rights, and establishes a system of individual petitions and cases, involving the Inter-American Commission and creating an Inter-American Court as a jurisdictional body capable of generating mandatory orders.

As any initiative grounded in international law, the System could not let States override its standards through their own municipal law, as also states the Vienna Convention²⁶¹. Article 2 of the ACHR goes as far as to note that States must, in fact, change their municipal laws so that they adapt to what the System requires of them. It is not difficult to conclude from this that the System places its rules as being hierarchically superior to national law, since article 2 ACHR requires national law to change in face of its demands. The System has also very clearly stated that these requirements are also made of constitutions²⁶².

Crucially, it is a professional field based on international law, more specifically international human rights law, all of these terms bringing considerable baggage. In seeking to uphold legal standards drafted by States, it must enter debates on the correct interpretation of these texts, seeking to understand State intent and the limits of sovereignty. This task is further complicated by the mention of “human rights”, which introduces even more subjectivity into the process of interpretation, and means the IAHRs lawyer must refer to conceptions of the good

²⁶⁰ Although the Inter-American Commission does have the mandate to monitor compliance with the Declaration. The Declaration has undergone meaningful changes in its interpretation, and the Inter-American Commission has repeatedly declared that States that are not party to the Convention have breached the Declaration and must redress these breaches.

²⁶¹ Vienna Convention on the Law of Treaties, article 37.

²⁶² Inter-Am. Court HR. *Case of Olmedo Bustos et al. v. Chile* (“The Last Temptation of Christ”). Judgment of February 5, 2001 (Merits, Reparations and Costs), ser. C, n. 73.

along with the right. As it is organized in a professional community, being recognized as a lawyer in the System requires not only technical mastery of case-law, but being recognized as having “values” or “moral views” that the professional field considers acceptable.

The System defines itself on its ability to constrain State action. This professional community of lawyers must constantly question what is the correct level of constraint to establish, and what is the correct level of deference to pay the States’ initial intent in drafting the legal documents. Some key recent debates will be summarized in order to explain these axes, although no detailed exposition of System jurisprudence is intended. The point of these vignettes is to show that the structures of legal argumentation broadly follow those discussed above. Crucially, they also show the professional community interprets itself as controlling the field’s outcomes, in a way consistent with the previously explained dynamics of a professional legal field, in which lawyers who are “in” can quite effectively keep “out” those who don’t “speak the language”.

5.2. The field’s foundations

To quote the Inter-American Court, the main purpose of the System is upholding the “limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State”²⁶³. The System’s output can be defined as “human rights standards”, meaning that both the Commission and the Court aim to produce instructions regarding how States should behave. At arguably their most abstract, these standards “recommen[d] the States of the region revie[w] the current legal framework on the prevention of human rights violations”²⁶⁴. At their most specific, they order States to award a specific amount of money to specific persons²⁶⁵. In the System’s daily workings, it is quite important to distinguish between binding standards and recommendations;

²⁶³ Inter-Am. Court H.R. *Case of the Miskito Divers v. Honduras*. Judgment of August 31, 2021 (Merits, Reparations and Costs), ser. C, n° 432, para. 42.

²⁶⁴ IACHR, Third Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II, Doc. 119/25, April 19, 2025, Recommendation 2.

²⁶⁵ This is a staple conclusion in sentences by the Court; for only one such example, see Inter-Am. Court HR. *Case of I.V. v. Bolivia*. Judgment of November 30, 2016 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 329, Disposition 13.

but for present purposes, the important aspect is that the System attempts to tell States how to behave.

This effort also requires constantly evaluating whether States do comply with the demands of international human rights law. At its most basic level, it is not necessary to recommend a State alter its law if said law already affords the requisite level of protection. Both the IACHR and the Court also follow-up the standards they set, and must constantly decide whether States have complied with their demands. The task, then, is interpreting State action to fit the molds of the standards set out by the System.

At times, States have clearly stated they did not have the intention to fulfill a standard, and actively rejected the attempt by the System to request the change²⁶⁶. While regrettable, this gives the System's lawyers a very good sense of what to expect. Conversely, if States fully comply with the orders, all is well. But States are not always this transparent, and at times wish the System would declare them to be in compliance, even when they have not undertaken any meaningful policy changes. Interpreting State action is then susceptible to all of the challenges and subjectivities of interpreting any social fact.

This activity showcases the difficulties of attempting to leave theoretical and normative questions open in the name of pragmatic focus. Human rights do not need to have objective and universal meanings for this jurisdictional activity to be carried out, as long as all actors involved can reach somewhat stable and intelligible meanings for the language they use. The existence of a professionalized field of lawyers, and an ever-expanding body of case-law, seems to enable just this stability of meaning. But this professional community often does not think this is enough, and returns to the normative problems its professionalization would avoid. Some ambivalence regarding States cannot be banished from the System's project. In Mégret's words,

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

²⁶⁶ Inter-Am. Court HR. Resolution Monitoring Compliance with 11 judgments against Guatemala, regarding the obligation to investigate, establish responsibilities, and, eventually, sanction the responsible parties for human rights violations. August 21, 2014. Available (in Spanish) at: https://www.corteidh.or.cr/docs/supervisiones/11_Casos_21_08_14.pdf.

international order; in human rights, the state is both the potential violator and the model cog in the law's enforcement.²⁶⁷

The System cannot escape this dilemma. It is hopelessly utopian, since it aims to uphold vaguely defined human rights, and their practical implementation has an uncontrollable degree of subjectivity. At the same time, it is inherently apologetic, as it is founded and maintained by States, and so can only represent “human rights” to the extent States have authorized it to do so²⁶⁸. The foundational tension of the field is then set. Attempting to “expand” the interpretation of human rights to better fulfill their “mission” means trampling over State consent, which is what founded the field in the first place. At the same time, “limiting” this interpretation to be closer to what States (probably) originally meant can come at the expense of the defense of human rights²⁶⁹ – how could the subjects that human rights aims to constrain be the arbiters of what are these constraints?²⁷⁰

In Koskenniemian fashion, the professional community cannot consistently prefer either position in abstract form: both the sovereign consent of States and (universal) human rights are founding tenets of the field. Thus, it falls on the lawyer to reverse her argument, and argue for “expansion” on the grounds of “sovereignty”, and for “limitation” as “greater protection to rights”. A possible version of the first argument is that what States consented to was precisely the creation of a system that supervises their action based on human rights (discourse), and to abandon this mission is, in fact, against the (express?) intent of States.

The second view routinely takes place in the System, by linking the “effectiveness” of human rights standards to a “desire” of States to implement decisions. If interpretations are expanded to a point which displeases the States, all of the System will suffer from greater State negligence, and so the defense of human rights requires self-restraint. A brief example is the case of the Belo Monte power plant. Briefly, there existed relevant legal challenges to its construction within Brazil, noting that legislation protecting indigenous peoples from constructions had not been followed²⁷¹. After the failure of these challenges, the matter was brought

²⁶⁷ MÉGRET, F. *The Apology of Utopia*, p. 467.

²⁶⁸ *Ibid.*, p. 467.

²⁶⁹ *Ibid.*, p. 469.

²⁷⁰ *Ibid.*, p. 470.

²⁷¹ VENTURA, Deisy; CETRA, Raísa Ortiz. *O Brasil e o Sistema Interamericano de Direitos Humanos: de Maria da Penha a Belo Monte*. In: FILHO, José Carlos Moreira da Silva; TORELLY,

to the IAHRs, which held that construction should stop²⁷². The Brazilian government was strongly opposed to this position, and, to make a long story short, withheld funding to the OAS and the IAHRs²⁷³, while Belo Monte was built and is today one of the largest hydroelectric dams in the world. The IAHRs lawyer must then wonder: if the power plant was going to be built anyway, did we lose funding for nothing?

In any case, the addition of “State consent” to the mix compounds the difficulties in building IHRL. Abstractly, this can weaken the human rights discourse, which seems less prone to compromises with States than public international law generally²⁷⁴. But pragmatically, it is not easy to understand *what* States have consented to. Indeed, some of the professional community’s disagreement with States happens on the lines of deciding what the American Convention conveys about State intentions. In Koskenniemian terms, this sort of conflict highlights a core tension regarding the category of “consent” by States in international law. At times, it can seem quite arbitrary to distance the foundations of public international law from the consent of sovereign States; and many classical explanations do start from the recognition of States as independent and equal entities who then decide to become bound through vows²⁷⁵. Clearly, States or persons who have indeed consented to an arrangement may try to deny it for strategic reasons. Still, there are scenarios that challenge the meaning of previous consent. Two brief examples in the System illustrates this.

In *Tenorio Roca v. Peru*, the Court had to deal with a case in which the disappearance of a Peruvian national, presumably under detention by the armed forces, was investigated by military courts. When the Court convened in 2016 to issue a judgment, it already had considered such facts not to be under the jurisdiction of military courts for some 20 years, mentioning for example its 1999

Marcelo (orgs.). *Justiça de Transição nas Américas: olhares interdisciplinares, fundamentos e padrões de efetivação*. Belo Horizonte: Forum, 2013. Available at: <https://professor.pucgoias.edu.br/SiteDocente/admin/arquivosUpload/17973/material/O%20Brasil%20e%20o%20Sistema%20Interamericano%20de%20DH.pdf>, p. 37.

²⁷² This description is meant as a simplification, as the matter was not formally decided as a “case”, but as a request for precautionary measures. The distinction does not appear meaningful.

²⁷³ VENTURA, D.; CETRA, R. *O Brasil e o Sistema Interamericano de Direitos Humanos*: de Maria da Penha a Belo Monte, p. 42.

²⁷⁴ MÉGRET, F. *The Apology of Utopia*, p. 469.

²⁷⁵ KOSKENNIEMI, M. *From Apology to Utopia*, ch. 2.

judgment of *Castillo Petruzzi v. Peru*²⁷⁶. However, Peru noted that the relevant facts were previous to the development of this standard; and argued that, for reasons of legality, its previous actions should not be deemed unlawful. The Court rejected this argument, stating that its standard is simply an interpretation of the right to due process, and does not truly “begin” at the date in which it was first noted by the Court, instead starting with the original consent of States to the ACHR²⁷⁷.

The second example has to do with denunciations of the American Convention on Human Rights. Threats of denunciation are routine in the System²⁷⁸; then-Judge Cançado Trindade was of the opinion that they should simply be weathered. To this extent, he delivered a presentation to System lawyers about a crisis in which Peru threatened to leave the System; through stern measures, which he helped adopt, the unsatisfied head(s) of State(s) simply fell back in line²⁷⁹. Still, sometimes the threats materialize, and Venezuela did denounce the Convention (in what has become a very lengthy and labyrinthine legal dispute over who has the power to represent the State of Venezuela and the temporal effects of denunciation²⁸⁰). With this case still fresh in memory, the Court issued an advisory opinion on the denunciation of the Convention and its effects²⁸¹. In a somewhat ambiguous opinion – laden with appeals for other States to “consider” whether the denouncing State acted in “good faith” –, the Court establishes several limitations

²⁷⁶ Inter-Am. Court HR. *Case of Tenorio Roca and others v. Peru*. Judgment of June 22, 2016 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 314, para. 195.

²⁷⁷ Inter-Am. Court HR. *Case of Tenorio Roca and others v. Peru*, para. 196.

²⁷⁸ Indeed, as this text is being written, there is such an ongoing threat, presented by the State of Peru: El País. *Boluarte traza un plan para sacar a Peru del Sistema Interamericano de Derechos Humanos*. September 29, 2025. Available at: <https://elpais.com/america/2025-09-30/boluarte-traza-un-plan-para-sacar-a-peru-del-sistema-interamericano-de-derechos-humanos.html>.

²⁷⁹ CANÇADO TRINDADE, Antônio Augusto. *La búsqueda de la realización de justicia en la era de los tribunales internacionales*. In: MAC-GREGOR, Eduardo Ferrer; GARCÍA, Alfonso Herrera. *Diálogo jurisprudencial en derechos humanos entre tribunales constitucionales y cortes internacionales*. Available at: <https://www.corteidh.or.cr/tablas/r31256.pdf>, p. 1375.

²⁸⁰ The OAS’s International Law Department keeps a tally of the signatures and ratifications of the Convention, available at: https://www.oas.org/dil/esp/tratados_B-32_Convencion_America_na_sobre_Derechos_Humanos_firmas.htm.

²⁸¹ Inter-Am. Court HR. *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for state human rights obligations* (interpretation and scope of articles 1, 2, 27, 29, 30, 31, 32, 33 a 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States). Advisory Opinion OC-26/20 of November 9, 2020. Series A No. 26.

to the effects of denunciation²⁸², speaking about the internal processes through which States should arrive at this decision²⁸³.

As a very brief aside, threats of withdrawal, or even withdrawal proper, are not unique to the Inter-American System. Discussing international organizations generally, Chimni argues that the mechanisms an organization leaves available for withdrawal are not studied enough²⁸⁴. As he briefly lists, such threats, and their effective implementation, have taken place in the ILO, UNESCO, UNICEF, the ICSID and the ICC, to name a few, and in many of these cases by States who are parties to the IAHRs²⁸⁵.

In any case, a very superficial analysis suggests this tension puts the professional community in the position of explaining to States what these same States have “really” consented to. As described in chapter 2 above, wanting to “know better” than the State is a difficult task, which exposes the subjectivity in international legal interpretation. Mégret speaks of a toolkit developed by “massively institutionalized human rights” to narrow States’ ability to not consent to, or to leave, these institutions. This includes conferring *jus cogens* status to norms, interpreting the “object and purpose” of human rights treaties (in the parlance of the Vienna Convention) as not to admit reservations, and limiting the room for withdrawals²⁸⁶.

5.3. The field and international legal indeterminacy

The field is internally aware of the theoretical struggles that surround it, and develops its own understandings of them. Former president of the Court Cançado Trindade spoke of the Inter-American Court as between the positions of

²⁸² LIMA, Lucas Carlos; FELIPPE, Lucas Mendes. *A Opinião Consultiva 26/20 da Corte Interamericana de Direitos Humanos: ao sair não feche a porta*. DPLF Blog, January 21, 2021. Available at: <https://dplfblog.com/2021/01/21/a-opiniao-consultiva-26-20-da-corte-interamericana-de-direitos-humanos-ao-sair-nao-feche-a-porta/>.

²⁸³ Inter-Am. Court HR. *Advisory Opinion OC-26/20*, paras. 64, 65 and 171.

²⁸⁴ CHIMNI, B. S. *Critical Theory and International Organizations: The Need for an Integrated Approach*. In: MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel (eds.). *Ways of Seeing International Organizations: New Perspectives for International Institutional Law*. Cambridge University Press, 2025, p. 25.

²⁸⁵ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 25. The States Parties he names are the United States – for many organizations, and many more after this text was written –, Bolivia, Ecuador, Venezuela and Honduras.

²⁸⁶ MÉGRET, F. *The Apology of Utopia*, p. 470.

“principism” and “pragmatism”²⁸⁷. In a somewhat stylized description, “principism” would mean holding States fully accountable to human rights standards, and accepting nothing less than their full completion, insisting on the System’s authority. “Pragmatism”, on the other hand, would mean acting not to disturb the relationship between the System and the States; this could mean issuing more lenient orders, or, in the follow-up stage, recognizing orders to be fulfilled before they are truly finished.

Then-Judge Cançado Trindade drew this distinction only as a way to dismiss “pragmatism” out of hand, and denounce it as incompatible with the System’s mission²⁸⁸. This problem did not seem to him only academic, however, and the Court possibly had changed its criteria to give States greater latitude in certain points²⁸⁹. Still, the possible advantages of some form of pragmatism seem quite clear. First, the System needs the States to actually implement its standards. If a State is willing to fulfill a slightly different version of a proposed standard, adapting it could be a way to not let the perfect stop the good from happening. If there are victims in need of redress, a less weighty standard could help them, if it induces the State to comply. The question then remains of how much can the System water its orders down until this actually harms the victims. Clearly, no standards are set with the objective of being unnecessary and superfluous, and the image of bargaining around reparations for a decades-long case of grave human rights violations is somewhat concerning.

Second, and more structurally, the System needs States to fund it. Its history shows that States can and do cut ties – and funding – if they feel the System has overstepped on important cases²⁹⁰. This dynamic has been observed in other international organizations, with the argument that voluntary contributions make

²⁸⁷ CANÇADO TRINDADE, A. A. *La búsqueda de la realización de justicia en la era de los tribunales internacionales*, pp. 1373 and 1383.

