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Response

Having It Both Ways: International Human Rights Law Cannot Both Be in Decline and Be (That) Problematic for International Law

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Introduction

As titles go, “International Law in the Post-Human Rights Era” is a pretty catchy one.¹ I am not sure, however, that the claim, in its breadth of ambition, can be robustly sustained, or that it would not be more correct (although less catchy) to simply speak of “the limited impact of human rights on international law.” In this response to Professor Wuerth’s stimulating, panoramic, and very provocative article, I try to suggest that some aspects of her argument are not strictly necessary to it and may detract from what I think might be a less ambitious but more effective message. More generally, I should say that I emphatically agree with one aspect of Professor Wuerth’s article: that there is more work to be done at the intersection of “international human rights law and international law as a whole.”² Having said that, I disagree on pretty much everything else that she deduces from her own effort at that task.

To begin with, it is worth noting how far international human rights law has come that an article can even suggest that the United Nations should focus more on international peace and security. Not long ago it would have been obvious that this was the only goal of the United Nations, and it may therefore be testimony to how far things have changed that we can now seriously

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1. Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEXAS L. REV. 279 (2017).

2. *Id.* at 280.

entertain the opposite proposition. At the same time, the claim that international law should be more about traditional international law things, which suffuses the entire article, is quite a peculiar one because Professor Wuerth simultaneously suggests that this is already largely the case.³ There is thus something slightly contradictory (or perhaps paradoxical) about the way the article is structured: on the one hand, human rights are on the decline and their promised transformation of international law is only partly fulfilled; on the other hand, human rights are presented as having a considerable, nefarious effect on international law.

It seems not particularly helpful to make both these claims simultaneously, one of which is factual and the other normative. The decline thesis is not particularly needed for the argument that international law is being compromised by its association with human rights. In fact, if international law is being negatively affected and sovereignty made weaker, then that must surely be a result of the significance of rights, not of their decline; if rights discourse is on its way out, conversely, then this is a curious time to complain about its ill effects, which clearly cannot run that deep. Although Professor Wuerth frames this as an “opportunity,”⁴ and one might argue that human rights law’s decline may provide a moment to see all that has been wrong about the interference of human rights when it comes to international law, I see no real logical connection between the two, and quite a few problems in the suggestion that international human rights law’s relative weakness, such as it may be, should be a reason to discard rights. In what follows I assess each claim on its own grounds before connecting them.

I. Are We Really in a Post-Human Rights Era and in What Way?

Since much of the article hinges on the claim that we are in a post-human rights era, that claim merits some prodding. Is international law really beyond human rights and what might that actually mean?

A. *Human Rights Generally: Hard to Say*

The indicators that Wuerth chose are quite focused on “enforcement,” a particular sub set of rights and a certain vision of what would most manifest the ascendancy of a rights culture.⁵ As she points out, there are other ways to measure the imperium of rights than how often they are enforced internationally and many human rights lawyers have long stopped being fixated on enforcement.⁶ Nonetheless, the focus is unmistakably on some of the most controversial and least successful developments of international human rights law. For example, if one were to judge the success of

3. *Id.* at 283.

4. *Id.*

5. *Id.* at 281.

6. *Id.*

international human rights law by how often it has prevented mass atrocities on the territory of permanent Security Council members, then clearly it would not have much to show for itself. By contrast, if at least “every international legal issue today is an international human rights issue,”⁷ then surely that is not much of a decay? If one measures the success of human rights in normative terms, then they do largely continue to provide a popular bulwark against authoritarianism, populism, racism, etc. There is an ambiguity, in fact, when one talks of the decline of “human rights.” Are we talking about the intensity of human rights violations or merely describing a decline in human rights as a legal discourse?

As to the former, the question of whether rights are respected globally is so broad, so methodologically fraught, and so beyond what can be meaningfully conveyed in one article that one can wonder whether any serious claim can be made to that effect in passing by mentioning a few handpicked political science studies. Which human right are we talking about, where, and when? It is suggested in passing that there is “widespread non-compliance” with human rights, which echoes a popular perception that human rights are more often honored in the breach.⁸ But is that actually the case? Could it be that we simply focus and know more about the violations than the cases where rights are respected? Reading Professor Wuerth’s article, my sense is that this rather broad claim is not actually what she is most interested in, although there is certainly a constant slippage between making a claim about the failure of certain doctrines and the overall failure of the project.⁹

I would suggest that whether international human rights law is powerful or not depends largely on what part of international human rights law one is talking about. Certainly for the roughly one-sixth of the world’s population that falls under the jurisdiction of regional human rights courts that routinely sanction their state for minor rights violations, where it is becoming increasingly popular for some politicians to complain that, for example, the European Court of Human Rights is too powerful, the idea that international human rights law is weak is simply not borne out by the facts.¹⁰ Equally, I

7. *Id.* at 282.

8. *Id.* at 320.

9. *Id.*

10. Displeasure with the excessive power and sway of the European Court is rampant, for example in the United Kingdom, but also in Turkey or Russia. There has been a wide range of responses in Europe to the Court, particularly negative ones. *See generally* PATRICIA POPELIER ET AL., *CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS: SHIFTING THE CONVENTION SYSTEM: COUNTER-DYNAMICS AT THE NATIONAL AND EU LEVEL* (2016); Luzius Wildhaber, *Criticism and Case-Overload: Comments on the Future of the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH* (Spyridon Flogaitis et al. eds., 2013). For a study of how the Court has built up its power over time, see JONAS CHRISTOFFERSEN & MIKAEL RASK MADSEN, *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 6–13 (2011).

would suggest that for some of the poorest states that are on the receiving end of conditionality in investment or trade agreements, or whose officials are prosecuted in Paris or Brussels, or who are denied entry in regional groupings because they fail to abide by international human rights standards, the conclusion might be exactly the opposite, namely that international human rights law, as the West's preferred mode of soft exclusionary power, is in fact highly effective.¹¹

The human rights discourse itself is sufficiently broad and fraught with contradictions and competing priorities that it seems to be capable of accommodating a large number of trends: some failures, some successes, some improvements and a lot of grey in between.¹² The focus on *violations* of human rights, significant as they may be, is reminiscent of some familiar debates about domestic or international law.¹³ For example, few would argue that a “wave of crime” in a given country means that we are in a “post-criminal law” phase.¹⁴ It may reflect more reporting of crimes, more attention to crime by the authorities, or merely constitute yet another opportunity for the criminal law to assert itself, which in some readings at least is what the criminal law is all about. Similarly, if the standard of the normative potency of a legal regime is how often it is complied with, one wonders whether human rights is doing any worse than international law generally—if anything, the weakness of human rights has also always been a weakness of international law.

Although enforcement is relatively important to the cause of human rights, and certainly human rights promoters can be faulted for their occasional enthusiasm for backing norms by force, international law itself has long recovered from its theoretical addiction to enforcement as the single measure of what counts as law.¹⁵ There is no reason why human rights law should be judged by a significantly different standard and, for example,

11. For a doctrinal study of conditionality that nonetheless gives an idea of its potential leverage effect, see LORAND BARTELS, *HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS* 1–3 (Paul Craig & Gráinne de Búrca eds., 2005).

12. It is easy to find scholars arguing that human rights are globally doing very well. *See generally* KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (THE NORTON SERIES IN WORLD POLITICS) (2011). Other scholars, however, argue that human rights are a passé ideology. *See generally* STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013); COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL THOUGHT AT THE TURN OF THE CENTURY* (2000). Some scholars provide a more nuanced historical assessment of where human rights stand internationally. *See generally* Kenneth Cmiel, *The Recent History of Human Rights*, in 109 *AM. HIST. REV.* 117 (2004); Emilie M. Hafner-Burton & James Ron, *Human Rights Institutions: Rhetoric and Efficacy*, 44 *J. PEACE RES.* 379 (2007).

13. *See* Anthony d'Amato, *Is International Law Really Law*, 79 *NW. U. L. REV.* 1293, 1293–94 (1984) (providing some instances in which conversations about international law mimic discussions of domestic law).

14. *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?* *Addison C. Harris Lecture*, 74 *IND. L.J.* 1397, 1398–99 (1999).

