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Simple international rights, global constitutionalism, and scholarly methods

A rejoinder to comments on "Beyond Human Rights" - part 1

Anne Peters — 1 February, 2016



An unexpected, organized, serious, and multiple engagement with arguments put forward in a manuscript which has gained shape, has grown, was written and re-written, was shrunk, cut, re-arranged, and which haunted my nights over so many years, which was proof-read and re-read so many times (though without detecting a number of embarrassing typos) – such an engagement is surely the most precious gift any scholar can ever receive. I am honoured and happy about the initiative taken by the blog editors to discuss the book *Beyond Human Rights* whose revised and updated English version will appear (hopefully) in the spring with Cambridge University Press. The lucid questions and critique raised in the blog contributions made me reconsider some points. Besides, the discussion showed where and how possibly to continue on the path taken in the book, and this is of course encouraging.

Update in times of re-etatisation

Since the finalization of the German edition of the book in 2013, the international political and legal system has been changing. The trend of “humanization” of international law may have slowed down or stopped, while State sovereignty seems to have become more important again. This may have to do with the recognition that strong and well-functioning States are needed to protect human rights, that basic “Westphalian” principles such as territorial integrity and the prohibition on the use of force have been violated and need to be re-emphasised, and that non-Western States and cultures which have their own views on the meaning of human rights are in economic and political terms on the rise.

The global political and economic constellation has changed with the rise of the BRIC States and a concomitant decline of the United States and Europe. The question is whether and how this power shift affects the international legal system, and with this, the status of the individual in it. Was the phenomenon of “humanization” or “individualization” of international law only “a hallmark of the period of U.S. leadership” (William W. Burke-White) which spread an ostensibly typically US-American narcissistic rights culture? If this were the case, a reversal of the “individualization” of international law would seem likely, because the voices of non-Western States which have traditionally been more sceptical of the purported “individualization” have gained more salience. However, I submit in the forthcoming English text that political disappointment about the “failure” or “abuse” of Western interventions in the Middle East and mere assertions of a novel Statism are not able as such to destroy the global legal *acquis individuel*.

Global constitutionalism

Some commentators linked the concept of international rights beyond (or “below” or short of) human rights to global constitutionalism. By global constitutionalism, I understand an ideology (an “-ism”) which reads parts of international as being grounded in some form of constitutionalist principles, notably the rule of law and human rights, and which suggests that international law can and even should be interpreted and progressively developed in the direction of greater respect for and realization of those principles.

In the forthcoming revised English Chapter 14 I spell this link out a bit more clearly than in the German text: “This study is based on the assumption that within the domain of international law, a constitution-like layer of norms has begun to crystallize and is being further developed. We refer to this as a process of constitutionalization of international law. International constitutional law includes the structural norms that define membership in the constitutional community, provisions on institutions and their powers, provisions governing the creation of law and conflict resolution, as well as substantive guide lines and principles embodying values. Human rights belong to the layer of international constitutional law. The ‘ordinary’ individual rights do not belong to this layer, but rather (figuratively) to the layer of ordinary international law ‘below’ that layer. This distinction between two layers of norms in international law, namely international constitutional law on the one hand (including international human rights) and ‘ordinary’ international law on the other hand (including ‘ordinary’ individual rights), is still only rudimentary. So far, there are hardly any special law-making processes guaranteeing that international constitutional law would be more difficult to amend, thus implementing a hierarchy of norms within international law.”

The contribution of rights “below” human rights to a normative hierarchy within international law would be one link to global constitutionalism. Besides, *Beyond Human Rights* is a “constitutionalist” contribution to international law scholarship because it considers (as I write in Chapter 17), the new international legal status of the human being as “an expression of a normative individualism. The idea here is that politics and law ultimately should be guided and justified by the concerns of the people affected by them. That paradigm does not dispute that people live socially (i.e. in communities), that their identity is constituted in part by those communities, that people act jointly, and that they have and should have collective goals. These collective projects must, however, ultimately be measured by the needs and interests of the people affected and are not an end in themselves. From that perspective, precisely this orientation toward the individual in (different, overlapping, changing) communities justifies international law as a whole.”