²⁸⁸ *Ibid.*, p. 1379.

²⁸⁹ REBELO, Leandro Léo. *Uma análise empírica do cumprimento de sentenças da Corte Interamericana de Derechos Humanos*. FGV Direito Rio, December 2023. Available at: <https://repositorio.fgv.br/server/api/core/bitstreams/1b52bbde-9440-4023-a5a3-3b5a27e3d6d7/content>, p. 31. The example analyzed here has to do with interest related to orders of monetary payment. States will at times delay the mandatory payments, but fail to correctly pay the amount due to interest. Under Cançado Trindade’s presidency, there are examples of the Court deeming this as a failure to comply, as the interest is part of the order; afterwards, the Court has understood the payments to be completed.

²⁹⁰ See generally VENTURA, D.; CETRA, R. *O Brasil e o Sistema Interamericano de Derechos Humanos: de Maria da Penha a Belo Monte*.

them liable to pressure from States who are major donors²⁹¹. While this concern is weighty, it is difficult to see what the System should do. The System could ask less of States than its lawyers think they should, in order to preserve its survival. But is it not, then, failing its mission of limiting misuse of State authority? How far can such calculations go before they threaten the System? The line between “defeat” and “strategic withdrawal” seems shifting and uncertain.

It is, then, an open question in the field what is the correct behavior around seeking greater compliance with standards. The textbook description, however, sees compliance as very important. A former IACHR Commissioner discusses the “advantages of regional [human rights] systems”, which would allow them to obtain notably higher compliance rates than UN treaty bodies²⁹². The lower number of member-States would result in “easier political consensus” and “easier monitoring” of orders²⁹³. As these States would have political and historical similarities, the regional systems would benefit from a “spontaneous acceptance”, even when no formal enforcement mechanisms exist²⁹⁴.

This self-description has a glaring problem. To be blunt, States do not follow the standards set by the IAHRs²⁹⁵. Attempts to empirically measure enforcement show what can only be described as failure, across all types of standards (both binding and non-binding)²⁹⁶. This account also seems to portray the field’s (continued) existence as something very natural and matter-of-fact, to which States would have no real reason to object. Curiously, former president of the Court Elizabeth Odio speaks of the creation of the Court as influenced by “luck”, by an

²⁹¹ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 29. Without getting into more detailed descriptions of funding, the Commission has previously stated it gets approximately half of its funds from “regular” (“binding”) contributions, and the other half from “voluntary” ones, in statements regarding its 2018 and 2013 budgets (https://www.oas.org/en/iachr/media_center/preleases/2019/067.asp; https://www.oas.org/en/iachr/media_center/PReleases/2013/084.asp).

²⁹² PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional*. Editora Saraiva, 2013, p. 340.

²⁹³ *Ibid.*, p. 340.

²⁹⁴ *Ibid.*, p. 340. I note that determining whether a “formal enforcement mechanism” exists in international systems seems like a treacherous affair, and one that will not be attempted.

²⁹⁵ One notable counter-example is Costa Rica: the Inter-American Court released a statement noting that Costa Rica had fulfilled every single order by the Court, and had no outstanding cases (https://www.corteidh.or.cr/comunicados_prensa.cfm?lang=es&n=1986). Still, at the time of writing, the Court had issued 7 judgments against Costa Rica, far from leaders Peru’s 116, Guatemala’s 59, and both Colombia and Ecuador’s 55.

²⁹⁶ See BASCH, Fernando *et al.* *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions*. SUR International Journal on Human Rights, vol. 7, issue 12, June 2010, Available at: <https://sur.conectas.org/wp-content/uploads/2017/11/sur12-eng-full.pdf>.

“alignment of the stars”²⁹⁷; in other words, as a very unnatural result which could easily not have happened.

Straying a bit from the IAHRs, perhaps international human rights law, generally, does not “accomplish” much in the way of enforcement, international sanctions, punishment of perpetrators, etc.²⁹⁸. As Klabbers notes of some accounts on the UN and the League of Nations, grand narrative accounts of such institutions tend to be good at explaining the facts they include, but may lose their explanatory powers very quickly with different events²⁹⁹. He also argues that the UN often does not achieve the things which any normative account would have it achieve, such as preventing the Rwandan genocide³⁰⁰.

Returning to the IAHRs, States sometimes emphasize the distinction between “binding” and “non-binding” standards as a way to not fulfill the latter. Brazil, for example, is one of the few countries in the region to still criminalize *desacato*, the act of disrespecting³⁰¹ a public authority in the exercise of their duty. The Inter-American Commission – as it quite often reminds the State³⁰² – has steadfastly held the crime of *desacato* to be a breach of international obligations for over thirty years³⁰³. But in a recent decision by the Supreme Court (STF), its justices found that, as this standard is not binding, Brazilian legislation is, in fact, in accordance

²⁹⁷ VACA, Pedro (Host). *La decisión de una Corte sin casos*. Podcast *Deliberante*, November 13, 2025. La No Ficción. Available at: <https://open.spotify.com/episode/5cQwOje4NwyuBk4JiKfoya?si=4639cfcb05a548e5>.

²⁹⁸ POSNER, Eric A. *Martti Koskeniemi on Human Rights: An Empirical Perspective*. In: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (eds.). *The Law of International Lawyers: Reading Martti Koskeniemi*, Cambridge University Press, 2017, p. 122.

²⁹⁹ KLABBERS, Jan. *Inter-disciplinarity and the Law of International Organizations*. In: MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel (eds.). *Ways of Seeing International Organizations: New Perspectives for International Institutional Law*. Cambridge University Press, 2025, p. 41 (noting that the League’s refusal of admission to Liechtenstein is quite understandable under some assumptions which fail to explain the UN’s acceptance of this very admission).

³⁰⁰ *Ibid.*, p. 41 (stating that “if ever there was something happening that would warrant UN action, this was it”).

³⁰¹ The controlling verb in the original Portuguese is *desacatar* (as in, to engage in *desacato*), which is not given any particular definition by the text.

³⁰² Only recently, it has asked the State to decriminalize *desacato* in two special country reports: a 2021 Report signed by the Commission itself, and a 2025 Report under the coordination of the Special Rapporteurship on Freedom of Expression. (IACHR. *Situation of Human Rights in Brazil*. OEA/Ser.L/V/II, Doc. 9, February 12, 2021. Available at: <https://www.oas.org/en/iachr/reports/pdfs/brasil2021-en.pdf>; IACHR, SRFOE. *Special Report on the Situation of Freedom of Expression in Brazil*. OEA/Ser.L/V/II, CIDH/RELE/INF. 35/25, November 27, 2025. Available at: <https://www.oas.org/en/iachr/expression/reports/RELEBrazilReport.pdf>).

³⁰³ IACHR, *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, 1994 Annual Report, Chapter V, Available at: <https://cidh.oas.org/annualrep/94eng/chap.5.htm>.

with Inter-American standards³⁰⁴. It bears noting that Brazil has only fully followed the *binding* orders of the Court in two cases: the oldest case against it³⁰⁵, and a case in which the Court accepted the State's argument that it could no longer investigate a crime because of the statute of limitations³⁰⁶.

In any case, non-compliance does not shake the field's foundations. Theoretical writings speak of “transcendence” of standards, meaning the impacts they generate beyond direct compliance³⁰⁷. A common theme is their adoption by well-meaning States, even when they are not the intended targets of the standards: State courts also apply Court judgments passed against other States, in a show of good intentions³⁰⁸. Under this view, direct implementation is “arguably not even the most significant potential outcome of a court ruling”³⁰⁹. The Inter-American Court also states in its judgments that the rulings itself are a form of relief to the victims³¹⁰, noting that listening to victims and recognizing what they have been through as illicit is a way of redress (which does not depend on the State).

It would not be accurate to dismiss the “transformative impact” of the System as mere wordplay, designed to distract from the truly important problem of non-

³⁰⁴ STF, ADPF 496, 2020.

³⁰⁵ Inter-Am. Court HR. Resolution Monitoring Compliance in the *Case of Ximenes Lopes v. Brazil*. September 25, 2023. Available at: https://www.corteidh.or.cr/docs/supervisiones/ximenes_lopes_25_09_23_spa.pdf.

³⁰⁶ Inter-Am. Court HR. Resolution Monitoring Compliance in the *Case of Escher v. Brazil*. June 19, 2012. Available at: https://www.corteidh.or.cr/docs/supervisiones/escher_19_06_12.pdf.

³⁰⁷ BENAVIDES-CASALS, María Angélica. *El efecto erga omnes de las sentencias de la Corte Interamericana de Derechos Humanos*. Revista Colombiana de Derecho Internacional, vol. 27, July-December 2015, Available at: <https://revistas.javeriana.edu.co/index.php/internationallaw/article/view/15380>.

³⁰⁸ GONZÁLEZ-SALZBERG, Damián A. *La implementación de las sentencias de la Corte Interamericana de Derechos Humanos en Argentina*. Revista SUR, vol. 15, 2011. Available at: <https://sur.conectas.org/es/la-implementacion-de-las-sentencias-de-la-corte-interamericana-de-derechos-humanos-en-argentina/>.

³⁰⁹ HUNEEUS, Alexandra. *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*. Cornell International Law Journal, vol. 44, 2011, Available at: <https://www.corteidh.or.cr/tablas/r30405.pdf>, p. 505. Some scholarship on the “legitimacy” and “effectiveness” of such international institutions and systems also suggests difficulties in ascribing causality. Measuring “State compliance to orders” would be both over and underinclusive. The lens could be overinclusive if it counts behaviors the State would already have done without the orders, for example as a result of orders which are “too easy” to follow. It could also be underinclusive by failing to notice adaptations and behavioral changes which are not direct “compliance”. Still, as many of the IAHR standards have to do with demanding a specific State solve a specific situation, the challenge of causality seems less pressing. For an overview of this discussion, HAWKINS, Darren; JACOBY, Wade. *Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights*. Journal of International Law and International Relations, vol. 6, issue 35, 2010, p. 2 (also suggesting that measurements of compliance to more concrete and specific standards do not have the same problems of causality).

³¹⁰ HUNEEUS, A. *Courts Resisting Courts*, p. 505.

compliance. As Daniel Cerqueira notes, the Court is still³¹¹ monitoring the enforcement of *Barrios Altos v. Peru*, a judgment with a truly outsized impact, both in the System itself and regionally³¹². Other judgments have a similar fate: although they have not been fully enforced, they have taken a life of their own, with demonstrable influence regionally³¹³. Nevertheless, one should resist the temptation to ascribe this transformative impact to all Inter-American standards³¹⁴, not least because States are recalcitrant to implementing even widely-known and lauded ones³¹⁵.

Returning to the starting point, even if the IAHRs is able to explain and justify the phenomenon of non-compliance to its orders, this is a clear problem. The Court has developed a wide body of reparations it demands of States when there has been a human rights violation, including reparations which have the stated aim of preventing future rights violations³¹⁶. As the System is simply not able to solve all of its workload³¹⁷, it prioritizes those cases where IAHRs intervention is deemed to have the biggest impact³¹⁸. If these orders are not complied with³¹⁹, the IAHRs has failed its mission to prevent grave human rights violations, and this is not a

³¹¹ This comment was originally made in 2021, but it remains true at the time of writing. The last resolution monitoring the implementation of the case dates from September, 2025, and notes that some orders remain unfulfilled.

³¹² CERQUEIRA, Daniel. *Por un abordaje crítico del impacto de las decisiones del sistema interamericano de derechos humanos*. Anuario de Derechos Humanos, vol. 17, n. 2, 2021, <https://doi.org/10.5354/0718-2279.2021.65021>, p. 262.

³¹³ *Ibid.*, p. 263.

³¹⁴ *Ibid.*, p. 273.

³¹⁵ As Cerqueira notes (*Ibid.*, p. 262), the System has a clear and long-standing standard against the criminalization of *desacato*, a crime that persists in Brazilian legislation. In 2020, the Brazilian Supreme Court spoke on the matter (ADPF 496), and stated that Brazilian legislation is fully in accordance with the Inter-American System, as no *binding* standards would actually require *desacato* to be decriminalized.

³¹⁶ Inter-Am. Court HR. *Case Law Bulletin n. 32 on Reparation Measures*. 2nd edition, 2025. Available (in Spanish) at: <https://bibliotecacorteidh.winkel.la/Product/ViewerProduct/1630#page=1>.

³¹⁷ The IACHR's 2024 Annual Report states that it evaluated 80.5% of the petitions received that year, for example. See IACHR, Annual Report 2024, OEA/Ser.L/V/II, Doc. 39 rev. 2, March 26, 2025, Chapter II, para. 14.

³¹⁸ Article 29.2.d of the IACHR Rules of Procedure.

³¹⁹ For the present aims, it is not necessary to draw any further distinctions than “complying” or “not complying” with the Court. As Hawkins and Jacoby suggest, “partial compliance” may mean a great amount of things, and should not be interpreted as a “waystation to full compliance” (HAWKINS, D.; JACOBY, W. *Partial Compliance*, p. 2.). There are many reasons why a measure can be partially complied with, ranging from simple recalcitrance of States to heightened logistical difficulties in fulfilling the remaining part of the order (such as needing to locate a missing person in order to fully comply with an order to pay dozens of people). The Court's own account of this phenomenon is also not especially helpful, as sometimes the Court will state that “part of an order was fully complied with”, instead of stating that the order was partially complied with (REBELO, L. *Uma análise empírica*, p. 32).

lesser issue. Law obviously does not need full enforcement to “do something”³²⁰. At the same time,

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 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 compulsion³²¹.

In any case, the character constructed by the field of “institutional lawyer”, then, is someone concerned with “concreteness” and “normativity”, with the field’s ability to ask for change and to obtain it. Certainly, some humanitarian sensitivity is present on this movement, but IHRL presents itself as being *law*, with the intent that this *law* can be opposed to uncooperative States³²². Her biggest preoccupation, then, is *balancing* these concerns.

5.4. Balancing and IAHRs technology

As does the international lawyer generally, the IAHRs lawyer sees her job as “balancing” between competing views. The main objective of the IAHRs, as chapter 5.2 above notes, is to constrain State action. But this can be better understood as *balancing* these constraints with States’ own interests. Thus, the main “game” that structures the field is the institutionalized attempt to impose standards that alter State behavior, while not forgetting that these very States have created the System, and their funding is imperative for its continued survival.

Under this stylized description, the institutions are torn between the demands of victims and their representatives, and the possible reprimands of States. If the institutions listen to the victims “too much”, they are liable to anger the States and threaten their own funding; if they listen “too little” and support all State action,

³²⁰ KLABBERS, J. *Inter-disciplinarity and the Law of International Organizations*, p. 49.

³²¹ MÉGRET, F. *The Apology of Utopia*, p. 494.

³²² *Ibid.*, p. 462.

they fail the core mission of curbing State activity. This vignette puts the spotlight on two roles, besides our institutional lawyer: the representative of a victim³²³, demanding reparations (allegedly) without regard for consequences; and the agent of the State, who depends on what the Federal Executive's current posture towards the IAHRs is, but is trying their best to prevent the recognition of international liability³²⁴.

The daily rites of this professional activity give the institutional lawyer reasons to place themselves at the center of the System, and as the arbiter between these two parties. While States have the discretion not to implement any orders, they usually fight hard to avoid these orders from being issued at all. The IACHR's landmark first visit took place in Argentina, while the country was under its brutal military junta³²⁵, and even this government wished to receive a positive evaluation from the IACHR, famously attempting to hide political prisoners from the Commission³²⁶. This does not mean an unconditional acceptance of a textbook account of States in any way "needing" validation from these international systems. But whatever human rights are and do, they seem to be an "irritant" to power, to cause some effect on existing structures, even if institutional lawyers cannot fully predict or control it³²⁷.

David Kennedy offers a compelling first-person account of the conflicting goals and desires of the human rights lawyer in describing his visit to prisons during

³²³ I choose to mention the victim's "representatives", and not the victims themselves, as they are more directly *part* of the field and, in attempting to speak its language, are locked in its internal struggles. Much can be said of how institutionalized human rights systems see its archetypal "victims" as distant "others" (see generally KENNEDY, David. *Spring Break*; MUTUA, Makau wa. *Savages, Victims and Saviors*). In the IAHRs's self-image, it is not as "distant" to its victims as this image portrays: if David Kennedy's *Spring Break* portrays his anxieties regarding the differences between the U.S. and Uruguay, the System's lawyers are either Uruguayan or from neighboring countries, and would be able to understand it better. Still, there is a wide gap between an elite Uruguayan lawyer and an impoverished victim of brutal State violence that nationality cannot bridge.