15. *See* Frédéric Mégret, *International Law as Law*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 64, 81–90 (James Crawford & Martti Koskeniemi eds., 2012).

compliance with norms these days certainly seems to be a better guide to their legal nature than the reality of enforcement. Compliance might, of course, be a function of a range of factors that has little to do with the prospect or reality of enforcement. As always, the indicators and parameters of compliance one chooses will be all-important to one's overall diagnosis, and this is in itself an extraordinarily complex exercise.¹⁶ But there is at least some evidence that compliance with human rights has improved over the last decades¹⁷ and that this is not simply a fluke in that it is at least partly related to legalization itself.¹⁸

In addition, there is no shortage of theories that have tried to transcend the enforcement/compliance dyad altogether by pointing out how international human rights law might be powerful in other ways, for example as a productive form of disciplinary knowledge that forcefully "legalizes" the language of rights,¹⁹ as a new "standard of civilization,"²⁰ or as part of the "social construction" of power internationally.²¹ The point here is not to argue that international human rights law is positively not in the decline but that this is both methodologically and theoretically a highly complex question that is highly reliant on a host of assumptions. Where some see a post-human rights age, therefore, others will see a continuing and complex struggle that is itself a manifestation of the rise and continued incidence of a forceful alternative rights paradigm to international law.²² Professor Wuerth recognizes these things at least in passing, but simply seems committed to a decline argument that she never really has the time to substantiate and, moreover, as I will argue, that she does not strictly need to make.

16. See generally Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 L. & SOC'Y REV. 533 (2017).

17. See, e.g., Christopher J. Fariss, *Respect for Human Rights Has Improved Over Time: Modeling the Changing Standard of Accountability*, 108 AM. POL. SCI. REV. 297, 297 (2014) ("I then show that respect for human rights has improved over time and that the relationship between human rights respect and ratification of the UN Convention Against Torture is positive, which contradicts findings from existing research.").

18. Berlin & Dancy, *supra* note 16.

19. See generally Tony Evans, *International Human Rights Law as Power/Knowledge*, 27 HUM. RTS. Q. 1046 (2005).

20. See generally Jack Donnelly, *Human Rights: A New Standard of Civilization?*, 74 INT'L AFF. 1 (1998).

21. See Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980, 981–82 (1999) (expounding on the link between human rights and social construction).

22. See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance: with CA Comment by John M. Conley*, 52 CURRENT ANTHROPOLOGY S83–S95 (2011).

B. *Specifying the Thesis: Normative Failures*

Still, there is no doubt that we live in interesting times. We seem to be constantly teetering between further dominance of the discourse of human rights or its effective roll back. One will find few triumphalist international human rights lawyers, and most seem to advance with a constant sense of doom, or at least an evident pragmatism that sits oddly with human rights' *a priori* principled stance.²³ One does not have to necessarily tie oneself to an overall thesis about being in a post-human rights age to see that very clearly all is not well in many parts of the world. Moreover, there are many worthwhile critiques of the force of the investment into the legalization of rights that suggest that whether rights are respected or not may have little to do with whether they are contained in constitutions or treaties.²⁴

Indeed, Professor Wuerth gradually refines her own argument by emphasizing a more plausible claim linked to the *normative* decline of human rights.²⁵ This is distinct, crucial, and more plausible: international human rights law could have failed on a purely doctrinal and sectoral basis, without having failed altogether. This is a significantly different and more plausible claim to make in relation to the idea that we are in a post-human rights age. It merely means that we are in a post-international human rights *law* age in certain specific doctrinal respects, one in which some ideas no longer hold sway or embody the promise that they once did. As a description of intellectual trends and fashions in international law, it is all the more credible that we have been there before: international law has always relied on the ebb and flow of doctrines, seemingly coming from its periphery like Barbarians to Rome, only to be either defeated or incorporated into its empire.²⁶

Even watering down and specifying the claim in that way, it should be taken with a grain of salt. First, the argument relies on choosing certain doctrinal moves, which are some among many contenders and then making them more central to the international human rights law project than they have ever been. If the doctrinal moves in question were that individuals are owed significant state action (including investigation, repression, etc.) in case of violation of the right to life, that core human rights have *jus cogens* status, that individuals in principle are capable of having standing before

23. See Geoff Dancy, *Human Rights Pragmatism: Belief, Inquiry, and Action*, 22 EUR. J. INT'L REL. 512, 512–35 (2016) (providing an overview of three types of pragmatism that could be applied to the human rights conversation).

24. Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. LEG. STUD. 417, 417–52 (2015) (examining constitutional prohibitions of torture and the fact that those prohibitions have little bearing on practices).

25. Wuerth, *supra* note 1, at 281–82, 325–35.

26. See, for example, in relation to the international law of state succession, MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES* 231–44 (2009). See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

international courts, or that they can claim violations of their rights extra-territorially, then the picture would be quite a bit different. Moreover, among the contenders for defeat in the hard crucible of international law that Professor Wuerth mentions, some, such as the right of forcible intervention in defense of democracy,²⁷ were never more than half-baked ideas briefly entertained by a handful of particularly U.S. scholars that had very little to do with the mainstream institutional human rights agenda: the failure of such outliers²⁸ is not really something that can be chalked up to some inherent weakness of international human rights law.

Second, simply because the human rights movement has not achieved success on every front does not exactly mean that it has failed. Activists, as good litigators, typically overshoot in what they ask for but then still eventually obtain something. Although anti-immunity activists may not have obtained all that they set out to obtain in the 1990s after the promising beginnings of attempting to prosecute Pinochet, they did clarify that former heads of states do not have functional immunity for international crimes;²⁹ apologists for remedial secession certainly did not obtain its formalization in international treaties, but they did provide a set of ideas that have been seized upon in the Québec or Kosovo context to make certain claims.³⁰ The power of ideas about human rights is not only that they act as trumps, but that they act as guides for action. This, at least, should be very familiar from general international law, where a wide range of doctrines exist, less as unmistakably hard law and more as a series of pointers for decision makers. Thus, there is a glass half empty/glass half full quality to claims about the normative failure (or, indeed, the success) of human rights.

Third, many of the problems that international human rights law has encountered are the very sort of challenges that the human rights movement set out to address, that will not be addressed overnight, and that human rights activists are well aware of. Take for example arbitrariness and politicization of enforcement: to criticize this—as many human rights scholars no doubt also do—is not really to make a case that we are in a post-human rights age; it is merely to bring attention to one familiar and enduring problem with one

27. See generally Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794 (1994).

28. The consensus that quickly developed after the invasion of Panama was that there was no unilateral right to restore democracy. Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 494–503 (1990); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 645–50 (1984).

29. Colin Warbrick et al., *The Future of Former Head of State Immunity After Ex Parte Pinochet*, 48 INT'L & COMP. L.Q. 937, 937–49 (1999).

30. See generally ANNE F. BAYEFESKY, SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED: LEGAL OPINIONS (2000) (evaluating these claims in the context of the Supreme Court of Canada's decision on the "Quebec Secession Reference.").

area of the human rights project about which no one is being especially naive. International human rights law, like all law, is forever a work in progress. It is hardly clear that the battle is over (or indeed that it will ever be over) so that we can start counting the casualties strewn on the battlefield and decide who has won. There are challenges to stopping the narrative “circa 2017” when clearly the history of these ideas and their real-world consequences are quite dynamic and even cyclical. Indeed, it is not exactly clear what in recent history justifies a diagnosis that we were previously in a human rights age and are no longer.

C. *Further Specifying the Thesis: The Challenge Has Run Its Course?*

I do think, however, that one can further refine the post-human rights normative thesis in ways that better connect to Professor Wuerth’s central argument about the problematic mingling of human rights with international law.³¹ In some areas, international human rights law has made significant headway, encountering relatively little resistance from international law;³² in others, it has created a number of intense “pressure points,” particularly where and when it clashed most clearly with defining aspects of international law.³³ Because so much of human rights and international law is based on a degree of creative and dynamic ambiguity, it may not always be clear at the outset what these pressure points will turn out to be. Over time and as claims are pressed, however, these areas of ambiguity may temporarily collapse as one normative system, when pressed, resists and possibly asserts dominance. Ultimately, for example, states either have immunity when it comes to crimes against humanity or not, and no amount of gloss on how sovereignty-is-a-form-of-responsibility-defined-by-cosmopolitan-human-rights-discourse can really hide that the ICJ decided for Germany and against Italy.³⁴

Here, however, it may be useful to distinguish between weaknesses of human rights that have arguably always been there and therefore could not specifically herald its decline, and elements that may have surfaced in the last few years that suggest a specific crisis (so that *now* is the time to date the beginning of a post-human rights era), in an effort to better historicize the recent trajectory of international human rights law. In that respect, one theory

31. Wuerth, *supra* note 1, at 279.

32. There are many normative successes of international human rights law. For example, the idea that how a state treats its own citizens is not part of the sovereign’s fundamental *domaine réservé* was successful early on (at least in principle). Dinah L. Shelton, *An Introduction to the History of International Human Rights Law* 8–11 (George Washington University Law School, Public Law and Legal Theory Working Paper No. 346, 2007), <https://papers.ssrn.com/abstract=1010489> [<https://perma.cc/4V2M-RNM9>].

33. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 872–74 (1990) (“On the credit side, international human rights puts . . . tyrants on notice that monarchical and elitist conceptions of national sovereignty cannot be invoked to immunize them from the writ of international law.”).

34. *Jurisdictional Immunities of the State (Ger. v. Italy)*, Judgment (Feb. 3, 2012).

might be that the 1990s opened with a range of constructive ambiguities about how far one might push the enforcement of various rights within international law, and that after almost three decades, we are getting closer than ever to the moment of reckoning where certain limits have been set by the system, and there is not much systemic indeterminacy left to explore. We can no longer claim for a range of international norms, for example, that we are “a case away” from finally getting clarity on defining the proper and hopefully dominant place of human rights; the “case” is often already behind us, and it has not always been very favorable to a certain expansive understanding of international human rights, whether it be in relation to immunities (the ICJ in *Germany v. Italy and Congo v. Belgium*),³⁵ responsibility to protect (R2P) (its steady decline after its ambiguous invocation in Libya),³⁶ the right to democracy (so 90s),³⁷ or the closing down of the ambitious aspects of transnational litigation for rights violations,³⁸ etc.

In that narrow but not unimportant respect, the push back is unmistakable. The decline of human rights, then, is best understood not as a real-world decline (although it may also be that—I have argued that is just too broad a proposition for scholarly purposes) but as a normative retreat precipitated by a series of specific defeats where international human rights law, as it were, pushed its luck and got unlucky. One consequence is that the time when one could get away with thinking that everything could be pursued at once without costs or consequences is gone: there are ultimate conflicts of value between human rights and the ordinary demands of international law, and they tend, perhaps unsurprisingly, to be resolved in favor of international law when it comes to fundamental issues of international law.³⁹ When pushed, the bluff of international law’s nominal commitment to human rights has been called. Human rights law has run itself into a wall.

The advantage of making it clear that one is only making the post-human rights argument in that limited sense (a bit in the way Fukuyama could be understood to have made his famous claim about the “end of history” as a claim about the idea of History rather than actual world events⁴⁰) are threefold. First, it is relatively unconnected from any strong claim about the

35. Jurisdictional Immunities of the State (*Ger. v. Italy*), Judgment (Feb. 3, 2012); Arrest Warrant of 11 April 2000 (*Dem. Rep. of the Congo v. Belgium*), Judgment (Feb. 14, 2002).

36. See Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT’L L. 59, 67 (2012) (“The Libyan intervention had presented considerable dangers for the future of the doctrine of R2P.”).

37. See *supra* note 28.

38. See Francois Larocque, *Recent Developments in Transnational Human Rights Litigation: A Prospect to Torture as Tort*, 46 OSGOODE HALL L.J. 605, 654–56 (2008).

39. For a discussion of the tremendous difficulty, for example, of arguing domestically for exceptions to the rule of sovereign immunity when both the ICJ and the ECHR have taken a conservative stance, see Frédéric Mégret, *Le Juge Lebel et les Immunités: Retour sur Quelques Jugements et Pistes de Réflexion pour le Futur*, 94 CAN. B. REV. 711 (2016).

40. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 68–70 (2006).

fate of human rights on the ground. For example, international human rights law could be doing quite well in practice (although, no doubt, not as well as it could) despite the persistence of immunities, the weakness of R2P, or the lack of a human right to democracy or remedial secession, for a wide range of other reasons (regional human rights courts, civil society, an improving global economy, human rights mainstreaming, national human rights commissions, the rise of constitutional judicial review, democratic transitions, etc.).⁴¹ Second, it is a specifically legal claim amenable to legal analysis. Indeed, I think that Professor Wuerth is on to something when she detects a series of simultaneous legal failures across different areas of international human rights law that are not typically connected yet exhibit very similar traits.⁴² Third, and most importantly, this line of argument connects the “post” in Professor Wuerth’s argument to the “problematic” by suggesting that international human rights law’s conquering trajectory may have been stopped *precisely in those areas where it was perceived as too problematic for the international legal order*.

In that light, and I suspect Professor Wuerth would agree, the post-human rights thesis, now framed as merely a thesis about the normative limitations of the international human rights law project where it clashed most intensely with the international system, potentially connects the declining fortunes of international human rights law (such as they are) with its problematic nature for international law.

II. How Problematic Is International Human Rights Law for International Law *Really*?

Indeed, the interesting and more provocative claim is that human rights law has affected international law in problematic ways; that is, that certain doctrinal moves claimed by human rights have rendered the rule of international law weaker.⁴³ I think that this is an interesting concern even though it is a self-standing one that could have been emphasized without any reference to whether we are post or in the thick of a human rights era. In this section, I seek to address the claim on its own terms by first setting out a few reservations, and then arguing that Professor Wuerth may be flogging a dead horse and that, if anything, international human rights law might in some respects be argued to have excessively bowed to the status of international law rather than truly sought to challenge it.

41. There is a range of social-scientific studies that claim to chart the success of human rights on the ground in sociological terms, that are very unconcerned with the palace battles surrounding international human rights law questions. *See, e.g.*, David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 HUMAN RIGHTS Q. 401 (2010); Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POL. SCI. REV. 853 (1994).

42. Wuerth, *supra* note 1, at 282.

43. *Id.* at 309.

A. *Some Reservations*

While there may be something to the argument that the nature of international law is changed by human rights, which might in addition be problematic in some respect from a certain international legal point of view, I first want to outline three basic reservations.

First, the excesses attributed to human rights when it comes to international law are not only human rights' doing. For example, dilution through an accumulation of soft law and a general disruption of international law's sources is not attributable exclusively to human rights, although it might conceivably be said to be primarily or at least significantly so.⁴⁴ The origins of "instant custom" are not in human rights but in norms in favor of self-determination, decolonization, and sovereignty over natural resources (understood at the time not particularly as human rights claims, although they may certainly be reframed that way).⁴⁵ The concept has been invoked in relation to *jus ad bellum* developments that have very little to do with human rights.⁴⁶ The idea that the sacrosanct rule of unanimity in treaty ratification was breached to make way for human rights concerns is not very convincing given the general needs of multilateral flexibility in the second half of the 20th century⁴⁷ and the fact that of all treaty regimes human rights ones are those that have argued most strongly against reservations precisely as a result of the fundamentally principled and collective nature of their commitments (It is true that states make more reservations to human rights treaties, but that is distinct from whether these reservations, when push comes to shove, will be legal, as Turkey once learned at its expense).⁴⁸

Intriguingly, Professor Wuerth risks giving too much credit to human rights for both interfering with international law and for doing so in problematic ways. Today, the international law canon is as likely (some would say far more likely) to be challenged by environmental, international organizations, trade, or investment law as it is by human rights.⁴⁹ One might

44. See William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L COMP. REV. 261, 278 (2001).

45. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 428–29 (1983).

46. See generally Benjamin Langille, *It's 'Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145 (2003).

47. Maurice H. Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BRIT. Y.B. INT'L L. 137, 142–43 (1971) (describing the more flexible system emerging in the twentieth century); Linda L. Hazou, *Determining the Extent of Admissibility of Reservations: Some Considerations with Regard to the Third United Nations Conference on the Law of the Sea*, 9 DENV. J. INT'L L. & POL'Y 69, 79 (1980) (emphasizing the need for greater flexibility during the drafting of multilateral treaties).

48. Allehone Mulugeta Abebe, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council*, 9 HUM. RTS. L. REV. 1 (2009).

49. See generally EDITH BROWN WEISS, *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS* (1992); JOSÉ E. ALVAREZ, *THE IMPACT OF*

even argue, a theme I return to in the conclusion, that the challenge is coming from the heart of an international law crumbling at the base, much more than from hostile takeovers by various branches of international law. Moreover, whilst Professor Wuerth handpicks possible sources of dilution of international law as a result of human rights,⁵⁰ there are also considerable contributions of human rights law to international law, including a much stronger sense of normative hierarchy or a concept of the standing of individuals under international law that would seem to stand for a reinforcement rather than a weakening of international law as a legal order.⁵¹

Second, human rights lawyers themselves have sometimes bemoaned the excessive mingling of human right with international law. They have argued, for example, that the tendency to make everything a positive right weakens the ability of international human rights law to act as a trump or make powerful distinctions;⁵² or that tying the movement's fortune to the Security Council is the surest way of losing its soul;⁵³ or that it is very problematic to characterize as obligations things that states routinely flout.⁵⁴ There are international human rights lawyers, in fact, who find that the Human Rights Council is deficient in every way and alien to everything human rights.⁵⁵ It is not therefore clear that all negative effects associated with the proposing of particular human rights doctrines can be tied back to the human rights movement, although some can clearly be linked to a part of said movement. Being broadly in favor of international human rights law hardly means that one is out to deconstruct every aspect of international law. There are radical cosmopolitan human rights activists, just as there are

INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW (2016); FREYA BAETENS, INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (2013).