The power of persuasion: Zoran Oklopcic

But fortunately, as Zoran Oklopcic observes, the analysis presented in *Beyond Human Rights* is *not necessarily* tied to global constitutionalism, but can also be “read as a standalone”. In his lucid comments on the overall structure of my argument, Zoran opines that only a “narrow subset” of “contemporary dignifiers of statism” could be „converted“ to cosmopolitanism by my book, namely the global bourgeois, or – worse even – only “neo-liberals”.

Of course, scholarship is not about conversion but about persuasion, deliberation, and argument – as Zoran later acknowledges when he urges us to “rethink the styles of engagement in international legal theory in general”. My style of argument in the book is doctrinal (tracing and reconstructing the ideas and legal concepts, and suggesting a new one), practical (identifying the relevant hard and soft law texts and statements), and theoretical (only a little bit).

I have no qualms with admitting that all this includes a normative dimension. The explanation is simply that a normative analysis of the law and of its applications is, firstly, to some extent inevitable, and secondly, even desirable. The first point is its inevitability: Because of the leeway inherent in any interpretation and application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a “normative” and not merely a “positive” analysis. Although a normative analysis can ideal typically be distinguished from positive analysis (in which the law is “only” described, explained, and prognosticated), it is banal to admit that there is in reality a blurred intermediate zone. First, because “description” is in itself already a constructive and systematic performance, which is based on numerous distinctions and choices. The “observer” must choose the actors, the acts, the periods of examination, and he must interpret texts. In all this, the observer’s (“normative”) preconceptions pre-structure her “positive” description. The inevitable blurriness between positive and normative analysis does *not* mean that we should give up the distinction between both types of analysis as an *idée régulatrice* (we should not abandon it) – but that we should harbour no illusions about its sharpness.

The second and I think more important point is that a normative analysis of international law is, due to specific features of international law, both inevitable and desirable. Because of the typical indeterminacy and vagueness of treaty provisions and by a large number of unwritten norms much more doubt hovers over the existence of the *lex lata* than in domestic law, which is relatively fully and precisely codified in the form of codes, laws, and decrees. In addition, international law has evolved gradually, often out of soft law texts. The exact point of change from a pre-legal practice to a hard rule of international customary law can hardly be pinpointed. For these reasons, neither the canons of construction for treaty interpretation nor empirical research on the formation of customary law will in themselves yield clear results. The findings must be complemented by normative (evaluative) considerations. For example, it makes sense to qualify a practice and the accompanying *opinio iuris* as sufficiently general and enduring when the legal norm identified thereby is overall in conformity with the international legal system and in harmony with other international legal principles.

I take the point that my analysis of the individual’s legal status risks, as any conceptual proposal, to sell a scholarly idea (or an at best “emerging” norm) for law as it stands. Generally speaking, the “premature” labelling of barely discernible “norms” or concepts as valid law is in methodological terms flawed because it mixes (beyond what is inevitable) positive and normative analysis. Moreover, it risks undermining the normative power of

international law as a whole. When a scholar wrongly asserts the existence of a legal norm, he or she usurps the position of a law-maker without normative justification.

However, an evaluative systematization and an evaluative closure of legal gaps is exactly what international legal scholarship is about – because of the inherent graduality of the international legal process and because of the indeterminacy of treaty law mentioned above. These typical features of international law prevent the purely “positive” analysis from generating clear and unequivocal results. And because States could then more or less choose that interpretation of the law which suits them best, any auto-limitation of scholars to “description” of the law and legal practice “as it stands” would make it even easier for States to disregard international law under cover of law. I submit that problems and perils of ideology can hardly be avoided by concentrating on seemingly value-free “positive” analysis, and this is why *Beyond Human Rights* does not even purport to do that.

Democracy and reversibility of simple international rights: Michael Riegner

Michael Riegner applies the framework suggested in *Beyond Human Rights* to information rights. While the right to information (Art. 19(2) ICCPR) is widely recognized as a human right, its exact scope and reach is not fully clear. Some emanations such as the right of access to official documents (see the CoE Convention ETS No. 205 of 2009 [not in force] and the EU Transparency Regulation 149 of 2001) are regulated in administrative-law type norms. The “information architecture” is a perfect example not only for a mix of international, regional, and domestic law (thus forming a body of “global” or “transnational” law), but also for an interplay of human rights with ordinary or simple rights (and obligations) within international law.