³²⁴ Clearly, the characters in this description are quite flat, to say nothing of the complexities that implementing these standards requires. The prevailing wisdom in the field is that implementation requires all three "characters" to work in tandem: the State is responsible for "doing" it, but civil society usually needs to continue advocacy domestically after the standards are laid out. Still, this incompleteness is intentional, as the ultimate goal – see chapter 6 below – is describing how these idealizations fall short of actual practice, and cannot fully explain the field.

³²⁵ IACHR, *Country Report - Argentina*, OEA/Ser.L/V/II.49, Doc. 19, April 11, 1980, Available at <https://cidh.oas.org/countryrep/argentina80sp/introduccion.htm>.

³²⁶ SUBSECRETARÍA DE DERECHOS HUMANOS ARGENTINA, *A 40 años de la histórica visita de la CIDH*, September 17, 2019, Available at: <https://www.argentina.gob.ar/noticias/40-anos-de-la-historica-visita-de-la-cidh>.

³²⁷ HOFFMANN, F. *Human rights, the self and the other*, p. 225.

the Uruguayan military regime. In his words, the experience of “doing activism” cannot be “flatten[ed] (...) into a single unambiguously true experience”³²⁸. His visit was marked by “confusion” regarding what it should really accomplish³²⁹. Was it talking sternly to Uruguayan authorities and attempting to “shame” them for the political repression being conducted? Or should the rapport with these actors be more friendly and respectful, hoping to seduce them into treating the prisoners better by appealing to their “reasonableness”?³³⁰

These calculations are evidently pragmatic: the reasons for avoiding the “morally correct” route of condemning these men was to seek a better treatment for the prisoners under their control. David Kennedy, however, could not know what were the outcomes of each choice under his control; in his words, he only interacted with the Uruguayan officials as they existed in his “imagination”³³¹. If this softer treatment would not lead to any benefits to the prisoners, maybe it is only “flirtation”, “complicity”³³² with the grave violations being conducted.

The human rights lawyer cannot flee this ambiguity of her work³³³. As Kennedy notes, one can easily lapse into searching for rationalizations of this “compromise”, attempting to balance the values of “authenticity” and “effectiveness”, and formulate strategies that one believes are both “moral” and “effective”³³⁴. Still, the human rights lawyer cannot have a definitive account of the impacts of her actions, and can only act through this uncertainty. The pressing demands of everyday practice and the existence of easy cases don’t solve this problem, as they equate to the lawyer “treat[ing] the ambiguity as already having been resolved in action”³³⁵. This effect is unsurprising, considering that the international lawyer’s trade has her distill abstract and convoluted scenarios into a clear legal formulation which “obscures all intricacies, inconsistencies, and hesitations that marked every phase of the process”³³⁶.

Against this backdrop, Outi Korhonen speaks of the responsibility the international human rights lawyer needs to bear for her choices and her project.

³²⁸ KENNEDY, David. *Spring Break*, p. 1392.

³²⁹ *Ibid.*, p. 1395.

³³⁰ *Ibid.*, p. 1396.

³³¹ *Ibid.*, p. 1388.

³³² *Ibid.*, p. 1388.

³³³ *Ibid.*, p. 1390.

³³⁴ *Ibid.*, p. 1396.

³³⁵ *Ibid.*, p. 1388.

³³⁶ SOAVE, T. *The Puzzle of Freedom*, p. 140.

Recognizing international (human rights) law as situated prevents the lawyer from claiming to simply be a “scientist”³³⁷, discovering previously existing meanings. In quite the opposite way, I(HR)L bears responsibility for the outcomes its practice produces, as “[e]ven ‘no comment’ is a comment”³³⁸. While international law can, theoretically, produce expressions which are of no pragmatic value and do not (attempt to) influence the world, Korhonen notes that this is done at the expense of IL’s relevance³³⁹. In short, attempting to truly work with the most pressing issues of one’s time requires a frontal and open engagement with one’s choices and their results.

In David Kennedy’s biting view, international human rights lawyers are repelled by this idea because “we do not think of ourselves as rulers. Other people govern, and it is our job to hold them responsible. It seems perverse to blame the humanitarians—the good guys, the ones trying to make things better.”³⁴⁰ Are the keepers of “the promise of turning swords into ploughshares”³⁴¹ really the ones to blame?

Returning to an earlier note on human rights as “anti-politics”, speaking of human rights in terms of “power” and “governance” seems to abandon one of its core tenets, of precisely not depending on any one political ideology³⁴² to be implemented³⁴³. Makau wa Mutua poses a similar conjecture, under which the human rights movement attempts to be “non-ideological”, meaning (artificially) non-political³⁴⁴. In a sense, the project of human rights “wants” to remain marginal in major distributional choices, to not bear the responsibility for creating winners and losers³⁴⁵.

As a brief aside, the Inter-American System has a complex relationship with the criticism of international (human rights) law’s propensity to (“Western”) imperialism. This criticism most often suggests that international law is too

³³⁷ KORHONEN, O. *New International Law*, p. 5.

³³⁸ *Ibid.*, p. 6.

³³⁹ *Ibid.*, p. 7.

³⁴⁰ KENNEDY, David. *The Dark Sides of Virtue*, p. xix.

³⁴¹ KLABBERS, J. *Inter-disciplinarity and the Law of International Organizations*, p. 50.

³⁴² I do not mean to use this word in any technical sense, but it could be adequate to characterize political positions “not based on human rights” (if this is at all possible) as “ideology” in the eyes of the IHRL practitioner, in the very common usage of the word to mean something like “false consciousness”.

³⁴³ MÉGRET, F. *The Apology of Utopia*, p. 457.

³⁴⁴ MUTUA, Makau wa. *The Ideology of Human Rights*, p. 591.

³⁴⁵ KENNEDY, David. *The Dark Sides of Virtue*, p. xxv.

susceptible to the input of wealthy or otherwise dominant nations³⁴⁶, and does not value enough the contributions of, for example, American countries besides the United States and Canada. As these countries hold sway over the IAHRs, it is easy to describe it as a forum for them to make international law, through its thematic emphases or creative solutions³⁴⁷. At the same time, the nationalities of the institution's lawyers do not automatically mean that all critique has been solved. Precisely in dealing with such thematic emphases, and attempting to craft such solutions, the IAHRs receives much criticism for not going far enough, or for not foregrounding, e.g., racial dynamics in its judgments³⁴⁸.

Perhaps the Inter-American System should not be described as a “ruler” in this scheme, as, to put it bluntly, this would require it to obtain higher rates of implementation for its orders, a problem Kennedy is not concerned with in his description³⁴⁹. In other words, it is probably not worthwhile to think about the negative distributional consequences of orders which, as a rule, are not fulfilled. Still, the image of the lawyer as “balancer” is a sort of “pragmatism of consequence”³⁵⁰, trying to imagine the field as not bogged down by endless theoretical debate, but thinking about what outcomes are going to be produced by its decisions and seeking the best one. This sounds more “hard-boiled”³⁵¹ than IHRs's usual emphasis on utopia³⁵², and seems designed to give the project a greater “seriousness”; in Koskenniemi parlance, a grounding in reality that utopia often lacks.

³⁴⁶ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 23. Of course, at this high level of abstraction, this notion conflates both “nations” and “lawyers” from these nations who may enjoy pride of place in certain fields. This does not suggest a concerted or intentional process, much as chapter 3 above suggests that fields may produce such results even without explicit coordination.

³⁴⁷ For a discussion of epistemological groundings of different “projects” of international migration, see ROSA, Marina de Almeida. *O Encontro do Direito Internacional dos Refugiados com o Sul Global: Uma análise do "conceito do Sul" de refugiado e de sua não aplicação pelas Nações Unidas*. Presented as a Master's Dissertation in 2019, UNISINOS. Available at: https://repositorio.jesuita.org.br/bitstream/handle/UNISINOS/8969/Marina+de+Almeida+Rosa_.pdf?sequence=1.

³⁴⁸ For one such example in the Brazilian context, see BERNARDES, Márcia Nina; FERNANDES, Luciana Costa; PINHEIRO, Maísa Sampietro. *Violência antinegra de Estado: reescrita do caso “Favela Nova Brasília” sob uma perspectiva decolonial*. Dossiê: Julgamentos Feministas Brasileiros, Revista Direito e Práxis, vol. 15, issue 1, Jan-Mar 2024, <https://doi.org/10.1590/2179-8966/2024/81220>.

³⁴⁹ KENNEDY, David. *The Dark Sides of Virtue*, p. xviii.

³⁵⁰ *Ibid.*, p. xxii.

³⁵¹ *Ibid.*, p. xxii.

³⁵² MÉGRET, F. *The Apology of Utopia*, p. 460.

But this can be defined as an appeal to “pragmatism” in the face of theoretical issues, which, as has been showcased before, can never really banish “theory”. Kennedy also challenges this pragmatic view on its own terms, challenging the ability of the international lawyer to effectively predict the consequences of each available path (she can see)³⁵³. In a sense, Cançado Trindade’s warning against pragmatism could be read as saying that engaging in such calculations is too difficult, and the lawyer should expect best results over time by sticking to human rights in their “undistorted” meaning. Of course, this view posits that there exists such a “pure” meaning to be objectively apprehended, but sheer repetition does not make doctrinal solutions any “truer”³⁵⁴; and so the cycle resumes.

5.5. Brief examples

Some cases from the IAHRs will be discussed with the vocabulary developed in the previous chapters. This does not aim to draw generalizations on all cases, and it is also important to avoid seeing cases as “magically” changing the system, as discussed in chapter 4.2 above. In other words, a comprehensive analysis of any change would require interrogating its social conditions of possibility³⁵⁵: why was the previous configuration preferred in the field? Which actors advocated for this change previously, and why had they not succeeded until this point? These points, and others like it, will not be tackled, leaving open the question of *why* and *how* the changes happened.

Two situations will be discussed. First, a brief analysis of the Court’s changing jurisprudence on article 26, ACHR, will serve as an example of the themes of reversibility and indeterminacy. Second, a diffuse overview of some cases, including the landmark Advisory Opinion 5, will serve as an example of the difficulty in distinguishing “case-law” from “theory”.

These two cases were chosen because the Court could not rely on its previous case-law, as they inaugurate new understandings. For this reason, the Court turns more explicitly to theoretical considerations, which can be more directly compared to the arguments made in the above chapters. In both cases, the precise results

³⁵³ KENNEDY, David. *The Dark Sides of Virtue*, p. xxiii.

³⁵⁴ MÉGRET, F. *The Apology of Utopia*, p. 470.

³⁵⁵ See chapter 3 above.

reached by the Court are less important than interrogating the structure of argumentation.

5.5.1. Variations on a theme: article 26, ACHR

Part I of the American Convention on Human Rights – State obligations and rights protected – is divided in three chapters. The first, comprised only of articles 1 and 2, posits that States are bound to “respect” (and “ensure”³⁵⁶) the rights described in the Convention. The second chapter is titled “civil and political rights”, and details, between articles 3 and 25, the rights held by “every person” or “all persons” or “everyone”³⁵⁷. Its third chapter has only one article, article 26, which reads quite differently from the preceding ones:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires³⁵⁸.

This difference in language is similar to the one between the International Covenants on Civil and Political Rights, on one hand, and the Economic, Social and Cultural Rights, on the other. As the *travaux préparatoires* show, this is not a

³⁵⁶ These two verbs have developed into two “dimensions” of State obligations regarding rights. The Court’s more abstract expositions on both dimensions, and how they relate to each other, can be seen in the judgments of the Mapiripán and Pueblo Bello massacres in Colombia (Inter-Am. Court HR. *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006 (Merits), ser. C, n. 140; Inter-Am. Court HR. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005 (Merits, Reparations and Costs), ser. C, n. 134). It is worth briefly noting that, in the Inter-American System, it is incorrect to state that there are rights requiring “positive” actions and rights requiring “negative” ones, as is sometimes advanced by theoretical discussion on the “generations” of rights, as these two cases show that both dimensions apply to the same substantive rights, with different obligations.

³⁵⁷ Article 23, ACHR, notes that “all *citizens*” hold political rights, not all *persons*, but this is a generally accepted restriction which is not relevant for present purposes

³⁵⁸ ACHR, article 26.

coincidence³⁵⁹, as these covenants were explicitly taken as inspiration³⁶⁰. Some alternate proposals had much more comprehensive instructions on how the Commission should act regarding the rights described in article 26, including mechanisms for technical cooperation between States³⁶¹. Foregoing a more comprehensive analysis of State intentions, article 26 asks States to do their “best efforts”, which is apparently not really the same as “respecting” or “ensuring”.

The System’s early interactions with article 26 emphasized this difference between these and other rights. In *Five Pensioners v. Peru*, the Court said that the “full realization” of ESC rights³⁶² is something that can only be measured by having a broad view of how these matters are attended to at the social level, not by studying individual cases, and this must be so because of “social equity”³⁶³. Other cases such as *Acevedo Buendía* go a bit further in their interpretation, but the general gist does not change³⁶⁴.

The Court can be read as saying that these rights, differently to the others, involve trade-offs, distributional choices, which it does not want to make. The State can never have any reason to kidnap children and torture their parents³⁶⁵, or to ignore reports of grave sexual violence³⁶⁶. But if the Court states that public policy must be made to improve healthcare or education or cultural access in a specific region, it is probably interfering in the State’s ability to provide these same rights to other persons or regions. It would do this at the expense of “leaving law” and “entering politics” (if, under the framework developed here, such a move is at all possible).

González Lluy and *Lagos del Campo* mark a complete reversal of this doctrine. In *Lagos del Campo*, the Court reminisces on the “indivisibility” of

³⁵⁹ Organization of American States, *Actas de la Conferencia Especializada sobre Derechos Humanos* (Travaux préparatoires ACHR), OEA/Ser.K/XVI/1.2, Costa Rica, November 7-22, 1969, available at: <https://www.oas.org/es/cidh/mandato/basicos/actas-conferencia-interamericana-derechos-humanos-1969.pdf>, p. 43.

³⁶⁰ *Ibid.*, p. 47.

³⁶¹ *Ibid.*, p. 119.

³⁶² To which, of course, the System now adds environmental rights, and nothing in this section should be read as arguing otherwise.

³⁶³ Inter-Am. Court HR. *Case of Five Pensioners v. Peru*. Judgment of February 28, 2003 (Merits, Reparations and Costs), ser. C, n. 98, para. 147.

³⁶⁴ Inter-Am. Court HR. *Case of Acevedo Buendía and others v. Peru*. Judgment of July 1, 2009 (Preliminary Exception, Merits, Reparations and Costs), ser. C, n. 198, para. 103.

³⁶⁵ Inter-Am. Court HR. *Case of Gelman v. Uruguay*. Judgment of February 24, 2011 (Merits and Reparations), ser. C, n. 221.

³⁶⁶ Inter-Am. Court HR. *Case of López Soto v. Venezuela*. Judgment of September 26, 2018 (Merits, Reparations and Costs), ser. C, n. 362.

rights³⁶⁷, noting that article 26 is under Part I, as are all the other rights it rules on³⁶⁸, meaning State liability can be analyzed relative to it. The only problem with this is that article 26 says nothing at all about what States must do to preserve any one right. For this reason, the Court sets out to “analyze the content” of (the specific right under) article 26, which it finds in a mix of General Observations by UN treaty bodies³⁶⁹, ILO conventions³⁷⁰, and conventions from other systems, including African and European ones³⁷¹.

This strategy has clear *descending* overtones, made more explicit by mention of the state of human rights interpretation in countless other systems. But even in a regional human rights court, it is probably not adequate to be fully descending and argue from an abstract view of rights, and the arguments must be reconstructed as *ascending* ones. Judge Ferrer MacGregor’s separate opinion combines both strategies, noting that while the decision is an innovation, it is also a recognition of features already existing in the wider corpus of international human rights law³⁷².

The full extent of his movement between ascending and descending justifications can be seen in his separate vote in *Yarce*, which he restates in *Lagos del Campo*. He begins by noting, in descending fashion, that the previously dominant interpretation is not in line with what the Inter-American System “should” do³⁷³. But what it “should” do is also no more than what States have actually agreed upon when drafting the Convention. For this reason, the correct interpretation can be surmised simply by reading article 26 in accordance with the Vienna Convention’s dictates of “good faith” and “ordinary meaning”³⁷⁴, or even by their “literal meaning”³⁷⁵, going as far as quoting dictionary definitions³⁷⁶.