50. Wuerth, *supra* note 1, at 290–95.

51. See generally ERIKA DE WET & JURE VIDMAR, HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS (2012); IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION (2001); JEAN D'ASPREMONT & SAMANTHA BESSON, THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW (2017).

52. See generally Frédéric Mégret, *The Apology of Utopia: Some Thoughts on Koskenniemi Themes with Particular Emphasis on Massively Institutionalized International Human Rights Law*, 27 TEMP. INT'L & COMP. L.J. (2014).

53. See Bertrand Ramcharan, *Modernizing the Role of Human Rights in the UN Security Council*, PASSBLUE (Nov. 28, 2017), <http://www.passblue.com/2017/11/28/modernizing-the-role-of-human-rights-in-the-un-security-council/> [https://perma.cc/M7TD-L3X8] (“There is also a point of view, held by many Council members, that the competent organs set up to do so, such as the Human Rights Council, should handle human-rights issues and that the Security Council should not intrude into their domain.”).

54. See generally Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

55. See Hillel Neuer, *What's Wrong with U.N.'s Human Rights Council*, CNN GLOBAL PUB. SQUARE (Oct. 31, 2013), <http://globalpublicsquare.blogs.cnn.com/2013/10/31/whats-wrong-with-u-n-s-human-rights-council/> [https://perma.cc/C4LC-DTMZ] (describing the inefficiencies and failures of the U.N.'s Human Rights Council).

internationalist and reformist human rights technocrats.⁵⁶ Traditional international lawyers, therefore, may have unsuspecting allies in some savvy and worldly human rights lawyers. This is clear when it comes to humanitarian intervention, for example, which has been met with skepticism by many international human rights scholars, who have thus tended to side, quite plausibly and understandably, with a conservative reading of the *jus ad bellum*.⁵⁷

Third, the marriage of human rights and international law often occurs solidly on international law's terms, so that it seems a bit unfair to fault human rights for destabilizing international law when it is arguably the opposite that has happened. In some cases, human rights arguments have been successful *in international law* and in largely traditional international legal fora, suggesting that international law ultimately has the upper hand in arbitrating conflicts with human rights. For example, the debate on former heads of states' immunities was settled on what are relatively conventional international legal arguments (functional immunities apply only to sovereign functions, of which torture is not) and not by simply affirming the superiority of human rights over international norms.⁵⁸

Indeed, human rights lawyers have been most successful when they have tried to "Trojan horse" their way into international law through bona fide engagement with its categories (torture is not a sovereign activity, human rights are an inherent part of international peace and security, remedial secession is implied by the Genocide Convention), rather than by bluntly asserting the superiority of some claim about human rights. Aside from their role as occasional norm entrepreneurs, international human rights lawyers have often thoroughly internalized the positivist jargon of international law.⁵⁹ That, initially, proposals emanating from international human rights law may somewhat destabilize international law does not mean that these proposals cannot, in some cases, then become part of established international legal categories. Many norms, for example, that began their careers as "customs turned on their heads" (emphasizing some loose element of *opinio juris* at the expense of practice) have since become very well established, suggesting that lead can, indeed, be turned into gold by mere hortatory clamor, at least in

56. There is a tendency for international human rights law to err towards reform rather than overhaul when it comes to the international legal system itself. *See supra* note 52.

57. *See generally* Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 INT'L AFF. 429 (1993); David G. Chandler, *The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda*, 23 HUM. RTS. Q. 678 (2001); Jack Donnelly, *Human Rights, Humanitarian Crisis, and Humanitarian Intervention*, 48 INT'L J. 607 (1993).

58. *See generally* ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (2008).

59. *See* Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1946–51 (1990).

certain circumstances.⁶⁰ Were it not for bold doctrinal moves by those inspired by human rights, we might not have individual responsibility in international criminal law, internationally compulsory human rights standards, or a global prohibition on torture despite the norm's poor record of enforcement. I doubt, at any rate, one can fault the human rights movement for trying its luck with some rights claims, especially given its very mixed record in being successful with many of those claims.

B. Flogging a Dead Horse?

Having made these reservations, I think one can definitely try to shed more light on how human rights specifically might have, all other things being equal, contributed, including negatively, to the evolution of international law. This is the heart of Wuerth's thesis, and it is one that will resonate with those who are concerned, both on the left and the right, with human rights law's intrusion into the international sphere: the risk of legal deformalization, the pursuit of too many and contradictory claims, the imperialist potential of powerful bodies invoking "humanity," etc.⁶¹

Of course, one might dispute whether some of the things that are mentioned by Professor Wuerth are that problematic taken individually. For example, what exactly is wrong with political polarization at the General Assembly in and of itself: is it not the point of human rights that they will trigger passionate reactions about their content and definition and that they indeed have since, at least, the adoption of the Universal Declaration? What kind of artificial homogeneity are we striving for here? Opposition in the right way and the right fora is not necessarily problematic for either international law or human rights; it is, rather, part of the constitution of a global public sphere in which rights are and should be debated.

Still, many of the concerns that Professor Wuerth suggests are at least potentially problematic for international law and need to be considered at least on a case-by-case basis. Of particular note is the author's concern with the increasing costs of human rights to peace and friendly relations between states.⁶² Immunities are a case in point. From the point of view of a particular human rights discourse, immunities are always wrong and excessive. This could endanger diplomatic relations. The discourse of R2P once very briefly

60. See, e.g., Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 561 (2003); Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 121–22 (2005).

61. See generally Martti Koskenniemi, *'The Lady Doth Protest Too Much'—Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002); Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMAN.: INT'L J. HUM. RTS., HUMAN., & DEV. 47 (2010); Martti Koskenniemi, *The Police in the Temple Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995); David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

62. See Wuerth, *supra* note 1, at 290–306.

threatened to overturn fundamental facets of the Security Council's role.⁶³ That discourse could lead us to a situation where we have neither human rights enforcement nor traditional international peace and security. There are concerns about unintended consequences and political manipulation evident from Kosovo, to the invasion of Iraq, and to Libya and Crimea.⁶⁴ Nothing is ever quite what it seems. The General Assembly and the Security Council's disputes about human rights may detract from cooperation in other areas or lead to paralysis. Who really wants a Security Council that thinks it is the world's human rights policeman but then fails to douse the world's burning fires?

However, I also wonder whether there is not a risk of mischaracterizing how problematic these developments have been, precisely because of the weakness of the "post-human rights" argument. These dangers, dangerous as they may be in the abstract, have largely failed to materialize. In many cases, the simple truth is that human rights arguments have been successfully resisted in international fora so that the dissolution potential for international law seems limited.⁶⁵ For example, litigators all over the world have never obtained a human rights exemption to the rule of sovereign immunity. It is fine for Professor Wuerth to mention the few domestic cases where they very tentatively did,⁶⁶ but one should not blow those out of proportion. Although immunities have been a bit of a *cause célèbre* for the human rights movement, there is no doubt where the international law of immunities stands

63. See Frédéric Mégret, *ICC, R2P and the Security Council's Evolving Interventionist Toolkit*, 21 FINNISH Y.B. INT'L L. 21, 35–36 (2011) (describing how the Security Council's role could have been diminished through R2P).

64. See generally Charles E. Ziegler, *Russia on the Rebound: Using and Misusing the Responsibility to Protect*, 30 INT'L REL. 346 (2016); Timothy Stafford & Laura Dzelzyte, *Crimea and the Hijacking of the Responsibility to Protect*, HUM. SECURITY CTR. (Mar. 18, 2014), <http://www.hscentre.org/opinion/crimea-hijacking-responsibility-protect/> [<https://perma.cc/K3ZR-VTQS>]; Xymena Kurowska, *Multipolarity as Resistance to Liberal Norms: Russia's Position on Responsibility to Protect*, 14 CONFLICT SEC. & DEV. 489 (2014); Philipp Rotmann et al., *Major Powers and the Contested Evolution of a Responsibility to Protect*, 14 CONFLICT SEC. & DEV. 355 (2014); Alex J. Bellamy, *From Tripoli to Damascus? Lesson Learning and the Implementation of the Responsibility to Protect*, 51 INT'L POL. 23 (2014).