Michael then links the idea of “simple” or “ordinary” rights to two concepts which play a part for international law more generally: Democracy and universality. He reminds us that *reversibility* is an important feature of democratic law. If simple rights were more easily amendable or withdrawable than human rights, then they were in some sense more democratic than entrenched human rights. At first sight, all rights enshrined in international treaties enjoy formally the same status and are equally difficult to amend. But while amendment and reform require unanimity, denunciation/abolishment can be realised unilaterally. Maybe the fact mentioned by Michael, namely that some Latin American States denounced their BITs (which – in my understanding – may endorse investors’ rights short of human rights) might show that they do not take those rights as seriously as human rights. On the other hand, even the membership in human rights treaties is, at least in the public debate, no longer considered to be a political no-go. Trinidad and Tobago had once withdrawn from FP 1 to the ICCPR, in order to accede again with a reservation, and that withdrawal from the ECHR is currently discussed in the UK and Switzerland. It remains to be seen whether denunciation action will follow, which would constitute a grave attack on the “sanctity” of human rights, would put into perspective my claim of a distinction in weight, and would furnish material for reflection on Michael’s idea of democratic reversibility of rights.

In the context of reflection on democracy, Zoran’s second observation is relevant, too. Zoran notes that *Beyond Human Rights* contains only quite limited sections on political rights, political participation, and on the barely existing law-making role of individuals (including their role as a global *pouvoir constituant*) in the current global system. Indeed, this whole dimension would warrant another book. For these matters, all depends, according to Zoran, on one’s “vision” of collective political action, seen in the context of economy and culture. Obviously, the enormous economic and cultural differences between communities or

potential political collective actors makes global constitution-making and global constitutional amendment hard not only to realize but already difficult to conceptualize. So let's wait for his book on this question.

Besides democracy, the second point made in Michael's contribution is the link between "simple" international rights and the debate on the universality of international law. I share his and Sundhya Pahuja's understanding of "universalism". Obviously, international law does not embody apriorical and eternal truths. On the other hand, it is reductionist to consider the universalist claim of international norms solely and always as a camouflage for the pursuit of national interests of the powerful players. "Hegemony" is no *passé-partout* which could explain or "unmask" the essence of the entire international legal order.

International law is, I would say, universal only *when and as long as* some of its principles can be based on an overlapping consensus by real persons across the globe, when it furnishes procedures to reconcile conflicting interests arising over global goods, territory, etc., and when it offers legal institutions which seek to contain damage to persons who live in the face of irresolvable conflicts. International law has, as Riegner says, a "negotiable content" – and the inevitable social fact is that bargaining power matters a lot in the negotiation of that contents. International law is not universal, but its formats and substance are in a constant and fluctuating process of aspiring at, acquiring, and losing universality due to contestation and violence. What matters is international law's *universalizability*. The downgrading of some rights might, if submitted, contribute to this objective.

This rejoinder will be continued in our next post.

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Tags: [Human Rights](#), [International Legal Theory](#)

Part 2: Simple international rights, global constitutionalism, and scholarly methods

The rejoinder to comments on "Beyond Human Rights" continued

Anne Peters — 3 February, 2016



This post continues [Anne Peters rejoinder](#)

Roland Portmann's main point is that national (domestic) law principles and practices matters crucially for the legal status of the individual, and that we must study closely the "interface of domestic constitutional law and international law." He also highlights the importance of domestic law on the incorporation of international (treaty) law.

Portmann is right in pointing out that direct effect is crucial. I would like to repeat at this point my (controversial) claim that direct effect is governed both by international law and by the domestic law in question. According to a traditional view, direct effect was solely a question of domestic law, the answer to which was entirely left to the domestic courts. The reasoning for that view was that the issue was primarily one of *implementing* international law or of fulfilling international legal obligations. International law itself demanded only that it be implemented, but it left the way in which it was implemented to the States. The way in which it was implemented fell within the *domaine réservé* and thus – from this perspective – also the decision on direct or merely indirect effect. In contrast, direct effect can and should primarily be understood as a question of *interpretation* of the treaty provision concerned. The decision on direct effect depends crucially on criteria relating to the content of the norm, and thus inevitably requires interpreting those criteria. The interpretation of an international treaty must meet international requirements, even if the interpretation is made by a domestic court. The rules for interpreting international treaties are codified in the Vienna Convention on the Law of Treaties and have been further specified by international (and domestic) case law.