³⁶⁷ Inter-Am. Court HR. *Case of Lagos del Campo v. Peru*. Judgment of August 31, 2017 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 340, para. 141.

³⁶⁸ *Ibid.*, para. 142.

³⁶⁹ *Ibid.*, para. 147.

³⁷⁰ *Ibid.*, para. 148.

³⁷¹ *Ibid.*, para. 145.

³⁷² Inter-Am. Court HR. Separate Opinion of Judge Ferrer Mac-Gregor, in the *Case of Lagos del Campo v. Peru*, para. 9.

³⁷³ Inter-Am. Court HR. Separate Opinion of Judge Ferrer Mac-Gregor, in the *Case of Yarce and others v. Colombia*, Judgment of November 22, 2016 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 325, para. 19.

³⁷⁴ *Ibid.*, para. 21.

³⁷⁵ *Ibid.*, para. 23.

³⁷⁶ *Ibid.*, para. 24.

This is, quite clearly, the dominant interpretation in the field today³⁷⁷, and has been restated in many subsequent judgments on article 26³⁷⁸. Some notable holdouts have not been convinced³⁷⁹, but the objective here is not to determine which is the “correct” interpretation. In its recourse to other systems and other instruments to determine the “content” of specific rights, the Court has had to deal with the meaning of State consent in some thorny situations. One notable example is its case-law on indigenous peoples, which is extensively based on the dictates of the ILO’s Convention 169; the Court relies on States being parties to this Convention³⁸⁰, even though it does not have explicit competence to recognize violations to it. When facing the State of Surinam, which is not a party to Convention 169, the Court recognized that it could not apply its dictates³⁸¹. Even then, through extensive mentions to its case-law (where it applied the Convention)³⁸² and to other human rights systems³⁸³, it is not clear that the final judgment was any different.

Under the theoretical framework developed in the previous sections, it is not possible to argue for a correct interpretation on these issues that would stem directly from (international) legal argumentation. These are all choices, which may be done with more or less recourse to pragmatics, with better or worse consequences. But in matters so clearly tied with public policy and distributional choices, it becomes harder to not acknowledge the costs, the risks, the “losers” that any such choice may create³⁸⁴. It may well be that the choices a State makes are wrong and flawed, and bodies such as the Court can steer them in a better direction; but it seems pointless to insist that this is not “politics”, but only “expertise”³⁸⁵.

³⁷⁷ See generally AZAMBUJA, Marcelo Andrade de; ROSA, Marina de Almeida. *Caso Lagos Del Campo vs Peru: a virada jurisprudencial da Corte IDH sobre a justiciabilidade dos direitos econômicos, sociais, culturais e ambientais*. In: SIMÕES, Bárbara Bruna de Oliveira et al. (orgs.). *Temas Atuais de Direitos Humanos: Volume 3 - Estudos sobre a Corte Interamericana de Direitos Humanos*. Editora Fi, 2021. Available at: <https://www.editorafi.org/367temas>.

³⁷⁸ Inter-Am. Court HR. *Case of Beatriz and others v. El Salvador*. Judgment of November 22, 2024 (Merits, Reparations and Costs), ser. C, n. 549, para. 123.

³⁷⁹ See Judge Sierra Porto’s dissenting opinion in the *Case of Dos Santos Nascimento and other v. Brazil*, in which he also summarizes his historical disagreements to this change, even before it happened.

³⁸⁰ Inter-Am. Court HR. *Case of the Rama and Kriol Peoples, The Black Creole Indigenous Community of Bluefields and others v. Nicaragua*. Judgment of April 1, 2024 (Merits, Reparations and Costs), ser. C, n. 522, para. 38.

³⁸¹ Inter-Am. Court HR. *Case of the Kaliña and Lokono Peoples v. Surinam*. Judgment of November 25, 2015 (Merits, Reparations and Costs), ser. C, n. 309, para. 122.

³⁸² *Ibid.*, paras. 129-134.

³⁸³ *Ibid.*, para. 123.

³⁸⁴ KENNEDY, David. *The Dark Sides of Virtue*, p. xix.

³⁸⁵ *Ibid.*, p. xxiv. See, for example, Daniel Wei Liang Wang’s work on individual health care judicialization in the Brazilian context. The common sense around this phenomenon is that such

5.5.2. “Technology” and “politics”

Some of the conceptual schemes drawn above present some kind of distinction between the “technology” of a field and its overarching theoretical aspirations. This notion has also been challenged, under the argument that the “technology” is theoretically situated. In the System, it is hard to argue that such a distinction even exists in the first place, as its “case-law” is fundamentally reflective of its conception of “rights”. Although a long reconstruction of how this phenomenon plays out in the field will not be attempted, some brief examples can illustrate this, starting with Advisory Opinion 5 and moving on to some frontier debates.

The judgment issued by the Inter-American Court in its Advisory Opinion 5 is considered a landmark case for many reasons, and it still holds pride of place in its case-law on freedom of expression. It is, in a sense, the Court’s first judgment dealing with substantive law, partially owing to its unorthodox history, in which it is essentially more a *case* than an opinion³⁸⁶. Either way, forty years later, it still is cited by both the Commission³⁸⁷ and Court³⁸⁸ for any and all matters on freedom of expression. Clearly, it is a core part of the field’s technology on this issue.

But its argumentation makes no effort to be “technological”, to compile existing legal standards and point to their solution. The Court considers what is the correct way to interpret terms such as “public order” and “general welfare”, making no explicit mention to other legal dictates³⁸⁹. The apex of the opinion is a rousing passage on freedom of expression as a cornerstone of democracy – since repeated

cases are often brought, and have high success rates, but the costs are not often explicitly considered; his research attempts a closer look at the actual case-law (WANG, Daniel Wei Liang. *Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF*. Revista Direito GV, vol. 4, issue 2, July-December 2008, pp. 539-568. Available at: <https://www.scielo.br/j/rdgv/a/5ScHqNs657gS9gsNhYcmFbg/?lang=pt>).

³⁸⁶ VACA, Pedro (Host). *La decisión de una Corte sin casos*. Podcast *Deliberante*, November 13, 2025. La No Ficción. Available at: <https://open.spotify.com/episode/5cQwOje4NwyuBk4JiKfoYA?si=4639cfcb05a548e5>.

³⁸⁷ IACHR, SRFOE, *The Impact of Digital Surveillance on Freedom of Expression in the Americas*, OEA/Ser.L/V/II, CIDH/RELE/INF. 33/25, September 2025, Available at: <https://www.oas.org/en/iachr/expression/reports/VigilanciaRELECIDH.pdf>.

³⁸⁸ Inter-Am. Court HR. *Case of the Members of the CAJAR Corporation v. Colombia*. Judgment of October 18, 2023 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 506.

³⁸⁹ Inter-Am. Court HR. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29, American Convention on Human Rights). Advisory Opinion OC-5/85, November 13, 1985, para. 65.

countless times³⁹⁰ –, leading to a discussion on the “radical” character of speech in a democratic society³⁹¹.

It is quite difficult to argue that a mechanistic study of this judgment could “cleanse” it of its political and value-based content. Arguably, it has only reached its longevity and influence because it makes no pretense of “revealing” already-existing law. Naturally, as one of its very first pronouncements, the Court did not have much material of its own to cite, but it does show a wide appreciation for other international standards. Still, it cites other systems not to follow their approaches, but to note that they are *different* from what the American Convention states, and so that the Court should not follow what they say³⁹² (which the Commission later restated³⁹³).

This position as an unavoidable basis for case-law on article 13 has not come without its problems. A core concern of Advisory Opinion 5 is stating that “truthfulness” is not a valid reason to restrict expression; in fact, restricting untrue expression does more harm to this right than it could do good³⁹⁴. This point still inspires heated discussion, as there are mounting calls to restrict untrue expression³⁹⁵. In fact, the System’s current developments on freedom of expression in the digital realm could be described as no longer following the overarching assumptions of Advisory Opinion 5³⁹⁶, even as the Opinion has not otherwise lost its prestige, and is often cited in the same breath³⁹⁷.

Without going deeper into the subject matter of the Opinion, it might be hard for the System to promote a substantive change to a standard which is so embedded

³⁹⁰ See, for example, Inter-Am. Court HR. *Case of Viteri Ungaretti and others v. Ecuador*, Judgment of November 27, 2023 (Preliminary Objections, Merits, Reparations and Costs), ser. C, n. 510, para. 79.

³⁹¹ Inter-Am. Court HR. *Advisory Opinion OC-5/85*, para. 77.

³⁹² *Ibid.*, paras. 45-46.

³⁹³ IACHR, *Martorell v. Chile*, Case 11.230, Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev., May 3, 1996, paras. 55–56.

³⁹⁴ Inter-Am. Court HR. *Advisory Opinion OC-5/85*, para. 77.

³⁹⁵ MARINO, Catalina Botero. *La regulación estatal de las llamadas “noticias falsas” desde la perspectiva del derecho a la libertad de expresión*. In: ALVAREZ, Ignacio et al. *Libertad de expresión: a 30 años de la Opinión Consultiva sobre la colegiación obligatoria de periodistas*. Estudios sobre el derecho a la libertad de expresión en la doctrina del Sistema Interamericano de Derechos Humanos. Available at: https://www.oas.org/es/cidh/expresion/docs/publicaciones/OC5_ESP.PDF.

³⁹⁶ This is clearly outside of the present scope; I have attempted to discuss this in greater detail in REBELO, Leandro Léo. *Can Prior Censorship be a Necessary Tool for the Protection of Human Rights?* American University International Law Review, vol. 40, issue 3, 2025, Available at: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2179&context=auilr>.

³⁹⁷ See generally ALVAREZ, Ignacio et al. *Libertad de expresión: a 30 años de la Opinión Consultiva sobre la colegiación obligatoria de periodistas*.

in its case-law. Its ascendancy over the Court's case-law is manifest. A pragmatic approach, then, would explain that, whatever many centuries of debates on freedom of expression may contain, an Inter-American lawyer can simply look at the premises of Advisory Opinion 5 and apply that to the case at hand. If the System seems increasingly reluctant to do that, this hesitancy cannot be explained by any pragmatic or "hierarchical" accounts of its case-law: it must simply disagree with *what* the Opinion says.

In any case, the dependence of the System's case-law on such clearly "subjective" notions opens the door for discussions to happen in "justice"-based terms. In fact, as alluded to in chapter 4 above, much discussion of human rights initiatives happens precisely around what politics they espouse, and it does not seem reasonable to defend that the System espouses no politics, only an application of very well-defined and objective "case-law".

If the discussion of such a well-established case already reveals some anxieties, they become much clearer at the frontier. The System has had many debates under the rubric of whether something which is not written in the American Convention is an "autonomous right"³⁹⁸. The Court has stated there is such a "right to defend rights" (i.e. to be a human rights defender)³⁹⁹; has a tentative relationship

³⁹⁸ The Inter-American System also includes other treaties, signed after the American Convention, which often use the language of "rights" to speak of things which are not described in the American Convention. This discussion does not apply to these aspects, and bears no weight on whether or how the Court should apply what is written in these other treaties. As a very passing comment, some of these treaties supply rules on how the Court should (or should not) apply them; but even when these rules exist in explicit fashion, there are controversies to be had, as the Belém do Pará Convention exemplifies.

³⁹⁹ Inter-Am. Court HR. *The Climate Emergency and Human Rights* (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of man). *Advisory Opinion OC-32/25* of May 29, 2025, Ser. A, n. 32, para. 561.

with the “right to a ‘life plan’”⁴⁰⁰; and is (at the time of writing) about to hear submissions on a “right to democracy”⁴⁰¹.

While the objective is not to discuss whether the Court is right or wrong in any of these cases, some warnings on what it means to proclaim a “right” to exist should be reproduced. Philip Alston wrote in 1984 that the “current trends” in what looked like a rapid expansion of the canon of rights meant that “the integrity of the entire process of recognizing human rights is threatened”⁴⁰²:

In principle, both the validity and the necessity of a dynamic approach to human rights, as well as the expansion, where appropriate, of the list of recognized human rights, cannot reasonably be disputed. However, reason for serious concern with respect to current trends arises not so much from the proliferation of new rights but rather from the haphazard, almost anarchic manner in which this expansion is being achieved. Indeed, some such rights seem to have been literally conjured up, in the dictionary sense of being ‘brought into existence as if by magic’.⁴⁰³

Of course, these points are not raised against one (or all) of the specific cases named above, as the distinction between the “necessary” and the “haphazard” can clearly only happen with attention to specific cases. Alston simply notes that some kind of criteria should be implemented in giving such proclamations, and he suggests considerations of “desirability, viability, scope [and] form”⁴⁰⁴. Such criteria naturally do not magically generate consensus on any specific claim⁴⁰⁵.

⁴⁰⁰ In the original Spanish, *proyecto de vida*; the term was taken from the translation of *Loayza Tamayo v. Peru*, para. 147. The Separate Opinions in the recent *Case of Dos Santos Nascimento and other v. Brazil* explain the “life project” originated as a way to calculate reparations (as in: material damage, immaterial damage, and “life project”). Some of the judges in the bench at that time, however, apparently wanted the Court to declare it an “autonomous right”, while Judge Sierra Porto wrote an opinion against this declaration. Whatever happened behind closed doors, the resulting Opinion places “life plan” in a strange intermediary category, in which it is treated *almost* as a right, but with the conspicuous absence of the word “right”.

⁴⁰¹ The Court has before it a request for an Advisory Opinion on whether democracy is “a right protected by the American Convention” (https://www.corteidh.or.cr/docs/opiniones/soc_1_20_25_spa.pdf). It will hold a hearing on this matter between March 17 and 20, in Brazil.

⁴⁰² ALSTON, Philip. *Conjuring Up New Human Rights: A Proposal for Quality Control*. American Journal of International Law, vol. 78, issue 3, Jul. 1984, p. 607.

⁴⁰³ *Ibid.*, p. 607.

⁴⁰⁴ *Ibid.*, p. 614.

⁴⁰⁵ *Ibid.*, p. 614.

But something that seems quite important in the political climate of the IAHRs is, once again, the issue of sovereign consent. The System has, in a roundabout way, defined all of its proclamations to be in accordance with (tacit) consent, in three simple steps. First, the States have agreed to follow the dictates of the Convention; not only have they signed and ratified it (and we can call the Vienna Convention to our aid), but article 2 also speaks of adapting internal law in its accordance. Second, the Court is the “ultimate interpreter”⁴⁰⁶ of the Convention, so that States must also follow its pronouncements on what rights mean and entail. Therefore, in cases like *Tenorio Roca* mentioned above, the Court can tell States that they have, indeed, consented to what is not written in the Convention, since they also consented at that time that such a Court would interpret these rights.

It would be perfunctory to reproduce the criticisms against this strategy laid out in chapter 2.2 above. Quite plainly, while the State can be made to follow this new interpretation, and might have initially only objected for strategical reasons, it cannot be made to agree that it has “consented” to something it has not. States retain the ability to add new rights to conventional protection by drafting new protocols, as provided for by article 77 of the Convention, and have drafted entirely new treaties on “rights” which they have placed under the jurisdiction of the Court⁴⁰⁷. This suggests that States do not, in fact, “consent” to the existence of these autonomous rights, as if they did, there existed many paths to enshrining them. (Perhaps, *contra* the textbook approach, this consent is not really necessary; but without it, we are back to discussing “choices”.)

The last practical point regarding the declaration of autonomous rights in the IAHRs is considering the impact of such a declaration on the protection of human rights. The American Convention does not enumerate consequences for violating “one right” as opposed to “two rights”, and the Court’s practice on reparations is notoriously flexible, seeking reparations that would be useful in the instant case⁴⁰⁸.

⁴⁰⁶ Inter-Am. Court HR. *Case of Pérez Lucas and others v. Guatemala*. Judgment of September 4, 2024 (Merits, Reparations and Costs), ser. C, n. 536, para. 238.

⁴⁰⁷ See, for example, the Belém do Pará Convention, which the Court has used to find international liability of States for not following it in many cases (e.g. *Case of Campo Algodonero v. Mexico*). Notably, reviewing the Court’s jurisprudence on the Belém do Pará Convention also shows States employing a “consent”-based argument for strategic reasons, arguing against the plain text of this Convention.