65. See Mégret, *supra* note 52.

66. See Wuerth, *supra* note 1, at 291–92.

today in relation to both sovereigns⁶⁷ and incumbent heads of states,⁶⁸ and it is not, presumably, in what might the human rights community would consider a particularly progressive place. The same thing goes with some of the other “doctrinal moves”: some scholars have argued for a right of secession,⁶⁹ but they have done so from the margins of international legal argument and have hardly made a dent in the edifice of positive international law, even under a “remedial” scenario;⁷⁰ or civil society pleaded for legalized humanitarian intervention, only to be rebuffed by permanent Security Council members and the BRICs.⁷¹ These were not minor tactical losses, given how much had been staked, and they proved the ample resilience of the fundamental structure of international law. Nor were they merely a symptom of Global South resistance to Western liberal trends and, at least when it

67. See generally Elton Tan Xue Yang, *The Jurisdictional Immunities Case: Between Immunity and Impunity—Jurisdictional Immunities of the States (Germany v. Italy: Greece Intervening)—Judgment of 3 February 2012*, *International Court of Justice*, OXFORD U. UNDERGRADUATE L.J. 32 (2012); Francesco Francioni, *From Utopia to Disenchantment: The Ill Fate of ‘Moderate Monism’ in the ICJ Judgment on The Jurisdictional Immunities of the State*, 23 EUR. J. INT’L L. 1125 (2012); Benedetto Conforti, *The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity*, 21 ITALIAN Y.B. INT’L L. ONLINE 133 (2011); Paul Christoph Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*, 13 GERMAN L.J. 773 (2012); J. Craig Barker, *Negotiating the Complex Interface Between State Immunity and Human Rights: An Analysis of the International Court of Justice Decision in Germany v. Italy*, 15 INT’L COMMUNITY L. REV. 415 (2013).

68. See generally Jan Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT’L L. 253 (2003); Steffen Wirth, *Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 877 (2002); Neil Boister, *The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law*, 7 J. CONFLICT & SECURITY L. 293 (2002).

69. See Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373, 373 (2002); David Copp, *International Law and Morality in the Theory of Secession*, 2 J. ETHICS 219, 219 (1998) (arguing that the right to secession would not necessarily create any “perverse incentives”).

70. See generally Thomas Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links Kosovo in the ICJ - The Case*, 11 GERMAN L.J. 881 (2010); Olivier Corten, *Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law*, 24 LEIDEN J. INT’L L. 87 (2011); James Crawford, *State Practice and International Law in Relation to Succession*, 69 BRITISH Y.B. INT’L L. 85 (1999).

71. See generally Charles E. Ziegler, *Critical Perspectives on the Responsibility to Protect: BRICS and Beyond*, 30 INT’L REL. 262 (2016) (explaining the attitudes of the BRICs regarding R2P); Charles E. Ziegler, *Contesting the Responsibility to Protect*, 17 INT’L STUD. PERSP. 75 (2014) (examining Russia’s position on R2P); Oliver Stuenkel, *The BRICS and the Future of R2P*, 6 GLOBAL RESP. TO PROTECT 3 (2014) (illustrating that BRICs differ regarding when to apply R2P); Christo Odeyemi, *The Responsibility to Protect (R2P) in Libya and Syria: Exploration of the BRICS Role, 2011–2014*, 6 J. GLOBAL RESP. 229 (2015); Stamatis Laskaris & Joakim Kreutz, *Rising Powers and the Responsibility to Protect: Will the Norm Survive in the Age of BRICS?*, 1 GLOBAL AFF. 149 (2015); Andrew Garwood-Gowers, *The BRICS and the Responsibility to Protect: Lessons from the Libyan and Syrian Crises*, RESP. PROTECT THEORY & PRAC. 291 (2013); Tim Dunne & Sarah Teitt, *Contested Intervention: China, India, and the Responsibility to Protect*, 21 GLOBAL GOVERNANCE: REV. MULTILATERALISM & INT’L ORG. 371 (2015); Jennifer M. Welsh, *Norm Contestation and the Responsibility to Protect*, 5 GLOBAL RESP. TO PROTECT 365 (2013).

comes to immunities or the scope of jurisdiction, both have been very divided on the issue.

Fears of human rights running roughshod over the delicate fabric of Westphalian international law, therefore, are essentially red herrings. In the end, none of these developments seem to have added much when it comes to those aspects of the international system that are held most dear by international lawyers. I am not sure, in this context, that agitating the prospect of human-rights fuelled violent secession, for example, in a world that is almost entirely and obsessively devoted to the rigidity of borders does a great service to our understanding of what is actually going on. Even institutionally, some of the moves that Professor Wuerth describes as problematic seem to be quite exaggerated: in an age where the High Commissioner for Human Rights announces that he will not renew his mandate because the United Nations is too unreceptive to human rights, it hardly seems as if the problem of the moment is that the United Nations has been taken over by radical human rights activists threatening to undo the fabric of international law.⁷² It is almost, at times, as if Professor Wuerth's article would have been a great fit 20, maybe 10 years ago but, with the benefit of hindsight, risks falling flat in our day and age.

There is a recurring pattern here, though, that Professor Wuerth incisively emphasizes: it seems that human rights activists have invariably pushed strongly for some maximalist reading of rights, only to be left with some rather meagre results that seem quite compatible, once the dust has settled, with international law.⁷³ For example, litigators plead for no immunities at all for international crimes and, when all is said and done 20 years later, are left with the relatively moderate result of no immunities for former heads of states with just about every other pillar of sovereign immunities intact. They argue for universal jurisdiction in abstentia but a few years later obtain only universal jurisdiction on the basis of some nexus with territory (e.g.: presence, residence);⁷⁴ they dream up a concept of R2P as an obligation to intervene for any state and only obtain a recognition that there must be Security Council authorization for any use of force and that Council members remain largely free to veto such a use of force; they jump into the opening seemingly created by the Alien Tort Act, only to have that

72. See Colum Lynch, *U.N. Human Rights Chief to Leave, Citing 'Appalling' Climate for Advocacy Foreign Policy*, FOREIGN POLICY (Dec. 20, 2017), <https://foreignpolicy.com/2017/12/20/u-n-human-rights-chief-to-leave-citing-appalling-climate-for-advocacy/> [<https://perma.cc/N6BF-93TQ>] (explaining that the top officials at the United Nations have resigned due to the retreat from human rights issues by global superpowers).

73. See Wuerth, *supra* note 1, at 285–95.

74. See Luc Walleyn, *Universal Jurisdiction: Lessons from the Belgian Experience*, 5 Y.B. INT'L HUM. L. 394, 394–406 (2002); Montserrat Abad Castelos, *The End of Universal Jurisdiction in Spain?: Did International Law Require a Modification of the Existing Model as the Preamble of the New Act Suggests?*, 18 SPANISH Y.B. INT'L L. 223, 223–30 (2013); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888–97 (2003).

jurisdictional door slowly slammed on them.⁷⁵ If anyone has won the international law “culture wars,” it is the foreign relations lawyers, not the human rights activists.⁷⁶

What can we make of this pattern? It seems to suggest something quite different from what Professor Wuerth argues. The issue is not of an international law being gradually compromised by the infiltration of “alien” human rights, but if anything of an international law remarkably adept at making small concessions in exchange for maintaining the fundamental status quo. This testifies to international law’s remarkable resilience and its consistent and effective prioritizing, when it comes to certain sensitive issues at least, of its pluralist, sovereignty-oriented bend against attempts to impose a strong universal standard of human rights. International law is sturdier than it seems, and in fact all of these challenges have served to reinforce rather than undermine it. This is a somewhat familiar story: for example, the radical claims once made by the Third World in the context of decolonization were carefully parsed by international law: those that reinforced its status (post-colonial territorial self-determination, *uti possidetis*, etc.) were accepted, whereas others that challenged the international status quo were not (secession on ethnic grounds,⁷⁷ the New International Economic Order, etc.).⁷⁸

C. *The Victory of the Mildly Reformist Strand of International Human Rights Law*

It is difficult, then, to argue both that human rights are in decline and that they are still—even in their mildly defeated form—*that* problematic. A better view might be to see them instead to be part of a moderate and dialectic process of reform of international law, one that has slightly shifted its center of gravity without fundamentally undermining it. It seems unfair to the human rights movement to simultaneously accuse it of being less forceful than it could be as a result of having lost some of the battles it waged, blame it for having lost these battles, and blame it for having dared to challenge and possibly continue to unsuccessfully fully challenge international law. It also seems uncharitable to add that the punishment for failing to do all of these

75. See Fernando R. Tesón, *The Kiobel Decision: The End of an Era*, 8 N.Y.U. J.L. & LIBERTY 161, 161 (2013); Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT’L L. 208, 208–21 (2013) (detailing the implications of how the *Kiobel* decision affects future development of human rights); Humberto Fernando Cantú Rivera, *Recent Developments in Kiobel vs. Royal Dutch Petroleum: An Important Human Rights Forum in Peril?*, CUESTIONES CONSTITUCIONALES 243, 243 (2013).