Of course, determining whether an international norm is self-executing is normally in the responsibility of the domestic authorities and courts called upon in the specific dispute. This situation corresponds to the normal case of international (decentralized) application of the law. The existence of centralized international requirements cannot guarantee that they are actually applied identically in concrete individual cases.

But because direct effect is a question whose answer – at least *also* – must be found in international law itself, the question may also be decided by international courts, as was the case in the PCIJ's *Danzig* opinion. The crucial argument is now that, because both levels are linked to each other as reciprocal catch-all mechanisms ("*wechselseitige Auffangordnungen*", to borrow Hofmann-Riehm and Schmidt-Aßmann's felicitous phrase), notably linked due to the local remedies requirement and the principle of subsidiarity, the application of an international legal norm by domestic *and* international bodies should follow rules that are in turn compatible with each other. If they remain disjunct and incompatible, the whole architecture will be undermined – and this would run contrary to the telos of the mentioned principles of local remedies and subsidiarity and thus create an inner contradiction within international law itself.

One further important point on direct effect: To argue that it is imperative to grant a political leeway to the genuinely political bodies of the State, which may then decide whether they in fact want to comply with a treaty (e.g. the GATT) or the judgment of an international court – *or not* (by denying direct effect), implies a downgrading of the legal-ness of international law. A rule which is not meant to be complied with resembles more a political guideline than a legal norm.

Under the premise that international treaties constitute genuine law, their violation must – from the perspective of the rule of law – be actionable in principle (as a rule), i.e. in domestic courts. Such a standpoint is not inevitably naïve in the sense that it disregards the political implications of the legal analysis but simply insists that law cannot be completely dissolved into or reduced to politics. From that perspective, we may admit that beyond these arguments lies the reality of power, as Hélène Ruiz Fabri has written (elsewhere). However, we can not admit that "*all* depends on the ability to resist and bargain over implementation". To the contrary, under the rule of law, not "*all*" depends on power only. From that perspective, exceptions from applicability must be specially justified. A general reference to the lower level of legitimacy of international law in principle is no convincing argument against the normal case of application postulated here.

Investor rights in twilight: Evelyne Lagrange

In her blog on my chapter 10 on investor rights and obligations, Evelyne Lagrange rightly points out that I left some controversial issues in "enduring twilight". In my English revisions I tried to illuminate those a bit more.

I now espouse Moshe Hirsch's insight that human rights law and investment law "have evolved along radically divergent paths". Although the new BITs negotiated or already concluded by the EU formulate a novel type of fair and equitable treatment standard which in part resemble guarantees of procedural human rights (denial of justice and due process), and human rights to non-discrimination, the differences between human rights and investor rights prevail over their similarities.

Investor rights are not accorded to the investors for the sake of human flourishing. They are mainly instrumental, an incitement for the exportation of capital which is supposed to generate welfare effects in the host State. Second, enforceable investor rights are incumbent only to few and extremely wealthy entities (often moral and not natural persons) who are affluent enough to institute an extremely costly investment arbitration proceeding. The two types of rights thus have a different telos, and arguably have a different weight, too.

Evelyne Lagrange herself highlights an important third difference: International human rights are primarily protected by domestic courts (sometimes placed under the control of an international body) and thereby “domesticated”, whereas the investor rights are safeguarded by international arbiters only, and thereby completely denationalized (see also Evelyne Lagrange, *L’application des accords à l’investissement dans les ordres juridiques internes*, in : Sabrina Cuendet (ed.), *Le droit des investissements étrangers : approche globale* (Paris : Larcier 2016)).

Lagrange in that work also demonstrates that substantive investor rights flowing from investment treaties are from a legal-technical perspective the proper conceptualization, but that political considerations by the tribunals motivate their denial. What really matters is the lacking invocability of those rights in domestic courts. A more ready acceptance of the direct effect of investment treaties and the re-introduction of domestic remedies in the host State (against what is foreseen in Art. 26 ICSID-Convention as the regular course) would remedy the normative problem of a potentially undue “*gouvernement des arbitres*” which is tainted by legitimacy problems and therefore currently regarded with scepticism.