⁴⁰⁸ See generally Inter-Am. Court HR. *Case Law Bulletin n. 32 on Reparation Measures*. 2nd edition, 2025. Available (in Spanish) at: <https://bibliotecacorteidh.winkel.la/Product/ViewerProduct/1630#page=1>.

For these reasons, judges opposed to some autonomous rights have historically insisted that this declaration would not, in fact, increase the level of their protection⁴⁰⁹.

Having made these considerations, the ultimate point is that the institutional lawyer cannot convincingly appeal to the “technology” of the field against other stakeholders’ (subjective, situated) preferences in such matters. Her argument for the expansion of the field’s technology must be made by appealing to something other than the technology itself. Of course, the deft international lawyer is expected to both ascend and descend, and such changes are often described as the recognition of features already latent in the field’s technology⁴¹⁰: the law “is always already changing, indeed, always already progressive”⁴¹¹. Even then, this requires the lawyer to briefly leave her position as holding the scales between the unacceptably subjective opinions of opposing parties, and the shelter that being “technical” provides.

5.6. Summary: between technology and stakeholder pressure

The institutional lawyer has cause to imagine themselves as having the upper hand, as they wield the System’s power daily. At the same time, the institutions are subject to the opposite pulls of civil society and States. Lawyers are aware that civil society is the System’s “client”, and, in many ways, the fuel for its daily operations. The System has an immense backlog of cases⁴¹², and it deems most petitions to be inadmissible⁴¹³. But even the most superfluous petitions speak, in a way, to the System’s relevance, to its image as something citizens can contact when they cannot

⁴⁰⁹ See Judge Sierra Porto’s Separate Opinion in *Case of Dos Santos Nascimento and other v. Brazil*.

⁴¹⁰ See Judge Mac-Gregor’s Separate Opinion in *Case of Lagos del Campo v. Peru*. Of course, this argument may be true more often than it is false, as momentous changes usually do not happen overnight. As they quite possibly require a shift in the “social conditions of possibility” of an argument in the field, it should be possible to trace their footprints in previous legal opinions. Still, a change is a change.

⁴¹¹ SCHLAG, Pierre. *Law as the Continuation of God by Other Means*. California Law Review, vol. 85, 1997. Available at: <https://scholar.law.colorado.edu/faculty-articles/668>, p. 428.

⁴¹² Which, of course, it attempts to diminish, and recent strategies by the IACHR seem to be effective in reducing the cases in its portfolio. “Cases” is not meant in the technical language of the System, as the IACHR has the power to decide which petitions become “cases”, and so many petitions do not reach this stage.

⁴¹³ In 2024, the IACHR admitted only 14% of the petitions it received. IACHR, Annual Report 2024, OEA/Ser.L/V/II, Doc. 39 rev. 2, March 26, 2025, Chapter II, para. 14.

solve problems internally. Having too few cases would probably be worse than having too many.

Many institutional lawyers also express the feeling that civil society has an outsized influence in deciding which of the System's standards actually get implemented, perhaps more than the System itself does. A former Judge of the Court once expressed that its judgments are "scraps of paper" without civil society to fight for their implementation⁴¹⁴. The Commission also spends considerable time and resources in its activities of "promotion", which largely consist of attempting to disseminate already existing standards, more than creating new ones. Its country-based mechanisms also reflect a similar dynamic. Interactions between the IACHR and prominent civil society groups strengthen both sides: civil society has a forum to speak on pressing issues, and the Commission reinforces its image as a worthwhile forum.

States, for their part, are the entities that IHRL seeks to control and constrain, but their cooperation is needed for the constraints to work; the State is the perpetrator of violations and the implementer of remedies⁴¹⁵. Only very cynical views of IHRL, according to which these mechanisms exist to validate State action⁴¹⁶ (in other words, are too apologetic), would probably give the power to "validate" law to the institutional lawyer, and not directly to the State. Still, even the IAHRs cannot truly affirm that State consent does not matter, given its foundational influence. How, then, do States influence the System?

States, of course, have strong opinions on what IHRL is or should be, which they often express in quite forceful manners. In the System, States have banded together to write "declarations" and manifestos against what they perceive as excessive expansions, asking the institutions to, functionally, give States more leeway. One such example is the 2019 declaration signed by Argentina, Brazil, Chile, Colombia and Paraguay⁴¹⁷, suggesting the IAHRs does not take adequate

⁴¹⁴ AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW. El Sistema Interamericano de Derechos Humanos (seminar). Advanced Program on Human Rights and International Humanitarian Law, 2025.

⁴¹⁵ MÉGRET, F. *The Apology of Utopia*, p. 467.

⁴¹⁶ Of course, there is much cause to be "cynical" or "pessimistic". While discussing this is (just) outside of the current scope, the professional lawyer or professor has to tackle with the severe human rights violations that continue to occur despite her opposition. See generally DOUZINAS, Costas. *Human Rights and Empire: The political philosophy of cosmopolitanism*, Routledge, 2007, p. 216 *et seq.*

⁴¹⁷ Ministerio de Relaciones Exteriores/Paraguay. *Declaración sobre el Sistema Interamericano de Derechos Humanos*. April 23, 2019. Available at: <https://www2.mre.gov.py/index.php/noticias-de->

account of the “margin of appreciation” left to States in their implementation of the ACHR⁴¹⁸. These attempts are usually met by strong resistance from the professional community⁴¹⁹, and have at times been the target of formal statements and decisions by the System’s organs⁴²⁰. Still, although these are direct challenges to the System’s jurisdiction, they don’t always bring any more serious consequences. The five countries who have signed the declaration are not included in the Commission’s list of countries with especially grave human rights situations⁴²¹, and have, since then, shown instances of cooperation with the Commission, such as visits⁴²². Even if some of the presidents who agreed to visits are not the same who signed the declaration, this shows that the System can weather temporary storms, and that even overt challenges pass.

But open contestation is not the only tool available to States who are displeased with the System. Both the IACHR and the Inter-American Court have seven members, respectively called “commissioners” and “judges”. While both institutions have many employees tasked with writing briefs and producing reports, these fourteen people are the highest authorities, and personally vote on whether core standards are to be publicized. Crucially, both sets of seven members are elected by the States subject to the authority of the IAHRs. If the System is

embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos?ccm_paging_p=4

⁴¹⁸ Which seems to be, in itself, a somewhat empty criticism, as States tautologically have a “margin” to do anything which does not violate their international obligations, and violations to these obligations give rise to international responsibility (as they are outside of the “margin”), etc. The objective appears to be asking the Court to simply recognize the liability of States less often, and the suggestion that recognizing the lack of an “American consensus” in certain matters would attain this result. Still, it is unclear whether the liability of States is primarily recognized for matters that really lay outside a “consensus”; there always is a sizable amount of cases regarding extrajudicial executions which were not adequately investigated, etc.

⁴¹⁹ As Daniel Cerqueira noted when this declaration was published, if States wish for the System to have greater similarities to its European counterpart, they could strengthen its mechanisms for supervision and its funding (CERQUEIRA, Daniel. *Impericia jurídica, insolencia histórica e incoherencia diplomática: a propósito del manotazo de cinco países de Sudamérica al Sistema Interamericano de Derechos Humanos*. May 3, 2019, Available at: <https://dplfblog.com/2019/05/03/impericia-juridica-insolencia-historica-e-incoherencia-diplomatica-a-proposito-del-manotazo-de-cinco-paises-de-sudamerica-al-sistema-interamericano-de-derechos-humanos/>).

⁴²⁰ Inter-Am. Court HR. Resolution Monitoring Compliance with 11 judgments against Guatemala, regarding the obligation to investigate, establish responsibilities, and, eventually, sanction the responsible parties for human rights violations. August 21, 2014. Available (in Spanish) at: https://www.corteidh.or.cr/docs/supervisiones/11_Casos_21_08_14.pdf.

⁴²¹ According to article 59.6 of the IACHR’s rules of procedure, its Annual Report will elaborate a closer analysis of States deemed to be in this situation, in its Chapter IV.B. This article establishes the criteria for inclusion of a Member-State; synthetically, a grave breach of its democratic institutionality and the imposition of a state of emergency that suspends human rights are among the reasons. The countries currently included in Chapter IV.B are Cuba, Nicaragua and Venezuela.

⁴²² For example, Brazil was visited in 2021, 2025 and 2026, and Chile was visited in 2020 and 2024.

overstepping its authority, or following a tendency that displeases States, why not elect new members who agree with States' criticisms? The following chapter will attempt to sketch some outstanding research questions around this notion, also based on the role of "values" and contributions from the study of international organizations.

6. Outstanding questions

6.1. “Values”

As was alluded to in chapters 3 and 4 above, the professional activity of the human rights lawyer has a component that can be termed “moral” or “value”-based. Mégret speaks of a “humanitarian sensitivity”⁴²³ as a component of international human rights law, as also in other projects seeking “international legalization”⁴²⁴. Outi Korhonen notes that entrants to the field are socialized towards a “world-view”, which contains “epistemic” components, as well as “meaning-structures”⁴²⁵. Florian Hoffmann reconstructs Rorty’s thoughts on a “sentimentality” that bases actions such as human rights activism, as a replacement for their inherent baselessness⁴²⁶. Bourdieu’s *Force of Law* notes that lawyers (of all areas) are “guided by their ethical or political inclinations, which form the basis of their social affinities with their clients”⁴²⁷. To Jean D’Aspremont, international law is organized as a “belief system”⁴²⁸. (How similar is legal argumentation to the “religious”⁴²⁹? Is it possible under “an agnostic framework”⁴³⁰?)

A more complete survey of what this characteristic truly represents, and its impacts on the field, will not be attempted. It suffices to say that international human rights lawyers, faced with theoretical baselessness and apparently impossible choices, solve them in more or less similar and previsible ways⁴³¹. This solution happens through something other than the field’s “technology”⁴³², the rote memorization of its case-law, and it has something to do with the worldview embodied by the character of the “international lawyer”. Of course, it is not clear that such “values” are distinct from the meaning given to “theory” in chapter 2

⁴²³ MÉGRET, F. *The Apology of Utopia*, p. 455.

⁴²⁴ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 268.

⁴²⁵ KORHONEN, O. *New International Law*, p. 6.

⁴²⁶ HOFFMANN, F. *Shooting into the Dark*, p. 412.

⁴²⁷ BOURDIEU, P. *The Force of Law*, p. 834.

⁴²⁸ See generally D’ASPREMONT, Jean. *International Law as a Belief System*. Cambridge University Press, 2017, <https://doi.org/10.1017/9781108375542>.

⁴²⁹ See generally SCHLAG, Pierre. *Law as the Continuation of God by Other Means*. California Law Review, vol. 85, 1997. Available at: <https://scholar.law.colorado.edu/faculty-articles/668>.

⁴³⁰ NOLL, Gregor. *What Moves Law?: Martti Koskenniemi and Transcendence in International Law*. In: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (eds.). *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, 2017, p. 21.

⁴³¹ MÉGRET, F. *The Apology of Utopia*, p. 464.

⁴³² KORHONEN, O. *New International Law*.

above, or are not synonymous with the allocations between “orthodoxy” and “heterodox” mentioned in chapter 3.

In any case, this aspect has important pragmatic implications, as it impacts what an international lawyer thinks about the legal problems posed inside the field. If this is so, the control exerted by the professional community between lawyers who are “in” or “out” will naturally select lawyers with a “world-view”, or a system of “values”, within an acceptable range, as lawyers outside this range will presumably fail to produce acceptable conclusions⁴³³. It bears reminding that there is room for more than pure orthodoxy in the field, as fields will naturally house controversies and disagreements⁴³⁴.

This characteristic is also important in understanding the field of international human rights law against the backdrop of indeterminacy in international legal argumentation. David Kennedy presents his and Koskenniemi’s critique of international legal “objectivity” as revealing an unease in the legal profession, as “legal arguments [are] inherently unpersuasive once they have been shown to be contradictory”⁴³⁵. But if the lawyer involved with IHRL believes her field to reflect her “values”, or its work to be “helpful” to the world, this may be an entirely basis for her relationship with these theoretical issues.

The “mainstream” IHRL lawyer, then, does not have to be construed as someone who is unaware of theoretical issues, or simply attempts to paper them over. Instead of a “normative dope”⁴³⁶, it may well be that she is unsatisfied with the theoretical underpinnings, deeply suspicious of certain patterns of argumentation, or highly skeptical of the possibilities of building properly “legal” responses to the problems she faces at work. Indeed, this could conceivably be an important driver of (some) change in the System, as institutional lawyers could help create the conditions for legal change by voicing their disagreement internally⁴³⁷.

⁴³³ This description does not account for strategic behaviors, such as a lawyer intentionally professing different professional opinions than what they “truly” think. As the description of professional fields undertaken here speaks of the “socialization” of lawyers to “acceptable” beliefs, it seems difficult to speak of what are “genuine” opinions in the first place, as all opinions seem susceptible to being “inauthentic” to some degree. Still, it seems difficult to imagine, for the purposes of the present description, a lawyer who has built a career around a certain image to then radically reverse it in a way that would be credible to the other actors in the field.

⁴³⁴ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 276.

⁴³⁵ KENNEDY, David. *The Last Treatise: reflections on From Apology to Utopia*, p. 9.

⁴³⁶ BYRNE, W. H. *Is critique part of the practice of international law?*, p. 11.

⁴³⁷ Of course, this is an empirical claim, and I do not have the material bases to support it. As a rule, institutional lawyers do not have editorial control over the System’s writings (see chapter 6.3 below),

Kennedy even argues that the character of the IHRL lawyer is someone with a public “earnestness” and a “private doubt”⁴³⁸. But the belief that her work “does good”, whatever that means (to her), may promise a reward for enduring the theoretical complications. As Kennedy notes, the play between “public commitment” and “private skepticism” is not one-dimensional. The skepticism itself is also a performance; the profession of international human rights’ evident sentimentality may make appearing “hard-boiled” attractive. Still, this person has chosen to be an international human rights lawyer, a profession which is presumably not so attractive as to draw in even its ardent skeptics. Thus, his alternate description of such skepticism is “hiding their private sincerity behind a screen of just-you-and-me eye-rolling about the piety of other people’s rhetoric”⁴³⁹.

As Kennedy hints at, his own misgivings and critiques of the project of human rights coexist with a deeper commitment and belief in universal human rights, that can (and should) be imposed regardless of context. This recalls the previous points about the epistemological implications of how professional human rights are structured. “Local context” is sometimes ignored in problem-solving not because of a willful attempt to flatten other “cultures”, but because, by definition, nothing can justify a breach to certain “values”. An example is Kennedy’s question to himself about what “standing”, what “right” he had to pontificate about human rights to the people of Uruguay, during its dictatorship⁴⁴⁰. But a person who believes that States should not hold political prisoners does not need to ask where exactly this is happening, and what is the local context or their mores.

The international lawyer’s tentative relationship with the “value”-based component of her work is a key through which much of the critique of international human rights law can be presented. The critique of human rights as an imperialistic or epistemicidal enterprise can be reworded as a dispute of “values”, pitting a (“Western”, liberal) mainstream against (“third-world”, socialist etc.) heterodoxies. This critique has purchase in academic and professional fields, but the human rights profession cannot let go of its outward-facing, universalistic pretentions.

but internal dynamics merit some examination beyond a one-dimensional description of attributions and powers.

⁴³⁸ KENNEDY, David. *Autumn Weekend: The Activist Community*. In: KENNEDY, David. *The Dark Sides of Virtue: Reassessing International Humanitarianism*. Princeton University Press, 2004, p. 101.

⁴³⁹ KENNEDY, David. *The Dark Sides of Virtue*, p. 99.

⁴⁴⁰ KENNEDY, David. *Spring Break*, p. 1380.

For this reason, the field must always remain vigilant of its tendency to be, in fact, epistemicidal and imperialistic. Perhaps no account of international law can do away with explaining it through the lens of imperialism⁴⁴¹. To what extent does appeal to the “universal” actually foreclose debate on how to improve living conditions of diverse peoples? In giving examples of discredited anthropological views, Clifford Geertz presents the untenable and apocryphal idea that “one of the central features of Human Nature is a separate judiciary”⁴⁴². Is this what the Inter-American Court is saying when it speaks of a human right to a judiciary independent from the other powers of the State⁴⁴³?