76. See David P. Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 601–21 (2013).

77. See, e.g., Gino J. Naldi, *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti Possidetis in an African Perspective*, 36 INT’L & COMP. L.Q. 893, 893–903 (1987).

78. For a contemporary account, see JERZY MAKARCZYK, PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER: A STUDY OF INTERNATIONAL LAW IN THE MAKING (1988).

things should be that human rights should cease to claim that they are part of international law, having not done enough to deserve that label.

One could of course argue that even the moderate encroachments of human rights on international law that have occurred are a step too far. There are certainly some states—Venezuela, Zimbabwe, Cuba—that have strongly argued for *even less* interference with sovereign affairs;⁷⁹ some foreign service lawyers are concerned that former heads of states might lose their immunities for international crimes.⁸⁰ But I doubt Professor Wuerth is arguing that we should roll back even those modest challenges as unduly upsetting the delicate balance of international law, and I would be curious as to how she would propose to do so given their by now unmistakable international legal status. If all we are left with are very minor victories, then, I think it would be unfair to deny the international human rights movement, even those.

One intriguing possibility is that the international human rights law movement has *itself* all along been substantially about international law, rather than just about human rights. What is interesting in that light is how its mainstream, at least, has been very cautious to not upset the Westphalian system. Indeed, perhaps what is revealing is not that human rights concepts have fundamentally interfered with the proper order of international law but that, as others and myself have argued, they have quite relentlessly comforted its broad contours.⁸¹ It is clear in particular that human rights bodies and thinkers have occasionally gone quite out of their way to accommodate Westphalian concerns.⁸² One thinks, for example, of the European Court of Human rights confirming that sovereigns have immunity in case of torture or being wary of imposing the ECHR extra-territorially lest it be accused of human rights imperialism.⁸³

Not all interpretations of human rights are maximalist and corrosive of sovereignty, therefore, and some could be faulted for not being at all. As Professor Wuerth points out, it is scholars of remedial secession who seem to define the rights restrictively in the hope of making it palatable to the

79. See Patrick Quinton-Brown, *Mapping Dissent: The Responsibility to Protect and Its State Critics*, 5 GLOBAL RESP. TO PROTECT 260, 260–82 (2013); Carl Gershman & Michael Allen, *The Assault on Democracy Assistance*, 17 J. DEMOCRACY 36, 36–51 (2006).

80. Miren Gutiérrez, *The Prosecution of Presidents*, GLOBAL POL'Y F. (Aug. 1, 2003), <https://www.globalpolicy.org/component/content/article/172/30086.html> [<https://perma.cc/W83G-37CA>] (discussing the possibility of prosecuting the heads of state of Liberia, Zimbabwe, and South Africa).

81. See Kennedy, *supra* note 61; Mégret, *supra* note 15.

82. U.N. GENERAL ASSEMBLY, ON STATE SOVEREIGNTY, DISARMAMENT MATTERS, WORLD LEADERS URGE SOLIDARITY OVER SELECTIVITY, AS ASSEMBLY CONTINUES GENERAL DEBATE, (Sept. 24, 2008) <https://www.un.org/press/en/2008/ga10757.doc.htm> [<https://perma.cc/TZ87-NSXW>] (addressing issues of human rights and state sovereignty).

83. See Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 567–68 (2003).

international legal order.⁸⁴ In other words, far from setting out to upset the international legal order, many international human rights lawyers and thinkers seem bent on an agenda of suppleness and docility. It is ironic, then, that even that seems too much and that international human rights law is asked to, essentially, make itself disappear.

III. The Complexity of Disentangling International Law and Human Rights

In this final section, I turn to what I think is a deeper problem with the issue that Professor Wuerth addresses, which points to the fraught relationship between international law and human rights. I am sympathetic to the methodological and theoretical obstacles any scholar dealing with these issues will encounter. It is practical, for example, to speak of “international law” and “human rights” as if these were entirely separate things that did not exist in a constant dialectical relationship together. Nonetheless, I want to offer a few thoughts as to how we might think about disentangling what are actually “international human rights law” and “international law.”

A. *Can International Law Insulate Itself from the Problematic Branches of the Human Rights Project, and Can Those Branches Be “Severed” from the Trunk of Human Rights?*

Whether we are talking about the decline of human rights or their problematic character, one common issue in the article is the extent to which they have already affected, in good or bad, general international law. At the very least, some human rights developments clearly remain very specific to human rights law, and general international law is successfully insulated from them in ways that belie the existence of an international “broken window” theory. For example, human rights treaties’ regime of reservations has not been extended to the general law of treaties and for very good reason.⁸⁵ International law outside human rights continues to be interpreted according to the rules as set in the Vienna Convention on the law of treaties and not, for example, as a “living instrument” allowing judges to occasionally suddenly comply with their international obligations.⁸⁶ There is no epidemic of non-compliance in international trade law, and I doubt one could find its origin in something as anecdotal as parallel violations under international human rights law, an entirely different legal regime.

84. Wuerth, *supra* note 1, at 298–301.

85. See Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT’L & COMP. L.Q. 390, 410–12 (1997).

86. See Luzius Wildhaber, *The European Convention on Human Rights and International Law*, 56 INT’L & COMP. L.Q. 217, 217 (2007) (finding that the European Convention on Human Rights and “international law find themselves in a kind of interactive mutual relationship, checking and building on each other”).

One evident reason for the insulation and the fact that states' reputations are "compartmentalized and issue-specific" is, precisely, that human rights treaties operate so differently from other treaty regimes: whereas most treaties (and international law generally) operate between states so that arguments from mutual interest and reciprocity are particularly strong, human rights treaties only superficially and formally bind states to other states; in effect they bind states to their own populations.⁸⁷ What this means is that violations by a state of the rights of its citizens hardly will make a dent on its international reputation in terms of holding its side of international treaties. A state might routinely violate the International Covenant on Civil and Political Rights but be a faithful adherent to its law of the sea and diplomatic immunity commitments. I have never heard of a state not entering in an otherwise beneficial international treaty because another state was late with its reporting obligations to a human rights treaty body.

Conversely, and assuming that some human rights doctrines that have more radically challenged the international legal system and have failed as a result, will those doctrines take down the whole international human rights law ship with them? Or can they be severed from the international human rights trunk in ways that are not artificial and maintain the idea that sovereignty today is centrally defined by international human rights law? I believe that, fundamentally, the failure of a "right to remedial secession" or the limited success of the combat against sovereign immunities or the fact that R2P did not become what it was hoped it would become in 2001 simply will not bring the entire edifice tumbling down. These failures were either not dramatic enough or, more importantly, not central enough to the international human rights law project.

The reality is that what counts as "international human rights law" is a very complex question, and one never satisfyingly addressed in the article. We certainly cannot argue that the international human rights law community—if there is such a thing—has spoken in a single voice on issues of humanitarian intervention, right to democracy, or remedial self-secession, or if they have seemed at times to, it is only as a result of remaining at the level of abstract generalizations and not asking vexing questions about how to implement these doctrines in actual cases. At times, in truth, the focus of Professor Wuerth seems quite US centered (notably on the idea of democratic intervention which was almost only debated in the US). In other places, the success of international human rights law might be understood as including how frequently Russia pays up reparations ordered by the European Court of Human Rights, how often the Supreme Court of India cites international human rights law, how a carefully orchestrated effort to eradicate female genital mutilation informed by CEDAW works out in Mali, or how often the

87. Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT'L L. 489, 500–04 (2000).

Council of Human Rights designates country rapporteurs. As opposed to the exception in human rights, it would focus on the thousands of ways in which they are (or are not) implemented. If that is true, then it is not clear that the doctrinal moves Professor Wuerth describes are either a symptom of human rights failure or a cause of concern for international law.