The acknowledgment of substantive (not merely procedural) investor individual rights – even short of human rights – makes a difference to the mere objective protection of investors by international law. By relying on rights, investors are emancipated from their home States, are protected from too burdensome interpretive statements, enjoy protection during the survival period in the event of denunciation and termination of an investment protection agreement, and ultimately are immunized to a certain extent against countermeasures by the host States.

Finally, we should remember that the normal legal situation will be the co-existence of State rights *and* investor rights flowing from a given investment treaty. Follow-up questions are then the relationship among these two sets of rights and the procedural consequences of such a co-existence. In the ICSID-system, the investor claim enjoys a procedural priority: Art. 27(1) ICSID prohibits the investor’s home State to institute any proceedings once the investor is involved in an ICSID arbitration.

Obligations of individuals and the principle of legality: Raphael Oidtmann

Raphael Oidtmann’s contribution focuses on individual obligations. This field is among the most complicated in which the law as it stands (and the debate) is somewhat chaotic, mainly because of its focus on criminal responsibility and the often lacking distinction between the level of primary and secondary obligations. I would however not side with Oidtmann that the ability to bear legal obligations is an “indispensable” corollary of the capacity to bear rights, “already for a logical reason”. On the contrary, it is perfectly possible to allow for rights without obligations, as domestic law foresees, e.g. for infants.

In *Beyond Human Rights*, I have sought to show that current international law imposes obligations on individuals in numerous sub-domains, to an extent Jacob Katz Cogan referred to as the *regulatory turn* in international law. Alongside these obligations, however, the normal international legal regulatory scheme – merely indirect imposition of obligations on individuals by way of the international obligations of States to enact national precepts and prohibitions, which in turn are addressed to private actors – persists and even prevails.

In light of the comprehensive and gapless responsibility of States, are parallel prohibitions and precepts directly addressed to individuals needed? Additionally, there is the danger that States might weasel out of their regulatory obligations by referring to the international

imposition of obligations on individuals. There are also the practical difficulties of imposing obligations on 7 billion actors. And finally, direct international individual obligations raise specific problems of legitimation. For all these reasons, international law should not be viewed as a substitute for domestic criminal or civil law. Still, no reason exists in the nature and structure of international law that would prevent it from addressing individuals and imposing legal obligations on them.

But the imposition of obligations on individuals must be specially justified separately. And because the obligations imposed on individuals are not generated by other private persons – against whom private autonomy would have to be taken into account – but rather by a public authority, the *pacta tertiis* principle is not useful in this context. Nevertheless, the basic concern of the *pacta tertiis* rule, namely to secure the freedom and consent of those on whom rights are imposed, remains relevant. The legal requirements for imposing international precepts and prohibitions on individuals can be found in the reservoir of public law and global constitutionalism. I have submitted that the development of further individual obligations directly under international law should be recognized only under two conditions: There must in fact be a need for global regulation in that regard, and the principle of legality must be respected. In situations where these conditions are properly met, individual obligations may be established through treaties, customary international law, general principles of law, case law, and even secondary international law.

A transnationalized principle of legality

The principle of legality originates from the national (public) law of liberal constitutional States, and is now a general principle of law as referred to in Article 38(1)(c) of the ICJ Statute and hence also an international legal norm. This principle (as in national law) serves a dual protective purpose, which is slightly modified at the level of international law. In national law, the principle of legality secures the legitimation of limitations of freedom, firstly in terms of the rule of law and secondly in terms of democracy.

Within the scope of international law, preventing concentration of power is likewise a concern. The international principle of legality is – just as in national law – an element of the rule of law. As in the national domain, the purpose of the rule of *international* law is to secure freedom, namely by stabilizing expectations. Securing freedom through the distribution of power within the multi-level system of international and national law is achieved less through the “horizontal” separation of powers than through a “vertical” separation between international bodies for the enforcement of individual obligations (such as through monitoring bodies, compliance committees, and the like) and national authorities.