Critically, the mainstream attitude towards international law seems to depend on the “subjectivity of value”. For the mainstream lawyer, explicitly positioning “values” as the guiding star of international legal argumentation severely imperils its “legal” character. At the same time, international human rights law cannot be described outside of “values”. Its lawyers learn to challenge existing arrangements, and to advocate replacing the “is” with what they think “ought to be”. How can this practice not devolve into endless subjectivity?

The lawyer defends the field from outside attacks based on the notion that it “does good”. At the same time, the field houses many open contestations, so that no lawyer is a perfect representative of its current dominant positions⁴⁴⁴. The lawyer has reason to interrogate whether the *status quo* is truly reflective of her “values”, or, even if it is not, whether the difference is bearable. Of course, the field can plausibly be changed from the inside. At the same time, those who are not yet professional lawyers will probably look to the field’s current case-law to see if the field is sufficiently aligned to their “sensibilities” before entering. The System is only read as “positive” because it produces specific legal outcomes (or attempts to).

Notably, the discussion on the pragmatic aspects of international legal argumentation showcases something other than a conflict between transcendental

⁴⁴¹ See generally ANGHIE, Anthony. *Imperialism and International Legal Theory*. In: ORFORD, Anne; HOFFMANN, Florian (orgs.). *The Oxford Handbook of the Theory of International Law*. Oxford University Press, June 2016, <https://doi.org/10.1093/law/9780198701958.001.0001>.

⁴⁴² GEERTZ, C. *Anti Anti-Relativism*, p. 272.

⁴⁴³ Inter-Am. Court HR. *Case of Capriles v. Venezuela*. Judgment of October 10, 2024 (Preliminary Objections, Merits, Reparations and Costs), ser. C, n. 541, para. 153.

⁴⁴⁴ Clearly, many lawyers can be aligned with the orthodoxy at any given time; but given the constant changes in what are the orthodox positions, this is a precarious arrangement. I would also conjecture that there is no real professional benefit in attempting to be such a perfectly orthodox lawyer, although this is outside of the current scope.

values. As illustrated in chapter 5 above, the international lawyer finds herself doing many pragmatic calculations in her daily work. There clearly isn't only one institutional arrangement of a State that can improve the situation of its citizens; it is only natural that the institutions could strike a working relationship with friendly States, in which some negotiations and exchanges occur.

This posture is sometimes challenged in the field, since rights, by definition, would not usually comport such calculations. Indeed, the text of the American Convention, and the definition given to words such as “respect” and “ensure”⁴⁴⁵, suggest an all-or-nothing model of compliance⁴⁴⁶. In this sense, negotiating with States can open the door to “decaffeinating” the System’s orders, to a point in which they are no longer useful.

But in this description, it is unclear *what* the lawyer is “maximizing” or “compromising”. If “values” are what a lawyer seeks to “maximize”, it can be hard to establish conversation on grounds that all parties can understand, as even attempting to be pragmatic is an exercise in value judgments. In any case, the introduction of pragmatic language makes it clear that the project of human rights has implications in “governance”, which it possibly always had⁴⁴⁷. There also exists much discussion of what is the correct or desirable relationship between established international law and moral philosophy:

How easy is it to dispute, after all, that the proposition ‘slavery is unjust’ is plainly true, even as ‘ $2+1=3$ ’ is plainly true? And why must the best explanation of anyone’s belief in the former proposition, unlike their belief in the latter, necessarily exclude appealing to the fact that the proposition in question is true?⁴⁴⁸

⁴⁴⁵ Or, more commonly, “guarantee”.

⁴⁴⁶ As stated elsewhere, this is not exactly the case with economic, social, cultural and environmental rights, about which article 26 speaks explicitly in the language of “progressive development”. Still, as alluded to in the description of *Lagos del Campo v. Peru*, a State can be held liable for not fulfilling its obligations according to these rights.

⁴⁴⁷ KENNEDY, David. *The Dark Sides of Virtue*, p. xxiv.

⁴⁴⁸ BESSON, Samantha. *Moral Philosophy and International Law*. In: ORFORD, Anne; HOFFMANN, Florian (orgs.). *The Oxford Handbook of the Theory of International Law*. Oxford University Press, June 2016, <https://doi.org/10.1093/law/9780198701958.001.0001>, p. 395. The example is particularly interesting because of this proposition’s unassailable character in international law, which does not make it any less foreign to describe it as “true”.

The politics of international law is (are) largely “the politics of *international lawyers*”⁴⁴⁹, and making sense of this requires a detailed study of just this character. Indeed, Koskenniemi’s concern with international law’s twin features of indeterminacy and stability was later tackled in a work more focused on individuals (the *Gentle Civilizer of Nations*), through the study of the *Institut de Droit International* and some key figures in the discipline’s development⁴⁵⁰. If the suggestion that the “discipline” itself has “values” is too anthropomorphic, it seems helpful to understand that the “values” belong to people who make the discipline. A longer discussion of this point will not be attempted; instead, some considerations of critical literature on international organizations will be presented.

6.2. International organizations

Some insight from the study of international organizations (IOs) will be discussed to further complicate the outstanding research questions. While a complete description of this literature will not be attempted, the recent works *Ways of Seeing International Organizations* and *A Theory of International Organizations in Public International Law* will be discussed in passing. This discussion will also draw heavily from the comparative reviews of both works undertaken by René Urueña⁴⁵¹ and Rita Guerreiro Teixeira⁴⁵².

In Urueña’s words, the current state of the field is concerned with a “turn to practice”, with a view to displacing the idea that reading an IO’s charter, constitutive instruments, and legal outputs is enough to explain the complex dynamics it encapsulates⁴⁵³. Instead, the “professional habit”(us) is a factor of utmost importance in how these fields work; their formal and organized output is a result of the games their professionals play daily, and the “practical conditions” (of

⁴⁴⁹ LANG, Andrew; MARKS, Susan. *People with Projects: Writing the Lives of International Lawyers*. Temple International & Comparative Law Journal, vol. 27, issue 2, 2013, p. 443.

⁴⁵⁰ Besides the *Gentle Civilizer* itself, this is briefly summarized in LANG, A.; MARKS, S. *People with Projects*, p. 445.

⁴⁵¹ URUEÑA, René. *International Organizations: From Black Boxes to Kaleidoscopes*. Völkerrechtsblog, February 18, 2026, doi: [10.17176/20260218-152643-0](https://voelkerrechtsblog.org/international-organizations/), available at: <https://voelkerrechtsblog.org/international-organizations/>.

⁴⁵² TEIXEIRA, Rita Guerreiro. *The Hidden Life of International Organizations*. Völkerrechtsblog, February 19, 2026, doi: [10.17176/20260219-152623-0](https://voelkerrechtsblog.org/the-hidden-life-of-international-organizations/), available at: <https://voelkerrechtsblog.org/the-hidden-life-of-international-organizations/>.

⁴⁵³ URUEÑA, René. *International Organizations*.

possibility) in which this happens are decisive⁴⁵⁴. When “the organization” acts, it does so as a result of interplay between its “secretariats, consultants, devices, templates, data infrastructures, funding instruments, and professional performances”⁴⁵⁵, such that the *absence* of participation of certain actors in decisions is also meaningful.

The editors of *Ways of Seeing* argue that the study of IOs is unduly centered in “landmark rulings” by international bodies and successive rounds of commentary on them⁴⁵⁶. This discipline would be centered on the practical knowledge produced by the IO, which is also the knowledge it looks for in eventual entrants. Thus, these undertakings would be done “with the aim of training new generations of future IO law practitioners”⁴⁵⁷, giving these fields a distinctly pragmatic approach. Under the description of professional fields offered above, such a process is the way of producing and ingraining specific (legal) understandings⁴⁵⁸, whether orthodox or heterodox.

This raises the challenge that “doing” law should not overshadow “thinking” about this law⁴⁵⁹. “Treating the IO as a coherent unit” has distributive consequences, by concealing the interplay necessary to produce the results of global governance (and decide how its costs are allocated)⁴⁶⁰. The absence of intrinsic meaning to “facts” is emphasized, so that “‘looking’ at international institutions is [not] a neutral operation”, since the “ways of seeing” are many⁴⁶¹. Under this paradigm, there is little reason to insist on seeking objective results to legal practice. Other related fields also do not contain objective meanings, so that “interdisciplinarity”, in itself, is no more conducive to “truth”⁴⁶².

⁴⁵⁴ *Ibid.*

⁴⁵⁵ URUEÑA, René. *International Organizations*.

⁴⁵⁶ MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel. *Seeing International Organizations Differently*. In: MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel (eds.). *Ways of Seeing International Organizations: New Perspectives for International Institutional Law*. Cambridge University Press, 2025, p. 4.

⁴⁵⁷ *Ibid.*, p. 4.

⁴⁵⁸ SOAVE, T. *The Puzzle of Freedom*, p. 127.

⁴⁵⁹ MANSOURI, N.; QUIROGA-VILLAMARÍN, D. *Seeing International Organizations Differently*, p. 4.

⁴⁶⁰ URUEÑA, René. *International Organizations*.

⁴⁶¹ MANSOURI, N.; QUIROGA-VILLAMARÍN, D. *Seeing International Organizations Differently*, p. 5.

⁴⁶² *Ibid.*, p. 9.

IOs are argued to be “sites of socio-technical struggles, or (...) vessels of visions of world ordering”⁴⁶³. In Rita Guerreiro’s description, the institutions “are nothing less and nothing more than the doings of the various people that compose them or otherwise intervene in their functioning”⁴⁶⁴, so that these persons’ distribution among the field’s disagreements and struggles is quite relevant. Many characters share the field with the “institutional lawyer”:

professional litigators (state agents, government lawyers, private counsel, NGOs, etc.) representing the parties in court; the legal bureaucracies (registries, secretariats, clerks, etc.) assisting the bench with the preparation, deliberation, and drafting of judgments; the specialised scholars developing the unified grammar and conceptual categories of each judicial field; and the like⁴⁶⁵.

Chimni suggests, for example, that features such as “the role of leadership, staff recruitment policies, knowledge production, and organizational culture and how these subserve the interests of powerful states”⁴⁶⁶ are missing from a more comprehensive account of IOs. Factoring these aspects into the logic of internal struggles in a field, job security may also influence a lawyer’s predisposition for aligning with orthodox or heterodox opinions, discouraging deviance if the consequences can be too costly⁴⁶⁷. A deeper dive would also require taking account of the demographic profile of their staff, as well as the relationship of the individual worker with the Member-States (namely, how susceptible they are to influence)⁴⁶⁸.

⁴⁶³ *Ibid.*, p. 5.

⁴⁶⁴ TEIXEIRA, Rita Guerreiro. *The Hidden Life of International Organizations*.

⁴⁶⁵ SOAVE, T. *The Puzzle of Freedom*, p. 127.

⁴⁶⁶ CHIMNI, B. S. *Critical Theory and International Organizations: The Need for an Integrated Approach*. In: MANSOURI, Negar; QUIROGA-VILLAMARÍN, Daniel (eds.). *Ways of Seeing International Organizations: New Perspectives for International Institutional Law*. Cambridge University Press, 2025, p. 20.

⁴⁶⁷ This is not necessarily to say that the result will be “orthodox” lawyers, as the precise organization, department, supervisor etc. may value alignment with the heterodoxy more. In any case, the absence of “tenure” seems a very important factor in understanding the internal dynamics of any field, and the Inter-American System currently employs a large number of “consultants” which do not have fixed contracts.

⁴⁶⁸ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 31.

International organizations are also challenged for reproducing “class, gender, racial, or geographical domination”⁴⁶⁹. It is quite understandable that IOs would reproduce the interest of the “dominant” groups over whatever axes are chosen for the analysis, as the image of fields as places of contestation and struggle suggests that these “dominant groups” could have the upper hand more easily⁴⁷⁰. But these institutions also serve as important fora for the articulation of their own change⁴⁷¹. Much work done by IOs is also “fact-finding” or otherwise geared to the “production of knowledge”⁴⁷², and this can clearly be repurposed by entities such as civil society organizations for their own purposes⁴⁷³. Here, too, it is helpful to think about “how [a] body of rules helps to structure patterns of winners and losers”⁴⁷⁴, and law’s role in creating (or mediating) distributional consequences.

This literature also complicates the relationship between international organizations and States. In a textbook description, international organizations are discrete entities, possessing a separate will (*volonté distincte*)⁴⁷⁵. Naturally, the exact characteristics of this exercise will depend on the structure of each international organization. But the relevant insight is that the “separate will” of IOs does not completely supplant the “individual wills” of States; in fact, States themselves are subject to the same logic, as they are composed of several internal organs in conflict and disagreement. Rather, both are an “internal space” where their components expose their wills and behaviors, in an effort to shape the will and behavior of “the organization” as a whole⁴⁷⁶.

In this context, the “micro-level practices”⁴⁷⁷ of these individuals are quite relevant in understanding the larger picture, even if some of this does not have the “stamp” of the organization’s approval. The “granular” may have much to offer in the way of understanding IOs. In our example of the Inter-American System, its

⁴⁶⁹ *Ibid.*, p. 16.

⁴⁷⁰ Of course, this process is not described as positive or immutable

⁴⁷¹ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 20.

⁴⁷² This statement is not obvious, as there is much interesting discussion on what these practices mean, not least motivated by the theoretical complications alluded to above regarding *what is a fact*. For a work compiling different perspectives, see ALSTON, Philip. KNUCKEY, Sarah (eds.). *The Transformation of Human Rights Fact-Finding*. Oxford University Press, 2016.

⁴⁷³ CHIMNI, B. S. *Critical Theory and International Organizations*, p. 32.

⁴⁷⁴ KLABBERS, J. *Inter-disciplinarity and the Law of International Organizations*, p. 51.

⁴⁷⁵ TEIXEIRA, Rita Guerreiro. *The Hidden Life of International Organizations*.

⁴⁷⁶ CHASAPIS-TASSINIS, Orfeas. *A Theory of International Organizations in Public International Law*. Cambridge University Press, 2025, <https://doi.org/10.1017/9781009374002>, pp. 204-206, *apud* TEIXEIRA, Rita Guerreiro. *The Hidden Life of International Organizations*.

⁴⁷⁷ SOAVE, T. *The Puzzle of Freedom*, p. 127.

members are States; their actions “must remain somewhat visible”⁴⁷⁸ in the larger whole. States do not simply delegate power when the institutions are created and swiftly move to the background, instead behaving as “dynamic legal creatures”⁴⁷⁹.

Thus, there is value in understanding what States (continue to) do towards the international organizations they have created. As Klabbers reminds us, organizational complexities and theoretical justifications sometimes fail to keep away “naked power politics”⁴⁸⁰; but even such situations are structured by law, at least in the form of legal rules and procedures.

As a summary, commenters in IO studies suggest that the State is neither a passive observer of legal production, nor an overbearing and determining leviathan. To this extent, the next section will attempt to sketch in greater detail what is the precise role of States in the Inter-American context, and whether or how they can influence the production of legal outcomes by the IAHRs.

6.3. The State at the helm

To start from a point made in the study of IOs, Tommaso Soave offers an argument which should be sketched out in greater detail in the case of the Inter-American System. He asserts that professional practice is what decides legal outcomes, more than “scientific” ordinary meanings, or purely “political” pressures from States⁴⁸¹. This construction is then contrasted to the notorious Koskenniemi-led report on “fragmentation”, specifically its claim that “regimes are institutionally ‘programmed’ to prioritize particular concerns over others”⁴⁸². Soave is concerned that this denies the agency of individuals inside a field⁴⁸³, although the previous chapters could support the report’s conclusions, from the standpoint of “values” and the barriers to entry in a field.

⁴⁷⁸ EIJKING, Jan. *The Micro-Politics of International Commissions: The Case of Telegraphic Standards*. In: MANSOURI, N.; QUIROGA-VILLAMARÍN, D. (eds.). *Ways of Seeing International Organizations*, p. 188.

⁴⁷⁹ TEIXEIRA, Rita Guerreiro. *The Hidden Life of International Organizations*.

⁴⁸⁰ KLABBERS, J. *Inter-disciplinarity and the Law of International Organizations*, p. 43.

⁴⁸¹ SOAVE, T. *The Puzzle of Freedom*, p. 126.

⁴⁸² INTERNATIONAL LAW COMMISSION. *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*. A/CN.4/L.682 and Add.1, April 13, 2006, Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, para. 488.

⁴⁸³ SOAVE, T. *The Puzzle of Freedom*, p. 123.