Again, one might want to further specify the thesis to make it stronger. One way of doing it would be to argue that international human rights law is simultaneously doing two things and that Professor Wuerth is only addressing the relatively less important of the two. It is important to underline human rights lawyers are mostly interested, at best, in the old project of using international law to civilize states from above by ensuring that human rights are respected. On that *vertical* level, the idea that state sovereignty is constituted by international human rights law is doing quite well and is not incompatible with strongly conservative overtones.⁸⁸ What most international human rights lawyers did not set out to do or only do as a result of pursuing this other project, is to challenge the norms that apply to the *horizontal* relations between states whenever those clash with its pursuits, e.g.: the norm against military intervention, strong respect for the internal affairs of states, and immunities. In that respect, the international human rights movement's attempt to change the international system itself has indeed remained relatively muted when it comes to what remains the fundamental horizontal matrix of international law. As I have argued, this may well manifest the continued resilience of the Westphalian system, in all its complexity and contradictions.⁸⁹

B. *What Should Be Done?*

There is an intriguing moment in the article when Professor Wuerth transforms an interesting diagnosis about the dangers of human rights for international law into a prescription for the future.⁹⁰ I take the argument of Professor Wuerth as being quite radical: that there is not much place for human rights within international law and relations except perhaps as prescribing standards from which no particular operational or judicial consequence should flow. In other words, the argument is that one should keep international law (relatively) pure of human rights distractions.⁹¹ For one thing, I wonder how that would be done. There is a degree of voluntarism involved that leaves me a bit skeptical, when we know the international legal

88. See generally MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION* (2017).

89. See generally David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 *LEGAL THEORY* 1 (2002).

90. Wuerth, *supra* note 1, at 337–38.

91. *Id.* at 337–43.

order to be the product of a thousand decentralized and non-coordinated factors and the fact that change in international law cannot simply be decreed.

Certainly, this is not something that scholars can do much about, and I doubt that even if a hundred like-minded international law scholars were to systematically make a strong argument against incorporation of human rights in international law, they would make much of a dent, except to the credibility and relevance of their discipline. I doubt, moreover, that states can be convinced to abandon all human rights legal claims in the General Assembly to de-polarize it once and for all. What would states think of international law's credibility if some of the international community's supposedly highest international obligations were reclassified at a stroke as non-binding soft law? And what of the fact that several regional human rights systems—clearly international albeit not universal—have made the unmistakable demonstration that the association of human rights with positive law and jurisdictionalization is entirely sustainable?

More importantly, the policy is only as good as its hypotheses, and I have suggested that these are not particularly convincing. Ignoring or marginalizing inept “human rights” doctrines, such as the right of forcible pro-democratic intervention, is perfectly feasible and desirable; it has, in fact, already been done long ago. The international legal system often works exactly as it is meant to, weening out doctrines that are manifestly incompatible with its structure, probably to the satisfaction of many human rights lawyers themselves, keen that more violence not be justified in their name.⁹² But to go from there to suggesting that one should do away with the entire UN human-rights machinery—inefficient and relatively inoffensive as it has been, but still lending minimal credence to the idea that human rights impose some legal obligations—in order to safeguard the legal character of international law seems an extraordinary price. This is especially so given that international law's legality problem largely predates the rise of human rights.⁹³

To justify this on the grounds that rights are not always very successfully enforced, furthermore, and that therefore we should do away with the promise of their legalization, will sound to many human rights lawyers like the very anti-thesis of what one should do. Rather than jump ship when human rights seem to not be as often complied with as one would like (but

92. It is by no means evident, for example, that human rights activists or scholars will frequently support military intervention to protect human rights, and many are wary of what might be justified in their name. Feminists have notably highlighted their misgivings about “rights” language in this context. See Karen Engle, *Calling in the Troops: The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007); 30 ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003) (“In the work that I published over that period, I had argued that the enthusiasm for the new interventionism of the post-Cold War period was dangerous.”).

93. See generally Mégret, *supra* note 15.

how often is “often?”), most human rights lawyers will predictably stick to their guns. One senses that the article is ultimately quite apologetic about power, wants international law to be restricted in scope, and to make sure that we do not risk “eliminating immunity *even in cases involving U.S., Chinese, or Israeli defendants tried in foreign national courts*”⁹⁴ because, I suppose, that is just not how things are done. At any rate, I fear that the minute the UN stopped engaging in human rights, one would find that none of the perceived depolarizing benefits would materialize and that states would bicker on every other issue left on the agenda, none of which strike me as particularly apolitical (peace, development, self-determination, etc.). The pre-war human rights era at the League of Nations certainly does not suggest that international fora that do not deal with human rights are any less political. I suppose the Danube Commission or the International Postal Union were marginally less political, but Professor Wuerth is clearly not suggesting that we roll back international organization and governance to merely technical issues.

Indeed, it is not clear what the ultimate normative standing of her argument is and whether it is just an argument about international law or whether it is also an argument about human rights. On the one hand, complaining that sovereignty is being eroded including by the restriction of immunities, the polarization of international organizations and the potential multiplication of uses of force is an argument that is difficult to make as a friendly, “within human rights” argument, except perhaps as a gentle retort to human rights lawyers to “know their place” and not attempt to chew something that is too big for them. At any rate, I do not think Professor Wuerth is going as far as to say that the human rights movement is failing because of its association of international law, perhaps merely that it is not getting enough from international law to justify the costs it imposes on it.

On the other hand, it could also be a sympathetic human rights argument, just one that cautions human rights scholars against corrupting their cause on the international level. That is probably something about which human rights lawyers have agonized about. But Professor Wuerth seems to require them to abandon too much and to not entrust them to figure out when legal and non-legal strategies are worthwhile.⁹⁵ Surely it is not as if the investment in international law has not occasionally been rewarded. To be sure, internationalizing human rights means that we have the dreadful politicization of the Human Rights Council, but it also means that one gets to broadcast and debate claims about rights in international fora in ways that can trigger countless productive opportunities. One cannot get the European Court of Human Rights without also getting the occasional state that refuses to implement a judgment. At any rate, I do not believe that the text of the

94. See Wuerth, *supra* note 1, at 348 (emphasis added).

95. See *id.* at 343–49.

article suggests that this is even incidentally what Professor Wuerth is interested in.

Rather, one of the central challenges of the article, in the end, is coming to grips with the notion that human rights is doing something to international law. For example, many human rights doctrinal moves described in the article are only the moves of a particular constituency within the field of human rights. To give them their due some human rights lawyers have long complained about the attention from international law or the aspiration to embed the human rights project solidly on the international level. For example, just as international humanitarian lawyers have been worried that humanitarian intervention and Security Council investment therein make actual humanitarian action by independent and impartial actors on the ground very difficult,⁹⁶ not every human rights activist is a muscular interventionist.⁹⁷

For every human rights argument that the international community should intervene to save a civilian population, there is a human rights argument that it should not (on grounds of respect for self-determination and democratic rights or the inevitable harm that will occur to civilians, etc.). Admittedly, the voice of the more stereotypically liberal and interventionist Western human rights defenders has been stronger in some contexts.⁹⁸ By the same token it would be difficult, for example, to frame the case for invading Iraq as occupying the human rights high ground (e.g., Blair's argument that Hussein is a bloody dictator who needs to be removed for the sake of his people), whilst the opposition to the war was merely advocating for state sovereignty and the Westphalian system (people who took to the streets all over the world were certainly animated by a broad human rights inspired case for not bombing other people).⁹⁹ Neither "human rights" nor "international law" are always where one expects them.¹⁰⁰

Moreover, one can at least debate which area of law is doing what to what. For example, Professor Wuerth seems to argue that the Human Rights Council has become hopelessly politicized and this has negative effects on

96. See Anne Ryniker, *The ICRC's Position on "Humanitarian Intervention,"* 83 INT'L REV. RED CROSS 527, 527–532 (2001).

97. For an example of the relevant anxieties, albeit expressed by self-styled "international lawyers" in that case, see Matthew Craven et al., *'We Are Teachers of International Law,'* 17 LEIDEN J. INT'L L. 363, 363–74 (2004).

98. See Fernando R. Tesón, *Ending Tyranny in Iraq,* 19 ETHICS & INT'L AFF. 1, 1–20 (2005).

99. There is much legitimate skepticism for example, from a human rights point of view, about whether human rights can ever be "enforced" through forceful intervention. See Sarah Kernot, *Humanitarian Intervention: Human Rights Versus Humanitarian Assistance,* 18 GLOBAL CHANGE, PEACE & SEC. 41, 41–55 (2006). See also JEAN BRICMONT, *HUMANITARIAN IMPERIALISM: USING HUMAN RIGHTS TO SELL WAR* (2006).

100. For example, on the notion of intervention in defense of human rights many human rights lawyers are themselves characteristically cautious. See, e.g., Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court,* INT'L & COMP. L.Q. 321, 321–33 (1989).

international law.¹⁰¹ But it is hardly as if this is something that “human rights” has done to an otherwise a-political international law. International law was hopelessly political long before human rights.¹⁰² The idea that the General Assembly has become any more polarized than it has always been as a result of human rights, in particular, struck me as contestable. If anything, it is human rights that have become increasingly politicized as a result of being internationalized and debated in international institutions that often lack the procedures and consensus about societal values to make the debate other than fraught and simplistic.