The second, democratic concern of the principle of legality can be taken into account in a limited way in international law, although international legal norms generally enjoy less democratic legitimation than national laws. A key demand of legitimacy which international law must fulfil, however, is that international actors be accountable. This principle has a similar containing function as the democratic principle, and therefore one of the well-known rationales of the principle of legality (namely to secure accountability) plays in international law, too. The democratic legitimacy deficit inherent in an international legal basis constitutes a handicap that must be compensated through enhanced requirements on specificity and, accordingly, foreseeability of the norm purporting to impose obligations on individuals.

Human rights obligations on business?

Based on these considerations it may seem warranted to make individual rights – and especially human rights – directly binding on enterprises under international law. In the age of globalization, gaps in protection actually do exist at the level of national law, so that there is a specific and increased risk of under-regulation of the protection of workers' rights, conceived as global goods (so my first requirement is met).

On the other hand, it is relevant that the private persons in turn are also holders of basic rights. An international regulation of the enterprise should not amount to an inhibiting restriction of entrepreneurial freedoms that are in turn protected by fundamental rights (economic freedom and property rights). Moreover, the danger exists in the economic context that States might shirk their responsibility. If reformed international human rights bodies were to deal with human rights violations by enterprises as well, some States would presumably seize the opportunity to divert attention away from themselves.

All things considered, expanding the binding nature of human rights into the sphere of transnational business is neither normatively desirable without reservations, nor does it have good prospects as a practical matter. It would be more promising, and more tailored to the qualitative difference between States and enterprises, to strengthen only the *indirect* imposition of the obligation to respect human rights on enterprises by intensifying the duties of the State to protect, as demanded by the Ruggie Principles. So far, States are bound to discharge their duty to protect through national action plans which aim to translate the UN Principles into practical action at national level. The ongoing UN Working Group has issued a "Guidance" which provides recommendations on the development, implementation and update of these plans. For the EU, the European Commission has requested that EU Member States develop plans; and some Member States have already done so. If this mediating scheme which is now being slowly and gradually established, turns out not to generate sufficient protection, the imposition of direct human rights obligations of business actors, through a new international treaty, respecting the principle of legality, is warranted.

Socializing States through rights beyond human rights

Returning to my initial reflection on scholarly "registers", I conclude that international legal scholarship should be adapted to the novel period of international law we are living through, a period which is characterised by a high tension between interdependence and globalisation (economic, technical, and cultural) on the one hand, and stark cleavages and fencing (ideational, economic, territorial) among States, on the other hand.

In this period, the normative demands on the States should not be overstretched by overlegalizing the international rights of individuals, because of the ever-present threat of a backlash. The reason lies in the sociological truism that law which is too "strict" and too clearly contrary to interests of those subjected to the law will provoke backlashes that undermine the normative force of the law in general.

On the other hand, law – if it is to deserve its name – is counterfactual. It is not and should not simply reflect the actually existing power relationships and interests. Rather, the purpose of every legal norm is to influence the interests and conduct of those subject to that norm and to guide them in the direction desired by the law-makers. Then, law, including international law, itself has a reality-shaping significance. Put differently, social reality, including international relations, is constituted in part by law and especially by rights. This interaction has been theorized and empirically demonstrated by the constructivist strands of political science. States can be "socialized" by international legal norms under certain conditions.

More specifically even, changes to the international system have been often or even mainly brought about through the struggles of individuals for human rights and their predecessor, religious tolerance, as Christian Reus-Smit has recently demonstrated. Historical examples are the emergence of the Westphalian system of States, the independence of Latin American States, the reorganization of Europe after the First World War, and the collapse of the Soviet Union.

Although this constructive power of law – and of legal rights of the individual in particular – is precarious, an anticipatory resignation of legal scholars in light of political resistance would mean to give up exploiting the factual power of normativity and would betray the counterfactual nature of law and of rights. It is, I submit, the job of international scholars, as professionals, to develop ideas – ideas which may have the power of transforming international relations, and which therefore contribute to “realizing utopia” (Antonio Cassese). As Victor Hugo, to whom Cassese refers, wrote : « *On résiste à l’invasion des armées; on ne résiste pas à l’invasion des idées* ».

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