In any case, to Soave – in a way very consistent with the description of fields in chapter 3 above –, the “community” is “the ultimate arbiter of professional recognition”⁴⁸⁴, as well as its “immediate audience”⁴⁸⁵. Even States’ initial discretion in establishing the treaties and the procedural rules happens under the influence of the professional community, since the States’ very representatives are such professional lawyers⁴⁸⁶. Once the field is established, it is inhabited by *habitués*, who are able to enforce orthodoxy (or at least “controlled dissent”) in ways very similar to the process described in chapter 3 above, deciding what is “law” and what does not belong⁴⁸⁷.

The Inter-American System’s positions are not immutable, and substantial shifts are often enacted. Still, presenting oneself as (at least mostly) in agreement with the field’s current understandings is usually strategic, as straying too far from the orthodoxy warrants a “*rappel à l’orthodoxie*”⁴⁸⁸, a recrimination. The field prefers that changes happen following its own time and logic, even if the results are at times contradictory and “magical”⁴⁸⁹.

Unsatisfied stakeholders, however, need not agree with the field’s preferences. The image of the Inter-American lawyer portrayed above is of someone seeking a balance between States and victims without going too far to either side. It is only natural that both States and victims have criticisms to solutions reached under this paradigm (indeed, if States and victims wanted the same outcome, they would probably have reached an agreement⁴⁹⁰).

The institutional lawyer would like to please both of these stakeholders. Although recriminations to State action are expected to be frequent, the System would prefer not to damage its relationships to States too much, both for its own survival and as a wager that some concessions have a net positive result for human rights. The System would also dislike being seen by potential victims as too apologetic to State practice, as this may hinder its ability to fulfil its mission.

⁴⁸⁴ *Ibid.*, p. 128.

⁴⁸⁵ *Ibid.*, p. 128.

⁴⁸⁶ *Ibid.*, p. 131. Naturally, these lawyers have no experience in the non-existing fields, but they are arguably chosen for their pre-existing experiences in related points.

⁴⁸⁷ *Ibid.*, p. 131.

⁴⁸⁸ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 278.

⁴⁸⁹ *Ibid.*, p. 282.

⁴⁹⁰ The System allows for States and alleged victims to reach friendly settlements. This possibility is mentioned in Article 48.1.f, ACHR, and further explanations can be found in the repository maintained by the IACHR, available at: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/friendly_settlements/default.asp.

Chapter 5 above briefly discussed some of the practical implications stemming from being “too antagonistic” towards States. This scheme, however, assumes that the applicable standards come directly from the professional community, and accurately reflect its “values” (or worldview, or sensibilities), without any interference from States. This may prove an overly simplistic description of the Inter-American System. Its fourteen highest authorities (seven members of the Commission and seven judges of the Court) are directly elected by States, which nominate them for election in whatever way they please⁴⁹¹. Quite clearly, if enough States are displeased with the System’s output, they can articulate themselves to elect authorities who also disagree⁴⁹².

This is a significant wrinkle in the field’s ability to “exclude” or “disqualify” actors who are outside of the accepted beliefs. Even worse, clashes with such actors may increase their standing with States, who would see them as truly opposed to the field’s standard notions. While Bourdieu notes in the *Force of Law* that legal actors are “quick to condemn and censure those who get too openly involved with (...) political questions”⁴⁹³, this may work to the advantage of actors seeking to distinguish themselves from the institutional consensus.

Naturally, the established professional community does not need to change its views to match those of the entrants, and is free to denounce their decisions as inadequate. But this does not make these actors any less powerful. They control what can or cannot be said in the name of the “institutions”, which are, presumably, the “ultimate arbiters” of (Inter-American) human rights, the apex organs of the professional community. The States are the actors under supervision, but they can quite effectively watch their watchers.

⁴⁹¹ Professional actors have advocated for procedures incorporating more oversight and societal controls, such as having formal nomination processes and opening channels for dialogue with interested actors. Still, most countries of the region do not have such mechanisms, and indications often are a direct choice from top actors in the national-level Executive branch. PERALTA, Ariela *et al.* *Final Report of the Independent Panel to Evaluate Candidates to the Inter-American Human Rights System (IAHRS) Bodies*. American University Washington College of Law. 2023. Available at: https://www.american.edu/wcl/impact/initiatives-programs/independent-panel-to-evaluate-candidates-to-the-iahrs-bodies/past-reports/upload/iahrs-panel_final-report_2023.pdf.

⁴⁹² It should be noted that this articulation should probably be understood as about abstract issues or understandings, and not about the outcome of particular cases that concern specific States. For example, article 17 of the IACHR Rules of Procedure, and article 19 of the Court’s, establish that authorities may not participate in proceedings against the State(s) of which they are nationals, and States almost invariably appoint their own nationals.

⁴⁹³ BOURDIEU, P. *The Force of Law*, p. 830.

While other actors may attempt to work around certain standards produced by the authorities, disputes over what is the true “canon” of standards are very much open-ended. To give a brief example away from intense conjunctural debates, freedom of expression is a topic where building a “canon” should be relatively easy. There are comparatively few judgments by the Court, the “landmark” judgments are well-known and alluded to by all actors⁴⁹⁴, and while the case-law has become more complex and detailed, there are no clean breaks with previous jurisprudence. The Special Rapporteurship for Freedom of Expression supplies a guide to the System’s standards on this point, and has recently released a 2025 update to its “framework”⁴⁹⁵. One case receives zero mentions: *Mémoli v. Argentina*. Its section on the meaning and content of article 13, ACHR, appears quite standard, and mostly reiterates previous jurisprudence, constantly mentioning landmark cases such as Advisory Opinion 5⁴⁹⁶. Its reception by the freedom of expression community, however, was anything but standard, as can be gauged by the op-eds written by leading figures against the Court’s decision⁴⁹⁷. While further developments mean that this decision is indeed an outlier, it has, in principle, the very same authority as “good” decisions⁴⁹⁸.

These considerations on the naming of authorities do not seem to be purely academic, as they are at the heart of great tensions inside the System. One such example are the comments made about the nomination of IAHRs candidates by members of the professional community. To foster accountability and control of this election process, a group of academics, civil society members, and former members of the IACHR collaborate in organizing an “evaluation panel” for IACHR

⁴⁹⁴ See generally ALVAREZ, Ignacio et al. *Libertad de expresión: a 30 años de la Opinión Consultiva sobre la colegiación obligatoria de periodistas*.

⁴⁹⁵ IACHR, SRFOE, *Inter-American Legal Framework on Freedom of Expression: 2025 Update*, OEA/Ser.L/V/II, CIDH/RELE/INF. 29/25.

⁴⁹⁶ Inter-Am. Court HR. *Case of Mémoli v. Argentina*. Judgment of August 22, 2013 (Preliminary Exceptions, Merits, Reparations and Costs), ser. C, n. 265, paras. 117-128.

⁴⁹⁷ BERTONI, Eduardo. *Retrocesso e tensão*. ESTADÃO. November 15, 2013. Available at: <https://www.estadao.com.br/opiniao/retrocesso-e-tensao-imp-/>; VIVANCO, José Miguel. *El Tribunal de las Américas retrocede en la libre expresión*. EL PAÍS. November 11, 2013. Available at: https://elpais.com/internacional/2013/11/11/actualidad/1384198105_138110.html.

⁴⁹⁸ For an example of trying to square *Mémoli* with the greater body of jurisprudence on subsequent responsibilities (and one that is concerned for what *Mémoli* could mean in future cases), see DEL CAMPO, Agustina (org.). *Towards an Internet Free of Censorship: standards, contexts and lessons from the Inter-American Human Rights System*. CELE UP, 2019. Available at: https://www.palermo.edu/Archivos_content/2019/cele/Mayo/Towards-an-internet-free-of-censorship-Web.pdf, p. 50.

and Inter-American Court candidates⁴⁹⁹. The purpose of this panel is to offer opinions on whether the candidates fulfil (vague) criteria such as “high moral character”, “recognized competence in human rights” and “independence”, as set out by the ACHR⁵⁰⁰. Simply put, some of the recently elected candidates have received very negative evaluations from this panel, which do not seem to have harmed their chances. The panel has singled out both candidates who allegedly did not have enough “technical” knowledge, but also candidates whose views “denote a regression” to existing standards⁵⁰¹.

The point of this discussion is not to comment on the views or actions of any specific Commissioner, nor on doctrinal controversies faced by the IAHRs. Rather, it is to showcase that the theoretical problems regarding the “foundations” of human rights also play out inside its professional communities, and simply resorting to the field’s “technology” is not enough to solve them. On the examples noted, the Panel was able to insist on the candidates’ disagreements to established IAHRs case-law as a reason for their disqualification. This is, in other words, a hierarchical argument; a would-be entrant to the field must show that they agree with existing views to earn their stripes. This sounds like a level-headed and pragmatic argument: the IAHRs’ established practice constructs a meaning for “human rights” for its lawyers to work with, also serving as an antidote to the endless philosophizing that always threatens human rights projects.

What happens, then, if these views change? With as few as four nominations, a heterodox faction could issue a decision stating that an existing standard was overturned⁵⁰². This is, in fact, the path of any change in understanding by the IAHRs, both the expected and unexpected, the well-accepted and the shocking. At these times, a simple hierarchical argument does not seem especially convincing to those who do not appreciate the change. It is true that the new standard is upheld by the IAHRs’s hierarchy, but this is only recently the case, and practitioners are

⁴⁹⁹ PERALTA, A. *et al. Final Report of the Panel*, p. 13.

⁵⁰⁰ Article 52, ACHR: “1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.”

⁵⁰¹ PERALTA, A. *et al. Final Report of the Panel*, p. 13.

⁵⁰² This slightly inelegant wording is preferred to “overturning a standard” because, as in the example of *Mémoli* discussed immediately above, the professional community may be able to prevent such changes from taking firm root (as it may also agree with the change). Of course, this description does not mean to suggest that the professional community has final veto power.

entitled to believe the change was a mistake. To note a well-known and consequential change, the Court has recently altered its notions on whether violations of article 26, ACHR, can be argued before the System⁵⁰³. While this is now its caselaw, dissenters can – and do⁵⁰⁴ – point to the System’s long history of deciding in the exact opposite fashion.

Mégret speaks of a strong competition internal to fields over control of what is “the law” it produces; but the identity of the field *qua* field is constructed around actors’ ability to “sufficiently coalesc[e] around a core of commitment to oppose a united front to their ‘exterior’”⁵⁰⁵. Under this scheme, no matter how strong the temptations and how numerous the defections, the field must rally to speak as a “field”, or else fail to uphold its barrier to competing fields and collapse within itself.

But what this sketch shows is a different process, in which, paraphrasing Mégret, the Prince is entrusted with the keys to the law’s undoing⁵⁰⁶ without the collapse of the field. From a distant enough vantage point, “progressive” changes look the same as “regressive” ones⁵⁰⁷. Arguably, all legal argumentation already requires very heavy lifting in order to construe the meanings and structures that enable “legal analysis”⁵⁰⁸. The *status quo* is just as contingent as any change would be, as any legal arrangement is the result of “political”, subjective choice:

change occurs when the dominant assumptions embedded in a judicial regime are successfully challenged and replaced by new assumptions, as a result of the piecemeal evolution of the power relationships among competing actors. Whenever this happens, ‘it is never because pure law has triumphed, but because of the internal properties of these relations of force or these conflicts between heterogeneous multiplicities’⁵⁰⁹.

⁵⁰³ See chapter 5.5 above.

⁵⁰⁴ See Sierra Porto’s dissenting opinion in Dos Santos Nascimento

⁵⁰⁵ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 271.

⁵⁰⁶ *Ibid.*, p. 272.

⁵⁰⁷ As Pierre Schlag provocatively puts it, lawyers like to suggest that the arrangements in their disciplines are not random and contingent, but ordered in service of a larger purpose; by doing this, they are quite close to a “teleological proof of God” (SCHLAG, Pierre. *Law as the Continuation of God by Other Means*. California Law Review, vol. 85, 1997. Available at: <https://scholar.law.colorado.edu/faculty-articles/668>, p. 432).

⁵⁰⁸ *Ibid.*, p. 440.

⁵⁰⁹ SOAVE, T. *The Puzzle of Freedom*, p. 139 (quoting Bruno Latour’s *Making of Law*).

In any and all compositions of the System's authorities, eight out of fourteen people can dictate what the System does and understands. Commissioners and Judges control the System far beyond what they say and publicly agree on. While a comprehensive description of this will not be attempted, the enormous caseload of both organs means that their authorities have the power to prioritize specific cases, and all Commissioners have some power over the docket⁵¹⁰. Disagreements can also be as impactful as agreements, as preventing the System from producing certain standards may be as meaningful as producing them.

Returning to the theoretical bases laid in the previous chapters, there is little reason to believe that international (human rights) law is, in itself, capable of controlling the result of these disputes in interpretation, and supplying the "correct" view regarding any specific standard. Going further, it has been noted that a structuring idea in the professional field is that such conflicts should not be solved by comparing abstract "moral" views, as this enterprise is inherently subjective, and the winners it produces are highly subject to biases or power dynamics. This is, in the theoretical scheme above, the precise insight that motivates recourse to professionalization, to "hierarchical" and technical arguments. But if all of this is so, and one's opponents can always claim institutional power and change one's preferred standards, this is a grave challenge to the professional community's ability to reaffirm its standing as controlling of what gets produced in the field.

There exist no objective standpoints from which to judge competing interpretations of any one standard, or to classify them as "not being" international (human rights) law. But this does not mean that any configuration of standards generates equal outcomes, and impacts the field's "legitimacy"⁵¹¹ and operations in the same way. The previous section speaks of the institutional lawyer as attempting to balance between the interests of States and civil society (organizations). However, if many important decisions are, in fact, taken by actors with a higher

⁵¹⁰ A comprehensive analysis of the System's docket control will not be attempted. Some of the Commission's tasks occur through a vote of all seven commissioners, in which they hold (essentially) equal footing and access to materials. However, all Commissioners also serve as "rapporteurs", dividing amongst themselves the IACHR's many rapporteurships (except the two labeled "special"). In their capacities as "country" and "thematic" rapporteurs, they have great influence over the IACHR's agenda in that subject. Even a Commissioner who is outgunned in votes could still exert great influence in their areas of rapporteurship.

⁵¹¹ There is no intention to defend any position regarding what "legitimacy" means for international organizations or how it can be measured or improved.

hierarchical standing than the institutional lawyers, they are one more stakeholder whose interests factor into decisions. The other two main stakeholders, however, have clearer ways to make their voices heard: States control funding (and these appointments), while civil society organizations have, among other indirect mechanisms of “pressure”, held demonstrations where the Court or the Commission would hold sessions⁵¹². The institutional lawyer’s only tool appears to be the ability to exclude those with opposing views from establishing themselves in the field, as described in chapter 3 above; but this can be superseded by these nominations, if States so wish.

No existing standards will be mapped to this description of a field-shattering change. However, this scheme raises some concerning questions about the sustainability of the field, and how it relates to new entrants. Returning to the System’s own description of itself, it exists to limit the power of States; and, as noted, there appears to be a “sensibility” that draws certain lawyers to the System, and not to other professional pursuits. This is the role of the professional community as “audience” to the output of the System (or “its own” output). Is there a core group of standards that, as the System exists and relates to States, represent this ability to effectively confront State power? How much can the System change before it no longer attracts people with similar sensibilities? What is, in fact, the “correct” or desirable sensibility for an entrant lawyer?

The System’s output may very well influence civil society organizations’ decision of whether to present new cases. Using the change to article 26 as an example, would-be petitioners may recognize that their case would receive a different treatment after the change in *Lagos del Campo*⁵¹³. The opposite can also happen: if the System restricts its interpretations of rights, or begins to understand that certain conducts are in accordance with State obligations under the ACHR, this change in standards can impact petitioners’ strategic calculations. Even if a change in standards is short-lived, the precise impacts of failing to submit a case for consideration are impossible to measure.

⁵¹² For one very simple example, see SWISSNEWS. *Marcha en Costa Rica contra el aborto por demanda a El Salvador en Corte IDH*. November 10, 2024. Available at: <https://www.swissinfo.ch/spa/marcha-en-costa-rica-contr-el-aborto-por-demanda-a-el-salvador-en-corte-idh/88079695>.

⁵¹³ See chapter 5.5 above.