C. *Are International Law and Human Rights Even Separate Things?*

One of the underlying difficulties of the argument, in the end, is the tendency to oppose “international human rights law” and “international law” as if these were separate agents imbued with a will of their own. Doctrinally, there is arguably only one *international law*, a law defined by a particular theory of sources and subjects, that increasingly deals with a range of issues, *including* human rights. That the “issue” in question has a certain liveliness of its own that speaks back as it were to international law and poses challenges to what it can do and how, does not make this less, overall, a development of international law as such. Many arguments about sovereignty and international law are simultaneously arguments about rights.¹⁰³ When a state argues that a certain limitation it has imposed on a right is legal under human rights law, it is not arguing against or even outside human rights but very much from within human rights.¹⁰⁴ Who is to say who is most “on the side of rights” in such a case?

More importantly, international law has long proved receptive “from within” as it were to rights claims, claims that hardly detract from international law’s authority. For example, the recognition that atrocities endanger international peace and security is not just a validation of the human rights narrative; it is a bona fide form of international legal analysis (one that one can of course disagree with) of conflicts. Yes, this recognition can endanger territorial peace in that, all other things being equal, it provides a further exception to the prohibition on the use of force (although as we know,

101. See Wuerth, *supra* note 1, at 312–16.

102. See generally MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW*.

103. This is illustrated, for example, in the whole debate on the “margin of appreciation” which is, essentially, a debate on how to reconcile the pluralism of international law with the universalism of human rights. See generally ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* (2012).

104. On the idea that the view of rights as “trumps” is misguided and that rights are in practice deeply enmeshed in certain justificatory discourses aimed at simultaneously limiting them, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725–63 (1998). For a sophisticated discussion of the relationship between rights and “balancing,” see Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 468–93 (2009).

that danger has rarely materialized). But festering domestic atrocities are not exactly a peaceful situation either and in describing them as falling under Chapter VII was a plausible and grounded work of *international law*. Of course, one might argue that when the Security Council described the then largely domestic genocide in Rwanda as a threat to international peace and security, it was stepping outside its boundaries; on the other hand, every single event in the Congo and beyond has shown how prescient that notion was from a straightforward international peace and security point of view.¹⁰⁵ Nor is an analysis that human rights violations feed grave conflicts incompatible with other theories such as those based on territory. Again, to take the example of the Congo, it is quite evident that mass rape, ethnic cleansing, and massacres are closely linked to attempts to capture territory for secessionist or merely criminal purposes.¹⁰⁶ The point then seems to be that just as sovereignty is increasingly conditioned by human rights, so is the international system, in practical and legally cognizable ways that do not involve simply a light-headed embrace of human rights law.

In fact, international law itself has long been haunted by its own naturalist hesitations, so one cannot blame human rights entirely for normative processes that are very much part and parcel of the evolution of international law. The entire formation of international law is indebted to the tension between naturalist and positivist claims. That tension has never gone away and it is constantly mediated even at the heart of a nominally “positivist” (if it is even that) international law in productive and just as equally legitimate “international legal” ways. International law is very good at undermining a vision of itself as a set of positive rules on its own and does not need human rights law’s help.

Institutionally, one may even wonder who has been most enthusiastic: human rights activists in trying to get the Security Council’s attention “for the cause,” or the Security Council in seizing on human rights as a way to expand its mandate? One cannot unproblematically make Professor Wuerth’s claim as involving an “international law” versus a “human rights law.” Another way of looking at it is that there was nothing new about rights discourse or no pure international law beyond human rights that one might recover having shed some of its human rights baggage. Albeit in another name—natural law, considerations of humanity, etc.—human rights have

105. See L. J. VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW* 34–38 (2005); K. MOGHALU, *RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 40–42 (2005).

106. On the multiple meanings of sexual violence in war in the Congo, see Anna Maedl, *Rape as Weapon of War in the Eastern DRC?: The Victims’ Perspective*, 33 *HUM. RTS. Q.* 128–47 (2011); Denis Mukengere Mukwege & Cathy Nangini, *Rape with Extreme Violence: The New Pathology in South Kivu, Democratic Republic of Congo*, 6 *PLOS MED.* (2009); Roberto Beneduce et al., *Violence with a Purpose: Exploring the Functions and Meaning of Violence in the Democratic Republic of Congo*, 4 *INTERVENTION* 32, 32–46 (2006).

always been international law's alter ego. Claims about sovereignty, non-forceful interference in the affairs of states, are constantly constituted by opposition to claims made in the name of something called "Humanity," "civilization," or "human rights."¹⁰⁷

IV. Conclusion

Professor Wuerth's article brings attention to some of the potential dangers of human rights for international law. However, I find that either the influence of human rights is significantly overestimated or that things are held against human rights that many human rights lawyers are fully convinced are problems and that are often attributable to the very international legal system they seek to reform. We should be worried about the dilution of normativity in international law, as international lawyers have long been, with or without human rights. This is a broader problem that is also evident domestically, whose roots are numerous, and to which human rights lawyers are themselves sensitive.¹⁰⁸

But to blame human rights for the current ills of international law seems too simplistic a diagnosis, when one could just as well blame international law for the limitations of human rights. It risks blinding us to the very deep problems that have always plagued the international legal project and that human rights merely reproduce and at best amplify by associating themselves with international normativity. Historically, Professor Wuerth's prescription also does very little justice to the Wilsonian and Nuremberg legacies, in which, in a deep sense, human rights, international law and international peace, and security were deeply intertwined.

Underlying these limitations is, I think, a rather one-sided sense of what the human rights project might achieve and aspire to internationally. If the human rights project is only and always about more armed intervention, fewer immunities, and a right of forceful secession, then it would be problematic if it had its way, and this is, in fact, probably why it has not been very successful. In moving away from that largely imagined danger, my sense is that Professor Wuerth overreacts and tries to drag us back to the 1950s, a "Mad Men" version of the United Nations, one in which the "adults" deal with "adult" questions at the Security Council and do not let those pesky human rights party spoilers ruin the show. After all, the end is close, and we really have no time. In the end, it seems as if what Professor Wuerth is saying is if we cannot have full international human rights law enforcement, then international law should abandon pursuing human rights altogether lest it

107. See generally Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. INT'L STUD. 519 (2001).

108. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82, 89 (1988).

contaminate its otherwise impeccable legal credentials.¹⁰⁹ I would have thought instead that in a time when the United States is gripped by the populist passions of a Doctor Strangelove, the link between contempt for human rights and the risk of inter-state war would have militated for a unified commitment to a certain idea of the international rule of law.

What I think remains persistently eluded in the article is that the international human rights law project has always been something much more subtle in essence, something which is both committed to human rights within states and a certain human rights legitimacy of the international system of states as a guarantee of self-determination, democracy, and pluralism.¹¹⁰ In that respect, the occasional identification of the cause of human rights with major Western human rights NGOs, for example, does a disservice to the complexity and the richness that is the international human rights movement—or what might lay claim to it.¹¹¹ Unlike those who are prompt to dismiss Global South visions of human rights as just a form of cynical cover up, I believe that it is evident that they articulate for anyone who will listen legitimate alternative paradigms of human rights. These include, for example, a greater emphasis domestically on the economic and the social and the communal and internationally on the margin of appreciation, regionalization, and non-intervention. They are no less human rights projects for it.

What this brings to light, and where I perhaps subtly differ from Professor Wuerth's prognosis, is that a worldwide culture of rights needs the inter-state matrix and that more work needs to go into understanding how the two have and might work hand in hand. It needs it not only as providing the basic security from within which a rights project can spring; it needs it because the relative security of states and their legitimacy are or should be intrinsic goods in any theory of international human rights. By contrast, it is certainly true that rash, violent, or undue meddling on behalf of human rights can be problematic for international law and, indeed, cause human rights violations of its own. I think such perverse effects are better understood than they have sometimes been, and I see Professor Wuerth's article as one further warning against the potential dangers of one—as it turns out somewhat dominant but not particularly successful—reading of human rights internationally.

109. See Wuerth, *supra* note 1, at 349.

110. For efforts at showing the theoretical compatibility of the human rights project and pluralism see Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 89–126 (1996); Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism - A Pluralist Assessment Based on the Rights of Minorities Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 249, 249–84 (1998); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 38–79 (2003).

111. See generally Balakrishnan Rajagopal, *The International Human Rights Movement Today*, 24 MD. J. INT'L L. 56 (2009).

What would be needed, perhaps, is a theory of how the international law of human rights needs both one thing and its contrary. In a world of states, we may simply be more aware of the need of intervention on behalf of human beings screaming for help, but in a world of constant interventions, we may become more acutely aware of the need for states to protect populations from external force. Whether one aspires more to one than the other will depend ultimately on experience and needs: one may forgive an Iraqi for thinking that he does not need another international intervention; at the same time, it would be hard to dissuade a Syrian civilian that he is entirely wrong in pleading for one.