If there exists a core of standards which definitively structure the field's ability to stand up to States, their change could collapse the field's mission. But from the outside, everything could look the same as it always has. For one, study of the Inter-American System is not always done in the line of intense scrutinizing and criticism⁵¹⁴. It may not always seem worth it for professional lawyers and students of the System to dwell on what it *could* have done, as opposed to what it has done, as these hypotheses are not caselaw to reference. Entrants on the "technical" side probably do not need to know it; professors attempting to speak on the System's output often focus on existing caselaw; and unless petitioners are highly specialized, and willing to risk the outcome of the present case for a grander strategy, they may not comment on these points.

The institutional lawyer has based her career on learning the technology of the field. She probably has, implicitly or explicitly, seen firsthand how difficult it is to reconcile theoretical considerations with the daily realities of the work, which pushes her into a pragmatic focus. If she learns enough of the field's technology, this will help her solve most cases, and possibly gain the insight necessary to find the correct (political, or "moral", or "value-based") solution to the truly hard cases. The standard challenge to this pragmatism has been described above, namely its failure in avoiding the influence of theoretical and subjective matters in international (human rights) law. And this flaw cannot be fixed by a "better" pragmatism, as it possibly stems from features inherent to international legal argumentation.

But this section attempts to present a different problem: the institutional lawyer's very reliance on technology is not straightforward. By presenting herself as an adept of technology, the lawyer loses her grounds to dispute complete reversals of the field's understandings. And there is reason to believe that the Inter-American System is particularly susceptible to changes that displease its professional community, as, ultimately, institutional lawyers do not have the last word. States – the entities that the System aims to constrain – are its most powerful entities, even if they at times choose not to exercise this power, or lack of consensus temporarily prevents them from articulating.

⁵¹⁴ See generally CERQUEIRA, Daniel. *Por un abordaje crítico*.

This lawyer, then, may have no choice but to retreat into an ostensibly subjective argumentation, that recognizes its (and her) situatedness, and makes explicit reference to her personal beliefs. But this restarts the cycle: the System's procedural safeguards, and the necessity of sovereign consent, are meant to stop decisions from being taken from subjective personal views. The professional lawyer, then, may be responsible in building the instruments of her own defeat. It is hard to imagine that she thinks all outcomes are the same; and even if she is a gracious loser, there are certainly outcomes she would deem unacceptable and destructive of the field. The System does not seem to have any tool to protect against this, and there is no reason why such a tool should exist, as it implies having access to a vision of the "true" mission of the field (and meaning of international law).

This discussion raises some questions regarding the field's sustainability in the face of organized resistance by States. In a simple, "game-theoretical" description of the professional field, States seem highly incentivized to organize such resistance, as they generally dislike being chastised by the field (even though they generally do not follow its standards). Against this phenomenon, appeals to "hierarchy" are powerless, as these changes would follow all necessary processes⁵¹⁵. As public international law scholarship becomes increasingly concerned with "authoritarianisms", "illiberal democracies" and similar descriptions, it is worth revisiting our textbook descriptions of the Inter-American System. Knowing that the ACHR reflects certain "humanitarian sensibilities", or that the field constrains States (or attempts to), is not enough to understand what it is and does.

6.4. Conclusions?

There is no clear way out of this labyrinth. If the professional lawyer insists that their intuitions "are" law, they are prone to being accused of utopianism and imperialism, also arguably losing the distinctly legal character of this discourse (however much of a fiction it was to begin with). But an emphasis on the field's formal hierarchy may constrict their ability to denounce the field's wrong decisions,

⁵¹⁵ Perhaps "hierarchy" was never a very useful category to understand the IAHRs in the first place, and cases such as *desacato* in Brazil (discussed in passing in chapter 5.3 above) show particularly heightened problems with existing interpretations; but this statement would require more discussion.

and risks classifying as “natural” a *status quo* built by countless contingent and situated decisions. Of course, there is no reason to argue that a simple attitudinal shift or turn in academic consensus would solve all of the field’s problems. The Inter-American System has, at the end of the day, always depended on the stars to be aligned, and its lawyers must continue to deal with their highly situated and contingent institutional practice.

The field’s weapon of choice against concerted efforts to change its longstanding practices is the “disqualification” described in chapter 3 above. It may well be that certain challenges are made in bad faith, and in service of their proponents’ hidden agendas. But the field of international human rights law appears to be considerably dependent on its participants’ hidden agendas, and whether they are nefarious or not can only be a matter of personal opinion and standing. Florian Hoffmann discussed a similar effect regarding challenges to human rights based on a “security discourse”: the barbarians at the gate are only “capable of having this effect because of the internal contradictions which have always permeated human rights discourse, and which have only superficially been masked by the imagined consensus of earlier periods”⁵¹⁶.

Still, even this impressive capacity for articulation does not, and cannot, determine the field itself. Beyond the simplistic descriptions of the field’s “characters”, no actor truly has the last say on what results the IAHRs produces. Like human rights generally, its standards are instantiated in different countries and different contexts, with no clear indication of what the results will be: the games simply must be played out.

⁵¹⁶ HOFFMANN, F. *Human rights, the self and the other*, p. 222.

7. Final remarks

International human rights law was described as an effort to “make the world a better place” through the familiar mechanisms of international law. International law faces many challenges – not least whether it is “law” at all –, among which is a (supposedly) excessive focus on procedural forms and lack of a clear, structuring objective. In Martti Koskeniemi’s scheme, international legal argumentation is in an endless back-and-forth movement, as it cannot base itself on a “true” objective. Perhaps “human rights” could be just what international law needs, as a guiding light against which arrangements can be measured.

This argument is very similar to “natural law” foundations of international law, which, Koskeniemi warns us, has several centuries of counter-arguments to grapple with. Most importantly, there is little reason to believe that it is truly possible to understand what these ideals mean in a way to curb conflicts. But human rights⁵¹⁷ cannot give up this form of argumentation, as it does require a degree of “knowing better” about what “humanity” entails and demands. For rights discourse to be employed in the absence of concrete laws – as it quite often is –, it requires invoking some independence from the context⁵¹⁸. Without this epistemological basis, the promise of “universality” is significantly threatened, and “doing” human rights seems much more difficult⁵¹⁹.

The project cannot be content with ratifying what States already wished to do in the first place; it exists to constrain what States do, to lend credence to claims that are outside consent and different from existing law. It is also liable to reproducing the “reversibility” between “ascending” and “descending” patterns that Koskeniemi describes in international law. Even as its lawyers advocate for change, a convincing argumentation also “proves” that the preferred outcome was the correct one all along. If “human rights” are aligned with “utopia”, their manifestation as a highly institutionalized international project requires “apology” to exist.

⁵¹⁷ This is a stylized description, but it should be restated that the meaning and “objectives” of “human rights” depend entirely on their particular instantiation. The role of “human rights” in an impossibly wide range of demands is a core feature of its prevalence in political discourse, and there can be no essentialization of what human rights argumentation means or how it can be employed in practice.

⁵¹⁸ DOUZINAS, Costas. *The End of Human Rights*, p. 344.

⁵¹⁹ HOFFMANN, F. *Human rights, the self and the other*, p. 222.

The Inter-American Human Rights System is one such project at the intersection of international law and human rights. Although both of these foundations are indeterminate, in the sense that they seem to allow for almost any outcome, the IAHRs's output is structured and predictable. It, and other similar enterprises, can be described as a *professional field*. In this context, determining what is "law" is the utmost marker of "power" inside the field, and its actors fight for this privilege. A part of playing this game is also establishing what others should do (or think) if they wish to be recognized as legitimate actors. Through repeated iterations of this process, there exists a way to consistently evaluate legal output through its initial indeterminacy, although results are not fixed, and control of the evaluative criteria is in dispute.

After *From Apology to Utopia*'s sharp and incisive critique comes "a tentative reconstruction" of international law⁵²⁰. This argument notes that lawyers must participate in their field through a "role", which threatens to swallow and determine them⁵²¹. The lawyer is drawn to this role due to some sensibility, some "promise of a more just society"⁵²², which she won't necessarily find in the field, as, after all, it was built through complex relational processes. Koskenniemi's path out of this requires a realization that the field does not supply solutions to all practical problems, much less "objective" ones⁵²³. Thus,

[r]ather than be normative in the whole (and be vulnerable to the objections of apologism-utopianism)[, the international lawyer] should be normative in the small. He can attempt, to the best of his capability, to isolate the issues which are significant in conflict, assess them with an impartial mind and offer a solution which seems best to fulfil the demands of the critical programme, as outlined in the previous section. In this way, he can fulfil his authentic commitment, his integrity as a lawyer⁵²⁴.

The very next passage of the book begins to defend this solution from the critical tools developed by Koskenniemi in the preceding chapters. "If my

⁵²⁰ KOSKENNIEMI, M. *From Apology to Utopia*, chapter 8.3.

⁵²¹ *Ibid.*, p. 550.

⁵²² *Ibid.*, p. 552.

⁵²³ *Ibid.*, p. 555.

⁵²⁴ *Ibid.*, p. 555.

formulation of it seems question-begging and leaves open the ‘method’ whereby it should be conducted,” he notes, it is because practical solutions *really* are not ready-made⁵²⁵, and there is no one “coherent programme for world order” to fulfill and implement⁵²⁶.

It is entirely possible to read this conclusion as strangely contradictory with the rest of the book, as a return to the conditions which the book’s critique has made impossible⁵²⁷, as a puzzling insistence that the emperor is fully clothed. But it does not come as a surprise that building a positive sense of how the discipline should work requires laying aside critique for a moment. Paraphrasing Mégret, one can do many things besides being an international lawyer; choosing this path requires, in some way, not being truly critical of the character of the international lawyer and the environment it inhabits⁵²⁸.

Diving into these epistemological and pragmatical criticisms reveals that the project of “human rights” is baseless, and the human rights lawyer possibly has no objectively justifiable “reason” to do what she does. But this does not mean that she should stop, or that a situated practice of human rights is impossible. Beyond rational argumentation, there is still something which compels her to participate in these institutions and play the field’s games.

Outi Korhonen presents three paths (or “characters”) for an international lawyer who has been forced to ponder the critique of international legal (in)determinacy. The first is “tragic silence”: there is no path to truly building international law “through” its criticisms. This necessitates a “silence”, a refusal to engage with them⁵²⁹; the practice of international law must insist on its objectivity, and on the other premises the critical enterprise challenges, because this is the only way in which it can occur, and the complications must then remain unspoken⁵³⁰. The tragedy of this option is that this lawyer is mired in a feeling that her practice has no meaning, even as she continues in it⁵³¹.

⁵²⁵ *Ibid.*, p. 556.

⁵²⁶ *Ibid.*, p. 559.

⁵²⁷ KORHONEN, O. *New International Law*, p. 18.

⁵²⁸ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, p. 273.

⁵²⁹ KORHONEN, O. *New International Law*, p. 16.

⁵³⁰ *Ibid.*, p. 17.

⁵³¹ *Ibid.*, p. 18.

The second is “fortress-building”, and Korhonen’s image is of a “noble fight for [a] lost cause”⁵³². The fortress-builder engages in theoretical exercises, and understands that they threaten to open a gulf under her doctrine and practice. But there is nothing better to do than to seek a “relatively satisfactory legal” solution, if one believes this cause to be right. The theoretical threat is grave; but “after deconstruction, one dutifully returns to the fortifications of the old order and works to strengthen the most solid parts of what remains”⁵³³.

The third approach is termed the “cave”, and through an intricate description, it is almost an ideal type, in which the international lawyer is able to work from both *tekhne* and *phronesis*, technology and intuition⁵³⁴. This state is not really a “system”, and cannot be reduced to a “pattern” or “structure”. The practitioner abandons whatever “foothold” they have, and “drags” through the cave in search of the theoretical and practical limits to their discipline⁵³⁵. There is no set end for this experience: it “necessitates no fighting for lost causes nor silence on foundational questions”⁵³⁶, and is ultimately a “continuing forward”⁵³⁷.

It is a bit presumptuous (and inaccurate) to try to define one’s own practice as attaining this radical break with the theoretical scaffolding of international law and its many contradictions. Perhaps the slightly tragic character of the fortress-defender is a more realistic role model, especially if the conversation gears itself towards a specific institutional practice, such as the Inter-American System of Human Rights. The fortress-defender does not need a “teleological optimism about reaching a goal, but optimism regarding engagement, the possibility to work for international law”⁵³⁸:

After the disclosure, [Koskenniemi] argues for some sort of transformation, a reconstruction, which eventually collapses under the weight of the same critique which undermined the old system. This proves the post-modern point, the inevitability of the eternal tragic game. However, Koskenniemi does not seem to

⁵³² *Ibid.*, p. 18.

⁵³³ *Ibid.*, p. 19.

⁵³⁴ *Ibid.*, p. 22.

⁵³⁵ *Ibid.*, p. 26.

⁵³⁶ *Ibid.*, p. 26.

⁵³⁷ *Ibid.*, p. 26.

⁵³⁸ *Ibid.*, p. 20.

be inclined to this game. He neither continues to deconstruct, nor falls silent. A complete turn becomes necessary. Koskenniemi abandons the camp of the dead post-modern souls and their doomsday deconstruction machines to go back to the fortress of international law discipline, to defend it with fellow international lawyers many of whom still believe in the indestructible fortifications of their traditions. This return has no grounds or reasons other than a moral one — a certain nobility. Hence, it is both unfounded (epistemologically) and founded (ethically)⁵³⁹.

Even if the exercise of international (human rights) law is baseless, and is beset on all sides, there are still people dedicated to its continuation. The preceding chapters have revealed no clear explanation for why they would do this, or for how they can surmount the deep theoretical and practical challenges to their discipline. Still, this practice continues, and even manages to produce stable and predictable case-law. A legal vocabulary remains necessary to justify decisions, even if it does not decide on behalf of the lawyer⁵⁴⁰. Participants are somehow still drawn to this and other fields by a “value” judgment, a “sensibility”, a “sensitivity”, whatever this means. Defining what international human rights *is* also entails defining what it *is not*⁵⁴¹, and the international legal professional can barely argue it *is not* a “politics” or a “morality”⁵⁴².

Mégret speaks of international humanitarian law as a “ship”; its lawyers would ideally like to “chart its course”, but they must also focus on keeping it afloat⁵⁴³. The core argument of this text is that such considerations also apply to the Inter-American System. But, critically, it is necessary to ask who is at its helm, what powers the professional community has, and what sea monsters and whirlpools lie just out of sight.

Arguing that the professional community does not truly control the (legal?) outcomes of the Inter-American System is breaking with a core tenet of its self-image. But in the spirit of the critiques showcased above, building a professional

⁵³⁹ *Ibid.*, pp. 20-21.

⁵⁴⁰ KOSKENNIEMI, Martti. *The Politics of International Law*. Hart Publishing, 2011, p. vi.

⁵⁴¹ KOSKENNIEMI, M. *From Apology to Utopia*, p. 16.

⁵⁴² CHARLESWORTH, Hillary; KENNEDY, David. *Afterword: and forward – there remains so much we do not know*. In: ORFORD, Anne (org.). *International Law and its Others*, p. 402.

⁵⁴³ MÉGRET, F. *Thinking about What International Humanitarian Lawyers ‘Do’*, section 10.2.

practice of international law is possible under daunting and baseless circumstances. If we are to undertake such a task, there must be a space for critique which is not an “unmitigated threat to the human rights project”⁵⁴⁴.

International human rights law is an easy target for criticism. Pragmatically, it quite often fails to do anything⁵⁴⁵. Morally, it cannot escape a profound uncertainty surrounding the choices it makes⁵⁴⁶. From this unstable footing, it can enshrine particular views as imperative, demobilize alternative paths of contestation, and justify violence⁵⁴⁷. Viewing it as a *language* implies a potential for boundless manipulation. But there might not be any “other language (at least no other language *now*) that would do better what rights-language tried to do”⁵⁴⁸.

⁵⁴⁴ MÉGRET, F. *Where Does the Critique of International Human Rights Stand?*, p. 2.

⁵⁴⁵ POSNER, Eric A. *Martti Koskenniemi on Human Rights: An Empirical Perspective*. In: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (eds.). *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, 2017, p. 122.

⁵⁴⁶ KOSKENNIEMI, Martti. *The Politics of International Law*. Hart Publishing, 2011, p. viii.

⁵⁴⁷ See generally chapter 4 above.

⁵⁴⁸ KOSKENNIEMI, M. *The Politics of International Law*, p. viii.

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